

Response to the technical review of draft legislation for copyright exceptions (second batch)

Amendments to Exceptions for Research, Libraries and Archives

(See: <http://www.ipo.gov.uk/types/hargreaves/hargreaves-copyright/hargreaves-copyright-techreview.htm>)

Background

This is a collaborative submission from a group of academics based in the UK with expertise in intellectual property and information technology law and related areas.

The preparation of this response has been funded by (1) British and Irish Law, Education and Technology Association (“BILETA”) <http://www.bileta.ac.uk/default.aspx> and (2) CREATE, the RCUK Centre for Copyright and New Business Models in the Creative Economy <http://www.create.ac.uk/>

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This response has been approved by the Executive of BILETA, and is therefore submitted on behalf of BILETA.

This response has been approved by the Management committee of CREATE and is therefore submitted on behalf of CREATE.

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RESEARCH AND PRIVATE STUDY: Section 29

Section 29(1)(1C) seek to provide that all types of copyright work may be dealt with for the purposes of non-commercial research and private study (as long as that dealing is a fair dealing). As the scope of subsections (1) and (1C) will now encompass typographical arrangements, subsection (2) has been deleted.

Q: Do these amendments achieve the Government’s policy regarding the type of works covered by this provision?

Yes.

Section 29(3)(a) prohibits copying by librarians unless it is permitted in Section 37, which is to be amended as discussed below.

Q: Does the wording achieve this?

Subject to our comments below concerning specific provisions within – as well as the general scope of – section 37: Yes.

A new subsection has been inserted to prevent the acts permitted by this section from being excluded by contracts.

Q: Does this subsection achieve this?

The new subsection (5) deals with contractual terms restricting the application of the exception. This is a welcome inclusion. We would, however, make two points: one general, the second specific to the wording of the proposed subsection.

1. The general applicability of exclusion by contract

We do not understand why government is taking the approach of embedding subsections preventing permitted acts being excluded by contract within specific sections pertaining to specific permitted acts (that is: sections 29(5), 29(1A)(2), 42(3), 43A(2)(c)), rather than extending the principle to all of the permitted acts set out within the 1989 Act (to the extent that European copyright law permits).

The *Hargreaves Review* recommended that government should change the current copyright regime to make it clear that ‘no exception to copyright can be overridden by contract’ (*Hargreaves Review*, 51), and government has endorsed the general principle that ‘contracts should not be allowed to

erode the benefits of permitted acts’, albeit acknowledging that ‘there are some permitted acts which under European law may not override contract terms’ (*Modernising Copyright*, 19).

In relation to the latter, in *Modernising Copyright* government gave the example of Article 5(3)(n) of the *Information Society Directive* (Directive 2001/29/EC) as an exception which, under European law, may not override contract terms. In fact, Article 5(3)(n) is the **only** exception set out within the Directive that makes **explicit reference** to the scope of an exception being ‘**subject to purchase or licensing terms**’. The only other provision in the Directive that arguably might not allow the overriding of contract terms concerns the ‘reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character’ (Article 5(3)(c)); in this case the Directive provides that such use is permissible only where it ‘is not expressly reserved’. In short, exceptions and limitations that – under European copyright law – may not override contract terms are in the minority.

With that in mind, we would strongly recommend the enactment of a single, general provision safeguarding all permitted acts from preclusion by contract. This provision would be subject to specific exceptions – such as the new section 43A – securing freedom of contract only where required to do so by European copyright law. This would be a much simpler and more coherent approach to adopt. It would also be in line with the recommendation in the *Hargreaves Review*, as well as the government’s previously stated position on this issue.

2. The specific wording of the proposed subsection

In the interests of clarity, the new subsection would benefit from making reference to ‘the term of any licence or contract’. We note, for example, that new section 43A(2)(c) is intended to ensure that the exception in question only applies where there are no licensing or contractual terms to the contrary, and that the wording of that subsection makes specific reference to ‘the terms of any licence’.

