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Document Supply of Notated Music by Libraries in the UK and Ireland: Observations, Interpretations and Recommendations



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1. Executive Summary

- 1.1 The Copyright, Designs and Patents Act 1988 includes provisions in sections 42A and 43 for libraries to make and supply users with single copies of copyright works, subject to certain parameters. Whilst the legislation permits this in relation to all types of copyright work, anecdotal feedback suggests that not all libraries offer the service in relation to notated music scores, and those that do aren't necessarily confident in the application of the criteria to this medium.
- 1.2 A survey was distributed focussing on these two "library privilege" exceptions, seeking to establish in a more structured fashion which libraries offered these services in relation to notated music scores, any impediments to their application, and the various ways in which libraries applied the criteria set out in the legislation.
- 1.3 The responses to the survey support the anecdotal impression. Just over one third of respondents offered library privilege copying of published music scores, whilst fewer than half of those that held unpublished music manuscripts offered a document supply service for these. Primary themes that were cited as obstacles were lack of expertise, insufficient staffing capacity, and difficulties in applying judgements.
- 1.4 Much of the difficulty centres around how to apply the "reasonable proportion" criteria of section 42A to a musical work. Section 5 of this paper considers changes in successive drafting of the provision since 1956, similarities and differences between musical and literary works, judgements of what constitutes a "work", conflict between horizontal and vertical treatment and how a "reasonable proportion" might compare to the concept of "fair dealing" (and whether that can be deemed to be of relevance).
- 1.5 The report concludes by providing overarching recommendations on the frameworks libraries should have in place to inform their own decision-making policy, and to ensure staff are supported in applying the criteria. It does not, however, seek to provide "one-size-fits-all" guidance. Based on the interrogation of the legislation, a range of possible interpretations is offered and existing practices are plotted on a risk scale. It is for libraries to establish their own parameters based on their institution's risk profile.

2. Introduction and Methodology

- 2.1 The IAML (UK & Irl) Trade and Copyright Committee issued a survey in March 2020 to gather information on the use of the two "library privilege" exceptions which allow libraries to copy works to provide to users for research and study purposes as they apply to notated music.
- 2.2 The objectives were to:
 - a) build up a picture of the extent to which libraries are utilizing these exceptions for music scores;
 - b) explore differences in practice and attitudes toward risk across sectors;
 - c) identify any obstacles to utilization;

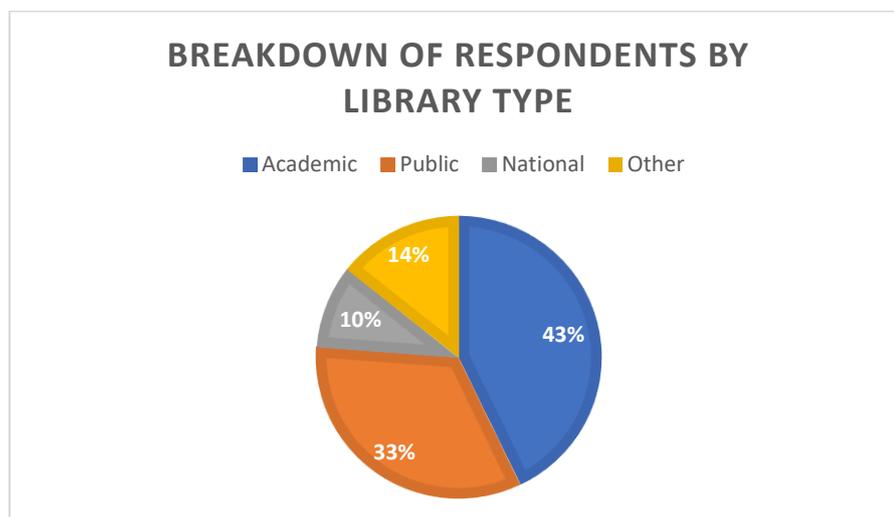
with a view to producing summary findings and exploring whether guidelines might be created to assist libraries in having the confidence to make full use of these exceptions.

- 2.3 The survey was circulated to the IAML (UK & Irl), LIS-COPYSEEK, LIS-ILL and Library Association of Ireland Academic & Special Libraries email lists. It was designed to be anonymous and respondents were likely to have comprised a mixture of librarians and copyright officers.
- 2.4 In order to keep the survey simple it only quoted UK law, however as Irish copyright law is substantively similar in this area, responses were welcomed from libraries in the Republic of Ireland.

