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Copyright exceptions for archivists and librarians in the UK

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Copyright legislation in the UK changed significantly in 2014, and this article provides an overview to some of the most relevant changes to the exceptions[1] in copyright law that can be used by archivists and librarians. Subscribers to ALJ will have read Tim Padfield's excellent introduction to UK copyright law for art librarians in 2012, much of which is still relevant and will not be repeated here. Given the varied nature of art library and archive collections in the UK, and the complex nature of the law in this area, it is intended that the following general guidance to the 2014 legislative changes will highlight areas for further study: such basic guidance should not be used to inform internal policy or decision-making. The article also includes a list of sources for more detailed information on the law, in the references section.

Changes to the Copyright, Designs and Patents Act 1988 (CDPA)

Research and private study

The fair dealing exception for research and private study[2] has been extended to include all types of works: previously the exception had only applied to literary, dramatic, musical and artistic works, but now includes film, sound recordings and broadcasts. This exception is still limited, in that an archivist or librarian can only copy a 'reasonable amount' of a work. Contractual terms do not override this exception: this means that if you have license agreements with specific publishers or collecting societies that prohibit the making of this type of copy, then those license terms cannot be enforced and the copies can be made.[3]

This is relevant for art librarians because library users may request copies of material (film, sound recordings, broadcasts) from your collection where copying was not permitted, or legal, previously. The benefit of this exception is that most types of work (except drama and musical scores) are now available for research and private study copying. This is a fair dealing exception, so in determining what a 'reasonable amount' of a work will be, librarians and archivists should take into account fair dealing concepts.

1. These exceptions allow individuals or particular types of institutions to copy works without infringing the law, so long as the copying meets a set of defined criteria.

2. Copyright, Designs and Patents Act 1988 s.29.

3. Many of the fair dealing exceptions now include contract override, a positive result of the lobbying which took place during the consultation on the changes to the CDPA 1988, and which makes the process of applying the exceptions much simpler.

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A brief note on fair dealing

Fair dealing is based on the Berne Convention 3-Step Test:[4] when we copy, we must "judge the fairness by the objective standard of whether a fair minded and honest person would have dealt with the copyright work in the [same] manner."[5]

Consider the following: Does your copy affect the market for the original, and thereby compete with exploitation of the copyright work by the owner? How extensive/important is the material that has been copied? What was the original purpose for making the copy? These are the type of questions that should be asked when coming to a decision on fair dealing.

4. Berne 3-step test: see 1886 Berne Convention for the Protection of Literary and Artistic Works Paris Act 1971 and the Directive 2001/29/EC of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society (aka the InfoSoc Directive).

5. *Hyde Park Residence v Yelland [2000] EMLR 363*.

Declaration forms

Users who obtain copies for non-commercial research and private study must complete a statutory declaration form,[6] but they can now do this electronically, replacing the old paper statutory declaration form: making it quicker and simpler to obtain copies from libraries and archives via email.

There is no need to keep using the old paper form, but some services may prefer to keep using it for audit purposes. If users contact you via email, it may be worth having an email template on file to send them for completion. The declaration needs to contain the following elements:

- the name of the person who requires the copy and the material which that person requires
- a statement that the person has not previously been supplied with a copy of that material by any library or archive, and
- a statement that the person requires the copy for the purposes of research for a non-commercial purpose or private study, will use it only for those purposes and will not supply a copy to any other person.

If you do switch to asking users to make electronic declarations (and I imagine many of you do so already anyway), make sure you have a record-keeping process established for the audit trail.

6. CDPA 1988 s.42A & 43, also see Padfield (2015) for examples of declaration forms.

Preservation

An existing preservation exception[7] allowed libraries and archives to copy literary, dramatic and musical works within their permanent collection for the purposes of preservation. This has now been extended to include all types of copyright work (artistic works, films, sound recordings etc). Museums and galleries have also been included within the exception for the first time. The exception can only be applied when it is not possible or reasonable to purchase a replacement copy of a work. Some cultural heritage institutions may find that limiting the exception to works within their permanent collection is problematic.