We also note that terms or conditions in any agreement that purport to restrict the acts currently permitted under sections 50A, 50B and 50BA are deemed to be ‘void’ (by virtue of section 296A). In line with this existing approach, we recommend that the term of any licence or contract relating to any of the other permitted acts should also be deemed to be ‘void’, rather than being rendered ‘unenforceable’.

--- END OF COMMENTARY ON SECTION 29 ---

PROVISION OF COPIES BY LIBRARIES AND ARCHIVES: Section 37

The provisions which permit copying by librarians and archivists for the purposes of research and private study (Sections 37 to 40) have been merged into a single section (Section 37). The existing Sections 38, 39 and 40 will be deleted.

Q. Is this an appropriate way to simplify these provisions?

In principle: Yes.

Improving the simplicity and clarity of these provisions will be a very welcome development for the library and archive sector, and should facilitate improved user understanding of these provisions. One single section is to be preferred over the current status quo. We would, however, make the following points:

1. The general scope of section 37

Tim Padfield, the former Copyright Officer and Information Policy Consultant at The National Archives has argued, for many years, that librarians **and** archivists should be able to make copies of published material for their user constituencies. Similarly, a number of respondents to the original consultation on the *Gowers Review* – including the Lord Chancellor’s Advisory Council on National Records and Archives, the Libraries and Archives Copyright Alliance, and the National Library of Wales – argued for explicit parity between libraries and archives with respect to the copying of published work under sections 38 and 39 (of the current legislation).

We strongly endorse that position. Archives routinely contain reference libraries for the benefit of their users, and their collections often contain published ephemera and other types of material. It is anachronistic to treat archives and archivists differently from libraries and librarians in this respect. Certainly users of archives find it nonsensical that an archivist can, for example, make a copy of unpublished material held within an archival collection for the user, but not published material.

Moreover, while it can be cogently argued that an archivist can already make a copy of published material for a user – whether a journal article or a reasonable proportion of any other published work – under section 29 (in that section 29 anticipates copying by a person other than the researcher or student), archivists are often uncertain about the scope of section 29, and so are unwilling to rely upon it.

In short, archivists should receive parity of treatment with librarians under the proposed new section 37. This would also be entirely consistent with the terms of the Directive, which draws no distinction between types of institutions in relation to the lawful reproduction of published or unpublished material (in the way the current and proposed UK legislation does).

Extending formal parity of treatment under section 37 would also be consistent with new section 43A, which anticipates making work available through dedicated terminals on an institution’s premises. In fact, Article 5(2)(c) of the Directive (the basis for section 37) makes reference to the provision of exceptions and limitations relating to ‘specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for

direct or indirect economic or commercial advantage'. We note that Article 5(2)(c) and Article 5(3)(n) (the basis for section 43A) adopt a common definition in relation to the institutions entitled to rely upon the exceptions in question. Similarly, the government might wish to consider the advantages of adopting a common definition in sections 37 and 43A that more closely corresponds to the wording adopted in Article 5(2)(c) of the Directive.

2. Subsection (3)(b)

Subsection (3)(b) currently makes reference to 'requests' [plural]; in line with the rest of the provision, subsection (3)(b) should make reference to 'request' [singular].

3. Subsection (3)(d)(ii)

There appears to be an internal inconsistency in the provision as currently drafted. That is: section 37(1) makes clear that the section applies to requests for a single copy of either an article in a periodical **or** a reasonable proportion of any other published work. Subsection (2) provides that making and supplying a copy of material requested under subsection (1) does not infringe copyright in the work copied so long as the conditions in subsection (3) are met. The conditions in subsection (3), however, require – under subsection (3)(d)(ii) – that the relevant declaration should include a statement to the effect that 'the person has not previously been supplied with a copy of that article by the librarian'; this provision – unlike subsection (3)(b) – relates to **any request** made under subsection (1), including a request for a copy of 'a reasonable proportion of any other published copyright work'. Read literally, this makes no sense.