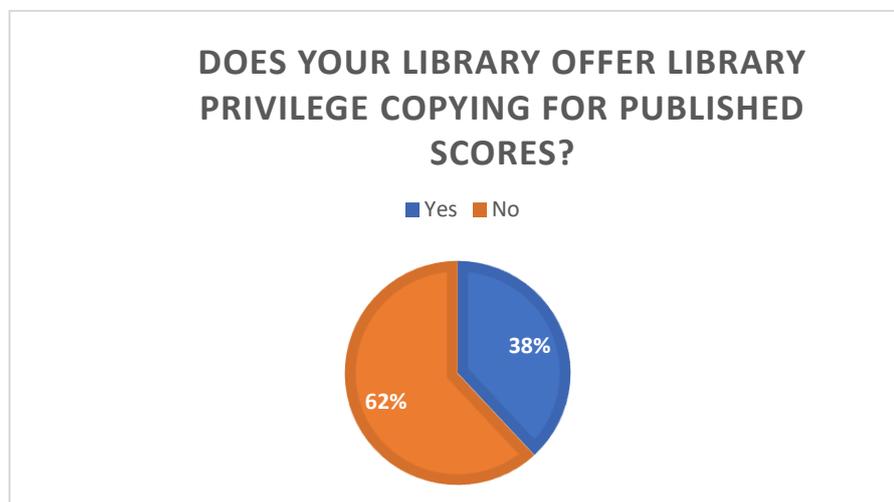
3. Survey Responses

- 3.1 Completed surveys were submitted by 21 libraries comprised as follows:

Figure 1. Type of library



- 3.2 **Figure 2. Library privilege copying of published scores**



38% of the respondents offered library privilege copying for published scores. Of the 62% that didn't, a number of reasons were quoted, falling into three broad categories:

- Lack of time/staff resource
- Lack of expertise/confidence/difficulties in making judgements
- Perceived lack of demand

3.3 Asked what criteria were used to judge what comprises a "reasonable proportion" of a score, the most common responses were:

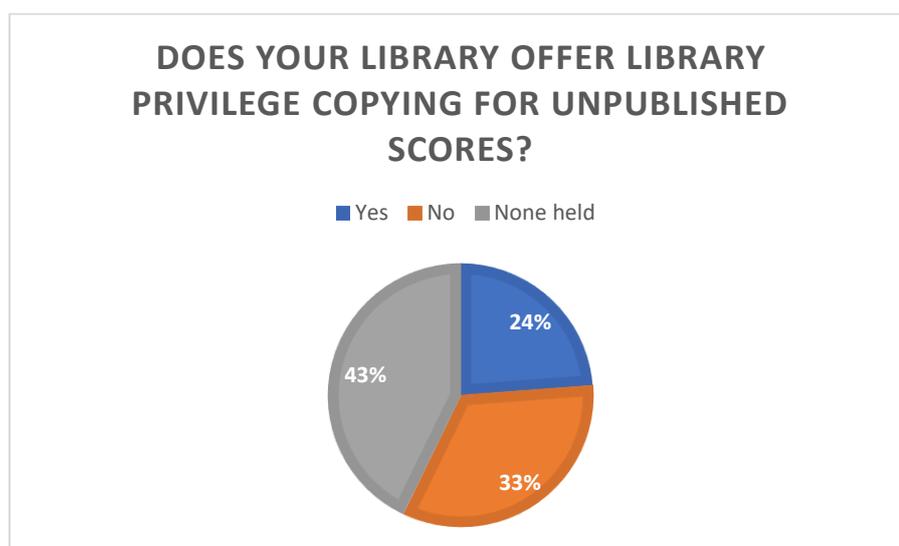
- 5% of a work
- 1 work from an anthology

Other responses included:

- 1 page or so
- A single movement
- 1 aria from an opera/oratorio
- A practice orchestral part
- We judge case by case

3.4 None of the libraries actively promoted their document supply service for printed music.

3.5 **Figure 3. Library privilege copying of unpublished scores**



24% of respondents offered library privilege copying for unpublished scores. 33% did not offer this service. The remaining 43% didn't hold unpublished scores in their collection.

3.6 All libraries that did offer the service allowed for the copying of complete works where the criteria of section 43 were met.