This is significant for art librarians and archivists because the preservation exception has been extended to include artistic works for the first time, and film and sound recordings. Of course, the usefulness of this exception turns on the make-up and type of collections you hold, and the arrangement of your permanent and non-permanent/

7. CDPA 1988 s.42.

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loan collections. You could, for example, copy slide or transparency collections for preservation purposes, or format shift VHS or cassette tapes to a high-quality digital format for medium to long-term preservation. The preservation exception could also help with long-term planning for access, in that, once you have preservation copies of a work, if a user should need access and be able to gain access under a specific exception, the copies will be available.

Dedicated terminals

Educational institutions, libraries, archives and museums can now provide access to digital copies of works for research and private study, via dedicated terminals on their premises.[8] This exception can be used to facilitate access to previously digitized collections, and to items which are too fragile to be produced or displayed in the museum or search-room: but access is still limited to the physical location of the archive, library or museum. Additionally, if the works you intend to display are subject to a licence or purchase agreement, then communication via a dedicated terminal must be compliant with that agreement.

8. CDPA 1988 s.40B.

If you have digitized parts of your collections already, you can make these copies available on dedicated terminals on your premises. This also applies to any copies you may have made under the preservation exception. Unfortunately, this is for viewing purposes only: on the basis of recent EU case law,[9] users should not be able to print copies of material from these terminals, or use removable drives to obtain copies. Of course, if a user requests a copy of material they have viewed on a dedicated terminal under another fair dealing exception, this can be accommodated.

9. *University of Darmstadt v Eugen Ulmer* [2014] ECDR 449.

Library privilege copying

This exception[10] allows libraries and archives to supply copies of articles and published literary, dramatic or musical works for the benefit of other libraries. This has now been extended to include all types of published works. The exception only applies if it is not possible to identify or locate the person who would be entitled to authorize the copying of the work. This exception would be particularly useful for institutions where parts of their collections have been lost, stolen or damaged.

10. CDPA 1988 s.41.

Of course, the usefulness of this exception has been brought into sharp relief by the fire at Glasgow School of Art in May 2014. This exception is extremely valuable and probably under-utilized by the sector. The relevance of the exception for archive collections is questionable, where the uniqueness of material, or extremely short runs of published works like artists' books can mean that replacement copies are not feasible. However, for copies of rare literary works that have been lost, stolen or destroyed, this exception has potential and should be used where possible.

Illustration for instruction

This fair dealing exception[11] allows a copy of a work to be used as illustration for instruction, including setting exam questions. The use must be non-commercial, by a person giving or receiving instruction

11. CDPA 1988 s.32.

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(or in preparation for such), and should be accompanied by sufficient acknowledgment where practicable. The exception cannot be overridden by contract. Emily Stannard has suggested the exception can be used to reproduce excerpts of sheet music and audio tracks, figures and diagrams to illustrate specific teaching points, limited extracts of works in PowerPoint slides, and images in non-commercial presentations which serve to illustrate instruction.[12]

12. Emily Stannard. "Brave New World or Tangled Web?: Educational exceptions in 2015." Presentation, Copyright Executive Briefing from CILIP, London, April 1, 2015. Available at: http://www.cilip.org.uk/cilip/events/cilip-copyright-executive-briefing-2015

Copying and use of extracts of works by educational establishments

This fair dealing exception[13] allows educational establishments to copy extracts of works. Copies should be made for non-commercial educational purposes, with acknowledgment where practicable. Copies can be communicated to students and staff via secure electronic networks, i.e. Virtual Learning Environments (VLEs). The exception includes most types of copyright works, but does not include broadcasts or 'standalone' artistic works, i.e. photographs, maps, plans or drawing which are not embedded or incorporated into other works, like newspaper clippings or magazine articles. No more than 5% of a work can be copied in a 12-month period, and the exception can be overridden by contract. This means that the CLA licence and publisher agreements will take precedence over this exception, although the 5% allowance cannot be overridden by an agreement.