As already noted, subsection (3)(b) relates **specifically** to a request for a copy of an article under subsection (1). It would make for a simpler and clearer provision if those conditions within subsection (3)(d) that relate specifically to requests for a copy of an article were dealt with separately. This could be achieved, for example, by amending the order of the current subsections. Consider the following:

- (3) The conditions mentioned in subsection (2) are:
 - (a) the copy is supplied for the purposes of ...
 - (b) the person making the request has delivered to the librarian a declaration in writing which:
 - (i) identifies the name of the person ...
 - (ii) states that the person will only use the copy for ...
 - (iii) states that to the best of the person's knowledge ...
 - (c) where the request relates to an article in a periodical:
 - (i) only a single copy of a single article is supplied from any single issue of the periodical;
 - (ii) the declaration by the person making the request also states that the person has not previously been supplied with a copy of that article by any librarian
 - (d) where the request relates to the supply of a copy other than an article in a periodical, a person is not furnished with more than one copy of the material;
 - (e) the librarian is satisfied as to the truth of the matters stated in the declaration and;
 - (f) the person making the request is required to pay ...

Alternatively, in line with the government's intention to draft a set of exceptions that are simpler and more flexible, removing specific reference to an article in a periodical could also be considered in that the reproduction of an article from a periodical can be deemed to be a reasonable proportion of a published copyright work.

Subsection (1) (a) is intended to clarify that articles in periodicals can be copied, regardless of the medium in which they are recorded. Subsection (1) (b) is intended to expand the exception to cover all classes of published work.

Q. Do these amendments achieve these objectives?

With respect to subsection (1)(a), we welcome the intended clarification that articles in periodicals can be copied, regardless of the medium in which they are recorded.

We also welcome the clarification that the copy requested by a person can be supplied 'in such medium as the person may request'. We take this to mean that, for example, where a person requests material held in a library in analogue form, the copy of the relevant material (whether a journal article, or a reasonable proportion of any other published work) could be delivered in a digital format.

We see great value in this clarification because under the existing legislation there is some uncertainty as to whether requests for relevant copies could be met (lawfully) by supply in a digital format. That is, there is an argument to the effect that – applied literally – the permission to 'make and supply a copy' of an article (current s.38), of a part of a published work (current s.39), or certain unpublished works (current s.43), would require that the copy that is made by the librarian or the archivist **must also be the same copy** that is supplied to the person making the request. Such an interpretation renders the relevance and scope of the current provisions almost nonsensical within a digital, networked environment.

If necessary, the validity of electronic communications for both purposes could be confirmed by including within the definition of 'medium' a reference to the frequently-used definition of electronic communication found in section 15 of the *Electronic Communications Act 2000*.

Subsection (3) (d) retains the requirement currently in the Librarian and Archivist Regulations that a written declaration must be provided, but removes the requirement that the declaration needs to be made using the form provided in those Regulations. This is intended to simplify and clarify these provisions, and to make it easier for declarations to be made in a digital format.

Q. Does the change achieve these objectives?

No.

At present, the section makes clear that a person can request a copy in such medium as they see fit, and that copies of articles in periodicals can be supplied irrespective of the medium in which the periodical is recorded. We would extend this useful clarification to subsection (3)(d). That is,

we would incorporate specific reference within this subsection to the fact that the necessary declaration in writing can be made in any medium or format, digital or otherwise, so long as it complies with the relevant criteria.

Subsection (4) is intended to retain the provision in the librarian and archivist regulations that removes liability from librarians when they have been provided with a false declaration, unless they were aware that the declaration was false.

Q. Does this provision achieve this objective?

Yes.

However, we would recommend that, in light of this provision, there is no need to retain section 37(3)(e). Its effect is fully captured in subsection (4).

Subsection (5) is intended to clarify that, when false declarations are provided, the person requesting the copy will be liable for infringement of copyright.

Q. Does this provision achieve this objective?

Yes.

