



Copyright briefing paper on the Hargreaves exceptions

Chris Morrison and Jane Secker



Acknowledgments

This briefing has been prepared by Jane Secker Consulting for the Society of College, National and University Libraries (SCONUL).

SCONUL and the authors would like to thank those at the case study institutions who have expended considerable effort to provide a detailed picture of current practice.

About SCONUL

The Society of College, National and University Libraries (SCONUL) represents all university libraries in the UK and Ireland, irrespective of mission group. It promotes awareness of the role of academic libraries in supporting research excellence and student achievement and employability, and represents their views and interests to governments and regulators. It helps academic libraries collaborate to deliver services efficiently including through shared services, and to share knowledge and best practice.

© 2019 SCONUL

Published: November 2019



This work is licensed under a Creative Commons Attribution 4.0 International License. Suggested citation: Morrison, C and Secker, J. (2019) Briefing paper on the Hargreaves exceptions. London: SCONUL. <https://www.sconul.ac.uk/publication/copyright-briefing-paper-on-the-hargreaves-exception>

Contact:
SCONUL
94 Euston Street
London
NW1 2HA

info@sconul.ac.uk

Contents

1. Introduction and aim of the guide	2
2. Overview and background of the Hargreaves Review and the main changes	3
3. Licenses and copyright exceptions	4
4. Making and supplying copies to researchers, staff and students	5
5. Supply of copies from one library to add to another library's collection	7
6. Copying for preservation purposes / replacement of stock	8
7. Other amendments to the law to support teaching and research	9
8. Case studies	11
Case Study 1: Interlending / document supply in Wales	11
Case Study 2: Electronic Document Supply	13
Case Study 3: Copying for researchers	15
9. Further support and guidance	17
Further reading	17
Appendix A: Summary of library privilege provisions in the Copyright, Designs and Patents Act 1988	18
Appendix B: Sample wording for library copyright request declaration	20

1. Introduction and aim of the guide

This briefing was commissioned by SCONUL (Society of College, National and University Libraries) and is for heads of service in academic libraries, interlibrary supply / document delivery staff and copyright specialists. It is a plain English guide to the 2014 amendments to UK copyright law, following the Hargreaves Review of Intellectual Property.

The guide concentrates on how the changes to copyright law impact on key library services, including supply of digital content, copying for library users and copying for preservation purposes. The guide avoids the term interlibrary loan (ILL), as it is primarily about the making and supply of copies, most notably those in digital format.

The guide includes three case studies to illustrate how academic libraries are using the provisions of UK copyright law. It clarifies what the law now permits and is intended to build confidence in the sector to allow academic libraries to provide more effective services to their users.

The majority of copying of collection items in academic libraries is done by individual library users at self-service copying devices under a 'fair dealing' exception that permits copying for non-commercial research and private study. There is no requirement to monitor such copying, although many academic libraries display reminders about copying limits in the form of posters (CILIP, n.d.). Therefore this guide does not focus on self-service photocopying.

2. Overview and background of the Hargreaves Review and the main changes

The changes to copyright law in 2014, which followed the Hargreaves Review of Intellectual Property, were the most significant for libraries since the enactment of the Copyright, Designs and Patents Act (CDPA) in 1988. The Government intended the reforms to allow digital uses of copyright works in a number of areas including education, research and cultural heritage. This led to the revision and creation of several copyright exceptions (see box on licences and exceptions).

The amendments introduced two important key concepts into copyright law, which were intended to provide benefit to libraries:

- Any licences that libraries agree to cannot override the library's or their users' ability to enjoy copyright exceptions.
- Many key exceptions were widened to cover all types of copyright work, not just text, which now allows copying and supply of artistic, musical and audio-visual works.

This guide focuses on the main changes to the section of the law often referred to as 'library privilege'. It considers the implications of library privilege on key library functions, services and activities. Although these changes have been beneficial to libraries, the legislative drafting remains complex and difficult to interpret. See Appendix A for a brief summary of the relevant sections of the CDPA.