3.7 The reasons quoted by those not offering the service fell into the following categories:

- Lack of resource/expertise
- Lack of access to materials
- Conservation reasons
- Perceived lack of demand

4. Summary Observations

- 4.1 The library privilege exceptions apply to all kinds of copyright work, however the majority of libraries who responded do not exercise these exceptions in relation to music scores. Those that do offer such a service don't actively promote it.
- 4.2 The primary obstacle for published material appears to be a lack of confidence in how to apply the "reasonable proportion" stipulation of section 42A to printed music (and indeed respondents from libraries that did offer the service also commented that they felt uncomfortable making those decisions). This is further exacerbated by the fact that many libraries operate an autonomous document supply department which is unlikely to include music specialists.
- 4.3 In the case of unpublished material, a wider range of obstacles exist – not all of which are likely to apply exclusively to music (e.g. conservation considerations). The fact that complete works can be copied removes the difficulty of making quantitative judgements, however research is still involved in ascertaining that a work is definitely unpublished. Within the field of music this wouldn't just be limited to the publication of the notated score, as a musical work also counts as published if it has been manifested in a sound recording or film which had been issued to the public.¹

5. Interpreting the Legislation

- 5.1 It is perhaps helpful to consider the history of this provision in UK copyright legislation. The library privilege exceptions relating to copying for researchers by librarians were introduced in the 1956 Copyright Act. At that time libraries were permitted to provide a researcher with a single copy of a periodical article, much as they can today. They were also permitted to supply a reasonable proportion of a literary, dramatic or musical work, but only where the librarian didn't know or could not ascertain the name and address of the rights holder. The phrase "reasonable proportion" was not defined anywhere in the Act and didn't appear anywhere else in the text. The same has remained true in all iterations of the successive legislation.
- 5.2 In the 1956 Act all exceptions relating to libraries fell under section 7, entitled 'Special exceptions as respects libraries and archives'. The CDPA 1988 expanded the library privilege exceptions over a greater range of sections. Copying from periodicals was separated from other types of work (becoming sections 38 and 39 respectively) with the latter now entitled 'Copying by librarians: parts of published works'. This allowed for the copying of part of a literary, dramatic or musical work. Again the copying was limited to a reasonable proportion, but there was no longer the caveat of the exception only applying where it was not possible to contact the rights holder.²
- 5.3 The Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014 brought the two provisions back together under section 42A, now entitled

¹ See CDPA s. 175. It is also worth noting that the performance of a musical work does not constitute publication.

² That requirement only remained in the legislation pertaining to the supply of copies to other libraries (not library users).

‘Copying by librarians: single copies of published works’. This begs the question of whether any significance can be attached to the change in the title from ‘Parts of published works’ in 1988 to ‘Single copies of published works’ in 2014. The contextualizing documents issued in the run-up to the implementation of the regulations may offer clues in this regard. The IPO’s technical review of the draft regulations states the following: “To safeguard the rights of copyright owners, restrictions on the making and provision of such copies will be retained. Under amended Section 37³, which will replace current Sections 37-40, librarians and archivists will only be permitted to make and supply a single copy of an article from a periodical, or a reasonable proportion of any other published work.”⁴ Also, “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.”⁵ The IPO’s related impact assessment⁶ also concerns itself with the expansion of the exception to cover all types of copyright work, and makes no mention of quantity.

- 5.4 Given that there is no suggestion in any of the government’s accompanying documents (or indeed the Hargreaves Review⁷, which was the catalyst to the changes) that the purpose was to impact on the quantity of a work that could be copied, we have to conclude the removal of “part of a work” from the section title not to be of any substantive significance in relation to the quantity of the work that may be copied. Rather, that the term is dropped because it is no longer appropriate now the new section brings together copying a *complete* periodical article and a reasonable proportion of any other kind of work. Whether or not a complete work could nevertheless be considered a reasonable proportion is discussed later in this paper.
- 5.5 Much of the secondary literature relating to copyright exceptions makes reference to the reasonable proportion requirement but remains silent on the question of interpretation.⁸ Additionally some sources entirely omit any reference to musical works in their discussion of s.42A which, by its absence, may contribute to libraries’ reluctance to offer this service.⁹
- 5.6 The guidance on copyright declaration forms the UK Libraries and Archives Copyright Alliance (LACA) produced to assist libraries states “a reasonable proportion generally means that only a limited part that is necessary for the research or study purpose can be copied”¹⁰

³ This was subsequently renumbered as s. 42A.