--- END OF COMMENTARY ON SECTION 37 ---

PROVISION OF COPIES BY LIBRARIES AND ARCHIVES: Section 41

The amendment to Section 41 subsection (1) is intended to expand this exception to cover any published work.

Q. Does the wording achieve this?

Yes, although we regard paragraphs (a) and (b) to subsection (1) to be redundant in the context of the government's intention to simplify the provisions relating to copying by libraries and archives. If subsection (1) enables a librarian to make and supply to another library a copy **of the whole or part of any copyright work**, without infringing copyright in that work, there is no need to set out that the scope of the provision extends to: (a) an article in a periodical or (b) the whole or part of any other published work.

A simpler version of this section might read as follows:

41 Copying by librarians: supply of copies to other libraries

- (1) Subject to the conditions in subsection (2), a librarian may make and supply to another library at its request a copy of the whole or part of any published work without infringing any copyright in the work.
- (2) The conditions mentioned in subsection (1) are ...

Also, consistent with our comments about the general scope of section 37 (see above), we suggest that the scope of new section 41 should extend to archivists as well as librarians.

--- END OF COMMENTARY ON SECTION 41 ---

PROVISION OF COPIES BY LIBRARIES AND ARCHIVES: Section 43

Subsection (1) is amended so that this provision will cover all classes of unpublished work. The works covered under this provision are those which were unpublished at the time they were deposited at the library or archive

Q. Is this achieved by the wording used in the regulations?

Yes.

Subsection (1) (d) retains the requirement in the Librarian and Archivist Regulations that a written declaration must be provided, but removes the requirement that the declaration needs to be made using the form provided in the regulations. This is intended to simplify and clarify these provisions, and to make it easier for declarations to be made in a digital format.

Q. Do these changes achieve this objective?

Yes, although we would strongly recommend amending subsection (d)(ii) so that it directly mirrors subsection (c). That is, the necessary declaration should not make specific reference to ‘the article’ being requested, but should state that the person making the request ‘has not previously been supplied with **a copy of the material** by any librarian or archivist’.

Subsection (2) is intended to retain the provisions in the Librarian and Archivist Regulations which remove liability from librarians and archivists when they have been provided with a false declaration, unless they were aware that the declaration was false.

Q. Does this provision achieve this objective?

No. Subsection (1) makes repeated reference to ‘the librarian or archivist’. This should be continued through the entire section. That is, subsection (2) should similarly make reference to ‘the librarian or archivist’.

Subsection (3) is intended to clarify that, when false declarations are provided, the person requesting the copy will be liable for infringement of copyright.

Q. Does this provision achieve this objective?

Yes.

--- END OF COMMENTARY ON SECTION 43 ---

PROVISION OF COPIES BY LIBRARIES AND ARCHIVES: Section 43A

This is a new exception that is intended to allow cultural institutions to make works available via dedicated terminals based on their premises. Subsection (1) sets out the types of institution that will be able to benefit from such an exception.

Subsection (2) sets out the conditions that need to be satisfied before a work can be made available. This exception is only intended to apply to works that have been legitimately acquired by the institution. This is covered by Subsection (2)(a). As with Sections 37 and 43, these works can only be used for the purposes of non-commercial research or private study, as set out in Subsection (2) (b) (i) and (ii). Subsection (2) (b) (iii) sets out the conditions, mentioned above, that the dedicated terminals need to be based on the premises of the cultural institution. These conditions are intended to correspond with the conditions set out in Article 5(3)(n) of the Copyright Directive.

Q. Do the regulations achieve the intended objectives?

Subject to the comments that follow: Yes.

1. The general scope of section 43A

We note that the new provision, in its current form, is narrower in scope than Article 5(3)(n) of the Directive. Whereas the provision in its current form refers to non-commercial research or private study, Article 5(3)(n), by contrast, allows for making work available on dedicated terminals ‘for the purpose of research or private study’. That is: the scope of Article 5(3)(n) is not specifically limited to activities relating to non-commercial research, unlike, for example, Article 5(3)(a) which does provide that an exception is permissible for ‘scientific research ... to the extent **justified by the non-commercial purpose to be achieved**’ (emphasis added). In this respect, the government may wish to consider whether this proposed new exception should more closely correspond with Article 5(3)(n) of the Directive.