3. Licenses and copyright exceptions

Copyright holders provide permissions for users to copy and communicate copyright works in the form of licences. Although licences provide permission to use copyright material, they are not the only way that material can be used legally.

Copyright exceptions are defences in law that allow copyright works to be used without the permission of the copyright holder. Many countries around the world have specific exceptions for libraries that allow them to copy under certain circumstances without the need to get permission.

A key aspect of the 2014 UK copyright reforms was the concept that contract terms cannot override exceptions. This ensured that the new flexible exceptions for libraries could not be negated by more restrictive licence terms. For example, a clause in a licence that prohibits copying of any kind can be ignored if an exception, such as that allowing copying for a print disabled user, applies.

Another key concept when considering copyright exceptions is the concept of ‘fair dealing’, which is a legal test that ensures the use of exceptions does not prejudice the interests of the copyright holder. Many of the library privilege exceptions do not involve a test of fair dealing, although some do refer to copying of ‘reasonable’ proportions of works.

Determining true fair dealing extents and reasonable proportions always needs to be done on a case-by-case basis.

4. Making and supplying copies to researchers, staff and students

The CDPA makes specific provision for librarians to make copies of items in their collection for their own users under certain circumstances. This is mostly relevant to universities who hold unique, fragile or valuable items, such as special collections, and when users are unable to visit the library to make their own copies. However, academic libraries often rely on this provision to support interlibrary supply services to their own staff and students who request an item not in the stock of their home institution. This section therefore refers to situations where only one library is involved in copying and supplying content, as well as those where the copy is supplied by one library but sourced from another.

The law allows libraries to copy an article from a periodical, or a 'reasonable proportion' of any other type of published copyright work for the non-commercial research or private study of their users. Unpublished works are subject to similar provisions, although it is explicitly possible to copy the entire work.

User declarations and record keeping

Prior to 2014, requesting users had to sign a specifically worded declaration form, confirming (among other things) that the copy was solely for their own use. This form had to be kept in hard copy format for a period of six years. While there is still a requirement for the user to complete a declaration, the wording of the form is no longer prescribed in the legislation and there is no requirement for a physical signature. This means the records can be held electronically, for example through the use of an online request form. See Appendix B for recommended wording for the requesting user declaration.

Supply of digital content

In addition to using electronic methods to record requests, libraries may also supply copies to users in digital format. Because of the provisions that stop contracts from overriding exceptions, librarians can rely on library privilege exceptions to supply items from their electronic resources without the need to check licence terms. Although libraries may apply different conditions of use to the material they supply, there is nothing in the law that requires them to apply additional restrictions over and above that defined in the legislation. For example, there is no legal requirement for the user to print out a copy of a PDF document and delete the original file, although some libraries supplying copies are still asking the receiving library to do this. In such situations, the library that sends the copy to their requesting user may ignore these additional restrictions as long as the user has agreed to the declaration.

Many academic libraries call the above services document supply, and primarily supply journal articles and book chapters through this route. However, since 2014 any type of copyright work can be copied and supplied under library privilege. This means that libraries can copy artistic works, sound recordings and films, although there is no agreed consensus on what a 'reasonable proportion' of such works might be. Library directors are encouraged to consider their users' needs, and empower staff operating these services when determining policy in this area.

5. Supply of copies from one library to add to another library's collection

Non-profit academic libraries are able to request certain items from another library to add to their collections. These provisions relate to either single journal articles, or the whole or a part of any other published work. They are primarily of use when material is no longer available for the requesting library to purchase.

In the case of the whole or a part of a published work, the copy can only be made if the librarian supplying the copy does not know, or could not reasonably find out, the copyright owner's name and address. This restriction largely confines the use of the provision to the copying of orphan works (where the copyright holder is untraceable or uncontactable) rather than out of commerce works where the copyright holder is known.