13. CDPA 1988 s.36.

It's worth pointing out that, while this exception does not allow the copying of standalone artistic works, the exception for illustration for instruction does. If the copies of artistic works were to be embedded in a PowerPoint presentation for communication to users via a VLE, it could be permissible to provide copies under the illustration for instruction exception.

Disabled persons: copies of works for personal use

This exception[14] applies if the disabled person has lawful possession or use of the works to be copied, and the person's disability prevents them from enjoying the work to the same degree as a person who does not have that disability.

14. CDPA 1988 s.31A.

The making of an accessible copy will not infringe if it is made by the person or on their behalf, if it is made for personal use and it is not possible to purchase a commercial, accessible copy on reasonable terms. The sum charged for copying must not exceed the cost of making and supplying the copy. Contractual terms do not override this exception: this means that if you have license agreements with specific publishers that prohibit the making of this type of copy, then those license terms cannot be enforced and the copies can be made.

The disability exceptions previously only applied to visual impairments. The exception now applies to all types of copyright work, rather than just literary, dramatic, musical and artistic works. Contract could override the exception, so this is a significant improvement. The previous exception was also dependent on no commercial copy being available.

Disabled persons: accessible copies by authorized bodies

This exception[15] applies if an authorized body (i.e., an archive or library, for example) has lawful possession of the works to be copied,

15. CDPA 1988 s.31B.

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including broadcasts, and it is not possible to purchase a commercial, accessible copy on reasonable terms. This includes supply to a person acting on the disabled person's behalf. Educational establishments conducted for profit must ensure that any copies provided using this exception are used for educational purposes only.

Accessible copies must be accompanied by a statement that the copy has been made under s.31B, with sufficient acknowledgement of the author (where practicable).[16] Accessible copies must incorporate the same or similar Technical Protection Measures (TPM) as the original (unless the copyright owner agrees otherwise); this is an unfortunate amendment given that TPMs are often what makes electronic copies of work inaccessible for disabled people in the first place. Again, contractual terms do not override this exception.

Similarly to the Personal Use exception, this exception was previously restricted to people with visual impairments, and only literary, dramatic, musical or artistic works could be copied, excluding sound recordings, films and broadcasts. Contractual terms could override the exception, and it was dependent on no commercial copy being available, so on balance, the exception has been improved.

Interestingly, an authorized body that has made an accessible copy of a work using this exception can supply it to another authorized body, to enable them to make accessible copies of the work. The sharing of accessible copies[17] should reduce wasted effort where broadly similar material is being copied for disabled access at multiple institutions, and could save significant amounts of staff time and money. In addition, the sum charged for copying must not exceed the cost of making and supplying the copy.

Criticism, review, quotation and news reporting

Fair Dealing with a work for the purposes of criticism and review[18] is fair if accompanied by sufficient acknowledgement, where practicable, and if the work has already been made available to the public.[19] Fair dealing with a work (other than a photograph) for the purpose of reporting current events does not infringe copyright if it is also accompanied by a sufficient acknowledgement.

The use of quotations, whether for criticism, review or *otherwise*, will not infringe copyright where the work has been made available to the public, the use of the quotation is fair dealing with the work, the extent of the quotation is no more than is required by the purpose for which it is used, and the quotation has sufficient acknowledgement, where practicable. Again, contractual terms do not override this exception.

This exception has been significantly improved. Previously, criticism & review did not cover 'illustrative' use, a purpose that many of our users would no doubt be interested in taking advantage of. The drafting of the exception, particularly the reference to criticism, review or *otherwise,* makes it very flexible indeed. We should encourage users to take advantage of it to the fullest extent possible.[20]

There has been some discussion, particularly from DACS, about what a quotation from a photograph or painting or other pictorial/graphic work would look like. According to an explanatory memorandum prepared by the IPO, a quotation can include the use of an entire photograph.[21] However:

16. Authorized bodies must keep records of accessible copies made under s.31B, intermediate copies it makes under s.31BA and the persons who are supplied with copies. Records must be made available for inspection at reasonable notice. Within reasonable time of making an accessible copy, an authorized body must notify rights owners or their representatives that a copy has been made, unless identifying and contacting individual rights owners is not reasonably possible.