2. The definition of a ‘dedicated terminal’

In using the term ‘dedicated terminals’ we note that the proposed legislation adopts the wording of the Directive. Although this is not further defined in the Directive or in proposed section 43A, we would expect that this term would not inhibit, in any way, the use of a range of appropriate technologies or platforms by relevant institutions to facilitate the making available of works on their premises. For instance, we see no reason why the concept of a ‘dedicated terminal’ should not extend to the use of dedicated mobile devices within the premises of an institution.

3. Works that have been lawfully acquired

Section 43A(2)(c) should make reference to the making available of works that have been **lawfully acquired** by a relevant institution, and not ‘purchased’ by a relevant institution. Libraries, educational establishments, museums and archives do not ‘purchase’ all of the material

that they hold in their respective collections. Many works will have been donated or gifted to the institution. The legislation must reflect this fact, as it does in subsection 2(a).

4. Section 43A(2)(b)(ii)

We note that section 43A(2)(b)(ii) requires that the work in question must be made available by the institution ‘for the purposes of non-commercial research or private study’. If the ‘purpose’ referred to within this clause extends only to the institution in question, we think this is appropriate.

Subsection (2) (c) is intended to ensure that the exception only applies when there are no licensing or contractual terms to the contrary.

Q. Does the wording of this subsection achieve this?

Yes.

--- END OF COMMENTARY ON SECTION 43A ---

PROVISION OF COPIES BY LIBRARIES AND ARCHIVES: Section 43B

This new section seeks to clarify that people acting on behalf of librarians, archivists and curators will be able to benefit from Sections 37 to 43B.

We welcome this clarification within the proposed legislation.

--- END OF COMMENTARY ON SECTION 43B ---

ARCHIVING AND PRESERVATION: Section 42

This exception will remain as Section 42 of the Copyright Act. Subsection (1) has been expanded to apply to any copyright work, as opposed to just literary, dramatic and musical works. This subsection is also intended to extend the exception to cover museums and galleries as well as the curators of such institutions.

Q. Does the wording of this subsection achieve these objectives?

Subsection (2) (b) is intended to ensure that the exception does not conflict with the normal commercial exploitation of copyright works by limiting the exception to situations when it is not reasonably practicable to purchase a replacement copy.

Q. Does this provision meet this objective?

The new section makes clear that: (i) its scope extends to any copyright work, as opposed to just literary, dramatic and musical works; (ii) it covers museums and galleries, as well as libraries and archives.

However, we would add the following comments.

Making copies of a lawfully acquired work for preservation purposes and making a copy of a work to replace an item in the collection of another institution that has been lost, destroyed or damaged are two very different types of activity. (We also note that making a replacement copy of a work within an institution is a typical form of preservation activity that should be conceptually distinguished from making a replacement copy for another institution of a work that has been lost, damaged or destroyed.) As such, we recommend distinguishing these two activities in two discrete sections, such as:

Section 42A: Preserving works in libraries, archives, museums or galleries

Section 42B: Making replacement copies of works in libraries, archives, museums or galleries

The comments that follow relate to preservation activity (including copying) within an institution (to prevent a work within an institution's collection becoming lost, damaged or destroyed), and making replacement copies for other institutions after a work has been lost, damaged or destroyed.