As with the other provisions described above, this exception now extends to all types of copyright works, including sound recordings and films. Despite the broadening of the exception however, outstanding issues with access to orphan and out of commerce works remain. This is because it does not cover unpublished material, nor does it enable mass digitisation and making works available to the public online. See section 7 on 'other amendments to the law to support teaching and research' for more information on orphan works.

6. Copying for preservation purposes / replacement of stock

The law has also been made more flexible for libraries that wish to copy material for preservation purposes. It allows them to digitise and make available collection items for research via a 'dedicated terminal' in the library as well as copying whole items in their permanent collection for preservation purposes. The preservation exception allows libraries to copy items to replace lost, damaged or destroyed stock and supply to other libraries if necessary.

7. Other amendments to the law to support teaching and research

There were a number of other important changes to the law that impact on education and research activities of universities and the services offered by libraries. These include:

- the introduction of an exception for text and data mining for non-commercial research (section 29A)
- broadening of the quotation exception beyond the narrower purposes ‘criticism and review’ and ‘news reporting’ (section 30)
- the introduction of an exception for parody, caricature and pastiche (section 30A)
- broadening of the teaching exception to cover fair dealing for the purposes of illustration for instruction (section 32)
- enabling the digital transmission of broadcast recordings not covered by the ERA (Educational Recording Agency) licence (section 35)
- increasing the extent limits covering educational copying to 5% of any copyright work per year, unless a blanket licence such as the CLA (Copyright Licensing Agency) HE Licence exists (section 36)
- provision for the digitisation and online communication of certain types of orphan works (section 44B).

Importantly, libraries and individuals are able to make copies of copyright works for accessibility purposes and for users with all types of disabilities, not just visual impairments.

For further information about the accessibility exceptions see: www.copyrightuser.org/understand/exceptions/disability/.

Detailed information about these other amendments to copyright law are outside the scope of this guide. Further information about other exceptions to copyright law which may be

relevant to academic libraries can be found at: www.copyrightuser.org/understand/exceptions/.

8. Case studies

Case Study 1: Interlending / document supply in Wales

Introduction

This case study concerns interlending and document supply in Wales as facilitated by the Wales Higher Education Libraries Forum (WHELF).

Summary and key objectives

Following the introduction of a common Library Management System (LMS) platform in Wales, a cross-Wales sharing scheme was developed, to maximise the value of WHELF collections and make savings for the sector.

An earlier trial indicated that more than 20% of interlending supply requests could be sourced from Welsh institutions rather than via the British Library Document Supply Service (BLDSS). The WHELF interlending scheme pilot started in January 2018 and it was formally adopted as 'business as usual' by the eight participating Welsh higher education institutions in June 2019.

Changes to procedures post-2014

In addition to the supply of print loans and copies of articles, documents are supplied in electronic format using the shared LMS platform – this involved some institutions needing to change their policy in relation to e-resources to include them in the core borrowing offer. The files are supplied with no security restrictions, beyond asking the requester to complete the declaration form, which is submitted electronically via the LMS.

The provision in the law since 2014 that ensures contract terms cannot override exceptions, means that institutions do not need to check the licence terms and conditions of their e-resources before supplying content.

Key benefits to library users

Library users are able to receive interlibrary supply copies more quickly and in electronic format, which is often more convenient for remote users, thus enhancing the user experience.

Key benefits to institution

WHELF saw the potential for the scheme to maximise the exploitation of participating institutions' collections, while also widening collaboration between institutions. During a data analysis phase, WHELF estimated the net cost savings of the scheme to be approximately £6,500 across the region. The data analysis was based on seven months of previous interlending data and the proportion of requests which could have been fulfilled by WHELF institutions rather than the BLDSS. Savings from the first year of the pilot scheme were estimated at £13,500 across Wales. This includes staff costs and postage.

