

Order From Chaos? Copyright Exceptions One Year On

Emily Stannard, Head Librarian & Copyright Officer, Bradfield College

estannard@bradfieldcollege.org.uk

Keeping up with change in the technological sphere can be tough; you just get used to the way something is done and then a company will change something for seemingly no apparent reason. But changes to laws are different; they don't happen as often, and when they do, it's usually to improve a situation or activity that is failing in some area. The difficulty for us as information professionals is understanding what's changed and how it affects us.

In 2014, five new statutory instruments were introduced and passed into legislation to amend sections of the Copyright, Designs and Patents Act 1988 (CDPA). These instruments had been at least five years in the making, but it was really thanks to the Prime Minister David Cameron taking an interest in intellectual property laws and their impact on the economic growth and development of the country that any real progress was made. In 2010-2011, the Intellectual Property Office (IPO) launched a series of consultations on copyright to which all stakeholders were able to respond. The consultations generated an overwhelming response from libraries, archives, educational establishments, researchers and consumers as well as the media industry, authors, creators, publishers and other copyright holders. The [Libraries and Archives Copyright Alliance](#) (LACA) played an instrumental part in responding on behalf of the sector, and continues to be an excellent organisation lobbying on behalf of the information profession. When the response to the consultation was published, it was finally felt that the concerns of information professionals about the hindrances created by copyright law were being listened to and acted upon.

In particular, information professionals were concerned about several issues: disconnects between the type of copying being done by them and the copying being done by their users; preservation copying (which didn't apply to all media types); copying for instructional purposes (only by means of a non-reprographic process); document supply (requirement for a signature on a physical form); and copying for people with a disability (limited to people with a visual impairment and not applicable to all media types). Copyright law was at complete odds with modern-day technology and practice, and something needed to be done.

Thus in April 2014 five statutory instruments were issued. Three of the five were accepted by the Houses of Parliament and passed into law on 1 June 2014: [The Copyright \(Public Administration\) Regulations 2014](#), [The Copyright and Rights in Performances \(Research, Education, Libraries and Archives\) Regulations 2014](#), and [The Copyright and Rights in](#)

[Performances \(Disability\) Regulations 2014](#). However, because of their controversial nature, the remaining two ([The Copyright and Rights in Performances \(Personal Copies for Private Use\) Regulations 2014](#) and [The Copyright and Rights in Performances \(Quotation and Parody\) Regulations 2014](#)) were returned to the IPO for further consultation and refinement. These two eventually became law on 1 October 2014.

Most of the instruments included amendments to several of the permitted acts most relevant to information professionals, such as exceptions to copyright for library practices, researchers, and educators. Some of these amendments related to the copying and use of whole works, whilst others amended or added to provisions made viable under what is known as ‘fair dealing’. Fair dealing in copyright law is not to be confused with fair use, its American counterpart which is similar but different from fair dealing. Unfortunately, fair dealing is not defined in law but [the IPO has attempted to explain it](#):

“ ‘Fair dealing’ is a legal term used to establish whether a use of copyright material is lawful or whether it infringes copyright. There is no statutory definition of fair dealing - it will always be a matter of fact, degree and impression in each case. The question to be asked is: how would a fair-minded and honest person have dealt with the work?¹”

One of the only ways to get to grips with fair dealing is by looking at case law, not just at a national level but at a European level as well. All decisions made by the Court of Justice of the European Union (CJEU) in copyright cases, regardless of which country they have been referred from, are important when interpreting national copyright law, especially over issues such as the substantiality of copying or communication to the public.

Further to the amendments made to fair dealing permissions, new exceptions were also brought in. These included copying for text and data analysis and making works available on dedicated terminals. Text and data analysis is a brand new exception, not held by any other country. As such, no case law exists, making it less easy to interpret. The exception allows large volumes of data and text to be copied from digitised or born-digital source material using computational analysis for speed and efficiency, provided the person making the copy has lawful access to the work and is only making the copies for non-commercial research purposes. Non-commercial is another term that is less easy to define in the context of copyright, but Justice Laddie suggests that it is the nature of the activity rather than the nature of the institution, which should be taken into account². This exception has already benefitted researchers but information professionals should be aware that publishers of electronic subscription databases might become concerned about the mass access to information that will occur during computerised text and data analysis. Information professionals are therefore advised to engage with their user community to ensure that they remain abreast of projects where text and data analysis will be used so that they can respond appropriately to publisher concerns.

¹ Intellectual Property Office (2014). *Exceptions to copyright*. <https://www.gov.uk/guidance/exceptions-to-copyright>

² Laddie, Prescott and Vitoria (2011). *The Modern Law of Copyright and Designs*. 4th ed. London: Butterworths.

Similarly, the exception for making works available on dedicated terminals is new, but only to the national law; this exception has formed part of the [EU Directive on copyright](#) (the Information Society Directive) since 2001. It allows the making available and viewing of works on dedicated terminals on the premises of any library, museum, archive or educational establishment provided the works have been lawfully acquired and the making available of the work does not contravene its purchase agreement or the wishes of the copyright owner. Information professionals are, for the most part, unsure about this exception given its relatively untested waters, but it does present an opportunity to digitise fragile material and make it available to view on dedicated terminals. However, following [the case in the CJEU about the University of Darmstadt](#) in Germany, whose library scanned whole books to make them available to students via dedicated terminals for printing out and storage, dedicated terminals may have to be standalone terminals without USB drives or access to the Internet.

The impact of these exceptions continues to play out as information professionals attempt to interpret the wording of the law in relation to their activities. Fortunately, there are plenty of resources at hand to help. Several new editions of copyright texts such as Tim Padfield's [Copyright for Archivists](#) and Graham Cornish's [Copyright: interpreting the law for libraries, archives and information services](#) (both published by Facet Publishing) are now available to purchase and training courses such as UKeIG's **Copyright Update: Making sense of copyright reforms** will give you the knowledge and skills necessary to navigate the copyright minefield and stay on the right side of the law. Look out for UKeIG's 2016 training opportunities on our regularly updated [training workshops](#) diary.

So what next for copyright? Well, there have been significant developments in Europe in relation to the Digital Single Market following the European Commission's copyright consultation at the end of 2014. Julia Reda, the Pirate Party MEP, was asked to compose [a non-legislative report](#) for the EU Parliament on proposed changes to copyright and priorities going forward, which was adopted by the EU Parliament in July. The EU Commission is now preparing a draft legislative proposal for copyright reform, which will be influential in deciding the fate of national copyright law in the UK. The proposal is due to be released by the end of the year.