⁴ Intellectual Property Office, *Technical Review of Draft Legislation on Copyright Exceptions, Amendments to Research, Libraries and Archives*, (UK Intellectual Property Office, 2013), 1.

⁵ *Ibid.*, 4. The drafting of that excerpt is not especially clear – it is not saying that all classes of work can be treated like articles, but rather, that the existing provision to copy a reasonable proportion of a literary, dramatic or musical work is now extended to all categories of copyright work,

⁶ Intellectual Property Office, *Impact Assessment on Extending Copyright Exceptions for Educational Use (FINAL)*, IA No: BIS0311 (UK Intellectual Property Office, 2012).

⁷ Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011).

⁸ For example Bently, Sherman, Gangjee and Johnson, *Intellectual Property Law*, 5th ed. (Oxford: OUP, 2018); Pedley, *Practical Copyright for Library and Information Professionals* (London: Facet, 2015).

⁹ For example paragraph 4.224 of Cornish, *Copyright: Interpreting the Law for Libraries, Archives and Information Services*, 6th ed. (London: Facet, 2015) states “The rules for copying material other than periodicals apply to all types of material – monographs, artistic works, sound recordings, films and broadcasts – but not to databases”.

¹⁰ See <http://uklaca.org/wp-content/uploads/2019/10/Guidance-on-declaration-forms-October-2019.pdf> [accessed 23 Dec 2020].

- 5.7 Morrison and Secker say: “Determining true fair dealing extents and reasonable proportions always needs to be done on a case-by-case basis”¹¹ and “Library directors are encouraged to consider their users’ needs, and empower staff operating these services when determining policy in this area.”¹²
- 5.8 Cornish states that, whilst a reasonable proportion is not defined, “a general view from the publishing industry has been that 10% or a chapter might be reasonable. Although this is not a legal definition it is a helpful guideline”.¹³
- 5.9 Padfield ventures that in the absence of any definition in the legislation, the best advice is to restrict copying to the same quantities as for fair dealing¹⁴. In relation to the latter he states “in general, for any kind of work 5% should always be fair.... for musical works what is copied should not be performable”.¹⁵
- 5.10 This would also seem to be the view taken by the Music Publishers Association, which states in its Code of Fair Practice: “Study and Research: Bona fide students or teachers, whether they are in an educational establishment or not, may without application to the copyright owner make copies of short excerpts of musical works provided that they are for study only (not performance). Copying whole movements or whole works is expressly forbidden under this permission”.¹⁶
- 5.11 One of the complexities in relation to music scores is what constitutes a “work” – also not defined in CDPA.¹⁷ Large-scale works are often subdivided into individual movements, which may stand up entirely by themselves and be performed autonomously (e.g. The Hallelujah Chorus from Handel’s Messiah, Memory from Lloyd Webber’s Cats, or the slow movement of Beethoven’s Moonlight Sonata). Although not a term appearing in UK (or indeed US) copyright legislation, a voluntary set of guidelines agreed by a variety of stakeholders for the educational use of music in the USA¹⁸ makes several references to the concept of a “performable unit”, providing examples of a section, movement or aria. This seems a helpful concept in the consideration of issues such as extent limits and fairness within the context of musical works.

¹¹ Morrison and Secker, *Copyright Briefing Paper on the Hargreaves exceptions* (SCONUL, 2019), 4.

¹² *Ibid.*, 6.

¹³ Cornish, *Copyright*, paragraph 4.226.

¹⁴ Padfield, *Copyright for Archivists and Records Managers*, 6th ed. (London: Facet, 2019), 198.

¹⁵ *Ibid.*, 167. In subsequent correspondence with the author of this report, Padfield clarifies that by “performable” he means a whole work, an identifiable part, or a specific section. He also draws attention to article 5(2)(a) of the Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, which expressly excludes sheet music. Whilst that section of the Directive was not transposed into UK law, he argues that this specific exclusion needs to be borne in mind.

¹⁶ The Music Publishers Association, *The Code of Fair Practice Agreed Between Composers, Publishers and Users of Printed Music*, 2016 rev. ed. (Music Publishers Association, 2016), 9. Whilst this clearly expresses the MPA’s opinion it should however be noted that this is the organisation’s own interpretation, and that nothing in the CDPA “expressly forbids” what they describe – the requirement is simply that the dealing be fair.

¹⁷ The discussion in this paper limits itself to notated music, but similar issues present themselves in the arena of sound recordings. The advent of services such as iTunes which introduced the ability to purchase individual tracks from albums again blurs the lines of what is considered the overall “work”.