1. Preserving works not yet accessioned to an institution's permanent collection

In relation to **preservation activity**, it is highly problematic to restrict making copies only to works that institutions hold within their permanent collection. This is because, in particular, archival material and collections can be held by an archive for many years before being accessioned into the permanent collection of the archive; this poses particular challenges in relation to the preservation of digital and born-digital material. Consider, for example, an item that has been lawfully acquired by an institution in a technologically obsolete format or medium (or one that is at risk of becoming obsolete). Before a decision can be made about whether or not to accession the item into the institution's permanent collection, the material would have to be

reformatted or transferred to a new medium (and so copied) to facilitate the appraisal and accession process. Section 42, in its current form, precludes making preservation copies of such material, in advance of accessioning an item into an institution's permanent collection. As such, we recommend that copying for preservation purposes should not be limited only to items held in an institution's 'permanent collection', but should also encompass works **that are to be accessioned to an institution's permanent collection.**

2. The applicability of section 42(2)(b)

We do not think that preservation activity within an institution should be limited to circumstances in which it is not reasonably practicable for the institution to purchase a copy of the item. In relation to preservation activity, a newly purchased copy is not necessarily an appropriate substitute for the existing item held in an institution's collection. By contrast, we do agree that, in relation to making **replacement copies for another institution** when a work has been lost, damaged or destroyed, the exception should be limited to situations in which it is not reasonably practicable for the other institution to purchase a copy of the item.

3. Section 42(2)(a)(ii)

In respect of **both** preservation activity and the making of replacement copies for another institution, we note that the current section 42(2) only applies to works held for reference on the premises or 'on loan **only** to other libraries, archives, museums or galleries' (emphasis added). This formulation could discourage institutions from loaning works to organisations outside the cultural heritage sector, and at a time when cultural heritage institutions increasingly are being encouraged by government to engage in partnership activity with other types of public, private and third sector institutions and organisations. As such, the necessity for the restrictive approach adopted in section 42(2)(a)(ii) is not clear.

4. Preserving works on loan

Finally, in relation to unique material on loan from one institution to another, we recognise that situations may arise where urgent action is necessary for preservation purposes by the institution to which the material has been loaned. Such activity falls outside the scope of section 42 as currently drafted. That said, we read proposed section 43B as permitting such activity, on the grounds that the preservation copying would be carried out on behalf of the institution loaning the material.

Subsection (3) is intended to ensure that the acts permitted by this exception cannot be prohibited by contractual terms.

Q. Does this provision meet this objective?

No.

Section 42(3) makes reference to ‘the term of **a** contract’; section 29(5) makes reference to ‘the term of **any** contract’. The wording in both – and all other relevant provisions – should make consistent reference to ‘the term of **any** contract’.

Moreover, in line with our earlier recommendation concerning section 29(5), we suggest that section 42(3) should be amended to make reference to ‘the term of any licence or contract’, and that any relevant terms should be deemed void, not ‘unenforceable’.

--- END OF COMMENTARY ON SECTION 42 ---

ARCHIVING AND PRESERVATION: Section 61

In order to make Sections 61 less bureaucratic, the requirement that organisations benefiting from the exception need to be designated by the Secretary of State will be removed. Instead, Subsection (1) states that the exception will apply for any body that is not established or conducted for profit, a condition currently found in of the Copyright (Recording of Folksongs for Archives) (Designated Bodies) Order 1989 (which will be revoked).

Q. Does this amendment meet this objective?

Subject to the comment that follows: Yes.

We consider that an individual, such as an amateur collector, should also benefit from the opening up of this provision. As such, we recommend that the amended provision should make reference to ‘a body not established or conducted for profit, or an individual not acting for profit’.

--- END OF COMMENTARY ON SECTION 61 ---

ARCHIVING AND PRESERVATION: Section 75

As with Section 61, the requirement that organisations benefiting from the exception need to be designated by the Secretary of State will be removed. Subsection (1) of Section 75 will be amended so that the exception applies to any body that is not established or conducted for profit. References to “designated bodies” and “broadcast(s) of a designated class” have been removed. These conditions are currently found in of the Copyright (Recording of Archives of Designated Class of Broadcasts and Cable Programmes) (Designated Bodies) Order 1993 (which will be revoked).

Q. Do these amendments meet the objective?

Yes.

--- END OF COMMENTARY ON SECTION 75 ---