One institution commented that changes to the law have: "...addressed challenges posed by the shift to digital-first library acquisition policies and the growth of online journals. Prior to the exception, students and researchers were limited in accessing copies of articles from other libraries, for no reason other than a variation in the published format and the application of restrictive publisher contract clauses."

The future

The consortia is looking at a period of consolidation, focusing on both internal governance and support mechanisms for the institutions involved. They are also exploring future developments for the scheme.

Other higher education providers and members of WHELF are looking to participate in the scheme, and discussions are underway to extend it to the NHS in Wales.

Where to get further information

WHELF Copyright working group: <http://whelf.ac.uk/whelf-sub-groups/copyright/>.

Case Study 2: Electronic Document Supply

Introduction

This case study concerns interlending and document supply at a small research intensive (former 1994 Group) university.

Summary and key objectives

Staff in the interlending service wished to enhance the customer experience by supplying journal articles electronically, even if they were from e-journals where the contract with the publisher stated that this was not permitted. They also wished to streamline their own workflows and change how they supplied copies to requesting libraries.

Changes to procedures post-2014

The library decided to conduct a brief survey to review practice amongst other libraries that were supplying them with interlending services. They intended to use this, alongside a greater understanding of the law, to inform their policy when supplying copies to others.

Supply of documents in electronic format is relatively common practice amongst Higher Education Institutions (HEI) interlending departments. In a six-week period, over 90% of articles supplied by other HEI libraries to the institution in this case study were supplied electronically.

Despite the changes to the law allowing interlibrary supply of electronic content, some libraries were still specifying that the receiving library must print off articles and only give a printed version to the requesting user. Others were only supplying requests that could be fulfilled in printed form because of the uncertainty around the legitimacy of supplying articles electronically.

The surveying library decided to disregard unnecessary restrictions on delivery and supply of electronic material and supply them in digital form to requesting users.

The key challenge for interlibrary supply is ensuring that the user declaration and charging requirements of the legislation are met. However, the changes to the wording of Section 42A and the provision that contracts cannot override the library's ability to enjoy copyright exceptions were helpful to allow the institution's policy and procedures to be improved.

Key benefits to library users

Electronic supply means that the library can now provide faster, more efficient document delivery services. There is also no requirement on users to visit the library in person to collect interlending requests in print format. The library also decided that they did not need to supply files to users using Secure Electronic Delivery (SED) meaning that users were able to receive the files and use them in a way that best suited their needs.

Key benefits to institution

This has led to savings in terms of time spent on photocopying, administration and postage by the supplying institution. It also means that those institutions requesting interlending services from this institution now receive the files more quickly and without additional conditions of use.

Case Study 3: Copying for researchers

Introduction

This case study concerns copying on behalf of a research facility by a large, research-intensive Russell Group university. The university library provides a free document delivery service to members of the research facility.

Summary and key objectives

Researchers from a variety of different institutions are working together at this new research facility. Access to e-resources is based on the individual researcher's institutional affiliation(s). The size and nature of the constituent partners meant that researchers from the smaller partners were considerably disadvantaged because of the size of their institutions' resource budgets.

Changes to procedures post-2014

The university explored the possibility of extending licences to the smaller partners, but found this to be unaffordable. The university then decided to exploit the new provisions in the law and offer a free document delivery service to members of the research facility who otherwise would not have access to certain resources.

The provision in the law that means institutions do not need to check the licence terms and conditions of their e-resources before supplying content is particularly useful in this example. Researchers must still sign a declaration form, but where the item is held in stock this can be supplied electronically to members of the research facility, each who have their own institutional affiliation.

The service continues to be monitored because a percentage of requests cannot be supplied using this route.

Document delivery process

The research facility introduced a process whereby the librarian mediates requests from researchers based within the research facility and sends valid requests to the document delivery team at the university.