17. An authorized body may make intermediate copies of work as part of the process of creating accessible copies of works, and they may share these intermediate copies with other authorized bodies in order to facilitate the creation of accessible copies.

18. CDPA 1988 s.30.

19. A work has been made available if copies have been issued to the public; if the work has been made available by means of an electronic retrieval system; if copies of the work have been rented or lent to the public; if the work has been shown, played, exhibited or performed in public; or if the work has been communicated to the public. The circulation of infringing copies does not count as making the work available to the public. See CDPA 1988 s.30 1A.

20. This exception is really useful for PhD students unsure about the quotations they've used in their theses, and useful for research staff in their own publications.

21. The memorandum states: 'In ECJ case C-145/10 Painer, the Advocate General concluded that a "quotation" could be a "full quotation" of the work, so could apply to photographs: "... it would seem possible that a full quotation can also be a quotation within the meaning of that provision. In the case of this type of work, a complete reproduction may be necessary in order to create the necessary material reference back to the work. If only parts of photos could be published under Article 5(3)(d) of the directive, this would significantly restrict the application of that provision to photos. This is consistent with the interpretation by the WIPO Guide to the Berne Convention (above) and the general academic opinion on this provision.' Paragraphs 3.5.5 & 3.5.6."

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'. . .if a full work is being quoted, "particular importance" would be attached to the requirements that quotations are used "in accordance with fair practice" and in compliance with the [Berne] three-step test . . . these conditions are implemented by the "fair dealing" requirement in the Regulations. In practice, this means that, while it is possible to "quote" a whole photograph, it may be more difficult to do this in a way that is considered "fair dealing" when compared to the use of shorter extracts of other works.'[22]

22. Intellectual Property Office. "Explanatory memorandum to The Copyright and Rights in Performances (Personal copies for private use) Regulations 2014, 2014 No. 2361 and The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014, 2014 No. 2356." HM Government. Paragraph 3.5.7. Available at: http://www.legislation.gov.uk/uksi/2014/2361/pdfs/uksiem_20142361_en.pdf

The orphan works exception

Orphan Works are copyright works for which a rights owner cannot be identified, or for which the rights holder, even if identified, cannot be located. As a result, permission to use the works cannot be obtained. There are significant numbers of orphan works in both library and archive collections, although the proportions tend to be higher in archive collections because they tend to be larger.

This new exception[23] allows publicly accessible libraries, educational establishments and museums, archives, film or audio heritage institutions and public-service broadcasting organisations to digitize published works, cinematographic or audio-visual works and phonograms and make them available online.

Before an orphan work can be made available online, the institution must conduct a diligent search[24] for the rights owner, and log the results of the search with the Office of Harmonisation in the Single Market of the EU (OHIM).[25] This allows for mutual recognition of orphan works status across the EU.

The exception is limited: it does not apply to standalone artistic works like photographs, maps, plans, paintings and drawings, and does not cover commercial re-use or unpublished works. Embedded works (i.e. photographs, illustrations, tables) included in books, articles and other published works *are* included in the exception. For this reason, and depending on the collection in question, many art library/archive institutions may find the orphan works exception is of little relevance to their work.

23. The Copyright and Rights in Performances (Certain Permitted Uses of Orphan Works) Regulations 2014 No. 2861.

24. The process of searching for rights owners can be complex: there are often multiple rights owners in a single work, or you may have to trace multiple heirs where the known rights owners are deceased. The complexity often means that diligent search is time-consuming and resource-intensive.

25. See https://oami.europa.eu/ohimportal/en/web/observatory/orphan-works-database for more information.

The orphan works licensing scheme

An alternative to the exception exists in the new UK licensing scheme for orphan works.[26] This licensing scheme covers standalone artistic works, and may be of more use to art library/archive institutions. However, there are issues with the licensing scheme that may affect uptake. See below for further comments, but first: the legislation.

Any user (not just cultural institutions like those mentioned above) can apply for a licence to use an orphan work under this new scheme. Licences will be provided for any type of work, to any type of user, for commercial or non-commercial purposes, but the licence will be limited to use within the UK,[27] and only lasts for a maximum of seven years, after which you can apply to renew it.

Users must conduct a diligent search for the rights owner before making an application to the Intellectual Property Office (the licensing body) to license the work.[28] The IPO have produced a series of comprehensive guides to diligent search for different media types.[29] A number of safeguards have been built into the scheme for rights owners: in addition to the diligent search, an applicant must pay a

26. The Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014 No. 2863.

27. This is another significant limitation: when we make things available on the Internet, we generally want everyone to be able to see them, regardless of location.

28. See https://www.orphanworkslicensing.service.gov.uk/viewregister for more details.

29. See the guidance at https://www.gov.uk/government/publications/orphan-works-diligent-search-guidance-for-applicants

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Fig. 1. Intellectual Property Office. Composite screenshots from "Apply to license an orphan work." Last accessed January 7, 2016. https://www.orphanworkslicensing.service.gov.uk/apply/work/title

licence fee equivalent to that charged for the use of a similar non-orphan work, which will be kept by the IPO for returning rights owners; and the orphan register will be made freely available online for rights owners and diligent searchers to check.

Cultural heritage institutions, pursuing digitization projects in the public interest or related to their public interest missions, will be charged a non-commercial licence rate of £0.10 per orphan work, in order to facilitate mass digitization within the sector. However, the administrative burden of diligent search in both the exception and licensing scheme may mean that mass digitization is unachievable for many cultural heritage institutions.

Issues with the application process for the IPO licensing scheme have also been highlighted. The cost of taking out a licence is dependent on how many works you require a licence for. Small numbers of works can be cleared easily through the scheme, but the burden begins to increase as the number of works increases. First, there is the cost of diligent search. The application process is a series of windows and drop down menus for each individual work, which will also prove time-consuming to complete. An application for 30 works (the maximum that you can apply for in a single application) is £80. A cultural heritage institution looking to license 1000 works non-commercially, which is a very conservative amount of material, given the relative size of UK archive collections and the proportion of orphaned material, would quickly rack up application and licence fees in the region of £2500–£3000. This figure does not include the time already spent on diligent search, or the time spent on the application process itself, which would be considerable given the stilted nature of the drop down menus. Those wishing to license material from art-based collections may also find the pre-determined categories of works available as part

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of the application process do not readily correspond to the material they hold and are trying to license.[30]

30. If you're interested, you can explore the orphan works application process here: https://www.orphanworkslicensing.service.gov.uk/apply/work/title.

Other new exceptions

Previously, new legislation had to be created each time a cultural heritage institution wanted to archive broadcasts or folksongs; this requirement has now been removed, and the process for archiving these works has been simplified as a result.[31] There are also new exceptions for text and data-analysis,[32] and caricature, parody and pastiche.[33]

31. CDPA 1988 s.61&75
32. CDPA 1988 s.29A
33. CDPA 1988 s.30A

Conclusion

There is much to celebrate in the 2014 changes to UK copyright legislation. Many of the exceptions we rely on to provide services to our users have been simplified, expanded or protected from contract override, and we should use them to the fullest extent possible. However, some obstacles clearly remain. Archivists and librarians may find it useful to consider a risk-managed approach to complying with the law in instances where exceptions are inflexible or unavailable in the pursuit of access or meeting user needs.

Useful sources

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Copyright User: www.copyrightuser.org

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