The librarian at the research facility acts as a mediator, ensuring requests are not forwarded for document delivery if they could have been fulfilled through the member's home institutions subscriptions, or via open access content.

No additional technical protection measures are added to the documents. However, the service is monitored to check that no further circulation of files takes place, for example ensuring they are not used as readings supplied to students.

Key benefits to library users

This service provides greater parity of access to licensed resources to all researchers based at the facility at an affordable cost.

Key benefits to the institution

The institutions can more effectively work in collaboration and there is equality in access to key resources for researchers.

9. Further support and guidance

Academic library staff with responsibility for copyright are able to make use of the closed JISCMail list LIS-Copyseek. This is the main UK community of practice for copyright specialists in higher education, and is a useful resource for information professionals with questions about copyright. The archives contain many years of discussion and advice on every aspect of copyright in UK universities. Further details about how to subscribe to the mailing list are available at: <https://www.jiscmail.ac.uk/lists/LIS-COPYSEEK.html>.

The Forum for Interlending (<http://www.forumforinterlending.org.uk>) maintain a website and hold events for staff involved in interlending and document supply services.

The Copyright Literacy website and blog (<https://copyrightliteracy.org>) provides regular posts about copyright education and maintain a list of copyright advice pages from UK universities (<https://copyrightliteracy.org/about-2/copyright-guidance-from-uk-universities/>).

Further reading

Deazley, R (2016) Archives and Preservation: Copyrightuser.org
<https://www.copyrightuser.org/educate/archives/>.

Graham Peter Cornish, (2015) "Reform of UK copyright law and its benefits for libraries", Interlending & Document Supply, Vol. 43 Issue: 1, pp.14-17 <https://doi.org/10.1108/ILDS-11-2014-0054>.

Libraries and Archives Copyright Alliance (2019). Guide to response to the IPO Call for Evidence <http://uklaca.org/wp-content/uploads/2019/03/2014ChangesReviewGuide20190328.pdf>.

CILIP (n.d) Copyright Poster <https://www.cilip.org.uk/page/Copyrightposters>.

Morrison, C and Secker, J. (2017) Exceptions for Libraries: Copyrightuser.org
<https://www.copyrightuser.org/educate/intermediaries/libraries/>.

Appendix A

Summary of library privilege provisions in the Copyright, Designs and Patents Act 1988



s.40B Dedicated terminals

Allows libraries and educational establishments to digitise collection items and make them available for research via a dedicated terminal in the library.



s.41 Library to library copying

Allows supply of whole or part of any published work from one library to another to add items to their collection.



s.42 Library Preservation

Allows libraries to make copies of items in their permanent collection for preservation purposes and to supply replacement copies to other libraries.



**s.42A Library Copying
for Users**

Allows libraries to make a single copy of a reasonable proportion of a published work for their users' non-commercial research and private study. In addition to covering copying by a library for its own users, it also covers inter-library supply if the copy needs to be sourced from another library. In both cases it requires a declaration from the library user which can be in digital format.



**s.43 Library Copying of
Unpublished works**

Allows librarians to make a single copy of a whole or part of an unpublished work for users for non-commercial research and private study. A declaration from the library user is required.

Icons from Copyright the Card Game – <https://copyrightcardgame.com>.

Appendix B

Sample wording for library copyright request declaration

Please supply me with a copy of:

Title(s)

Collection

Catalogue reference number(s)

Details of part(s) if applicable

Copyright declaration I declare that:

1. I have not previously been supplied with a copy of this material by this or any other library or archive.
2. I need the copy for the purpose of non-commercial research or private study. I will not use it for any other purpose and I will not pass it on or copy it for anyone else.
3. I understand that supply of this material by [University of X] does not confer the right to reproduce, quote or publish it. I understand that if this declaration is false, the copy you have supplied to me will be an infringing copy and that I shall be liable for infringement of copyright as if I had made the copy myself.

Name

Address

.....

Email address Phone

Signature Date