¹⁸ United States Copyright Office, *Reproduction of Copyrighted Works by Educators and Librarians*, rev. 2014. <https://www.copyright.gov/circs/circ21.pdf> [accessed 23 Dec 2020].

- 5.12 A chorus from an opera could be considered a performable unit. It may appear in a variety of different publications: by itself as a standalone publication of 15 pages; in a 150-page anthology of favourite opera choruses; or as a constituent part of the 400-page score of the complete opera. In the case of the complete opera it is clear-cut that the work is the opera. But what of the anthology? It is difficult to recognize the complete anthology as being a work in its own right – rather, it is a publication comprising a collection of works. And finally the stand-alone publication of the single chorus: within this context it can surely *only* be considered a work in its own right.
- 5.13 So in the above scenario we have the exact same content, appearing in three different publications, where the context of that publication fundamentally impacts on what one judges to constitute the work, thereby inherently affecting how section 42A may be applied.
- 5.14 A further complexity particular to musical works is that they have both a “horizontal” and “vertical” aspect. An orchestral work such as a symphony may comprise some twenty or more separate performing parts. The perspective of what constitutes the “work” and a “proportion” of it would likely vary according to who placed the request and for what purpose. Considered vertically the first clarinet part may constitute less than 5% of the complete work and if the conductor of the symphony were provided with only that part, rather than the full score, they would take the view that they had only been provided with a tiny proportion of the work. However, providing the first clarinettist with the exact same material would, from that performer’s perspective, be providing them with the complete work. How can these perspectives be reconciled?¹⁹
- 5.15 Many of the exceptions in CDPA are subject to a defence of fair dealing. One of these is section 29 (Research and private study) which is closely related to section 42A in that the outcome of the copying is for the same purpose. It is perhaps puzzling that the language of the two sections isn’t more closely aligned – in particular that section 42A uses the term “reasonable proportion” rather than framing the exception within a requirement for fair dealing, which would be more consistent with other exceptions.²⁰ Indeed, whilst section 29 does allow for the possibility of copying being undertaken by a person other than the researcher, subsection 3(a) clarifies that where that person is a librarian, it is not fair dealing to do anything that is not permitted under section 42A. So what can be concluded from this? The concept of fair dealing is framed qualitatively (though consideration of quantity naturally forms a key part of that assessment), whereas the term “proportion” explicitly denotes something quantitative (albeit requiring a judgement of “reasonableness” in this instance). Did the drafters of the legislation back in 1956 eschew fair dealing in order to spare librarians from having to make judgements on fairness, believing a more quantitative

¹⁹ It’s worth emphasizing this paragraph is discussed within the context of private study. Any copies made under section 42A could not be utilized in a performance.

²⁰ This point was communicated to the legislators as part of the consultation process in 2014. The Government’s response to the technical review referenced in 5.3 states, “Some respondents suggested additions to the text, including that the exception is limited to an “article from a published periodical”, and that “reasonable proportion” is replaced with “fair dealing”. In amending the provisions for librarians copying published works, the Government has used existing language from the CDPA. The current terminology has not been problematic; therefore, the current drafting is retained.” (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/308732/response-copyright-techreview.pdf p.17)

focus to be easier to implement? If so, their efforts to simplify matters haven't in practice proved successful, at least in the multi-faceted context of musical works.

- 5.16 Arguably there is more flexibility in claiming a defence of fair dealing. Case law exists in relation to fair dealing exceptions where judgments have stated that the reproduction of a whole work can meet the requirement of fairness²¹. What we can't know is whether the same judgment would have been reached if the reasonable proportion criterion had been applicable, given its more overtly quantitative focus.
- 5.17 The question then to consider is whether the more nuanced criteria one might apply to fairness can still form part of an assessment of what might constitute a reasonable proportion on a case by case basis.
- 5.18 Fair dealing is another term that is not defined in CDPA. Copyright commentators have put forward a range of factors for consideration and there is a general consensus that a key precept of fairness is the impact of the dealing on the rightsholder. Article 5(5) of the 2001 EU Information Society Directive, qualifies the circumstances under which the preceding provisions (which include "specific acts of reproduction made by publicly accessible libraries...which are not for direct or indirect commercial advantage") can apply. It states "The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder."²²
- 5.19 However, this stipulation sits slightly at odds with section 42A considered as a whole. As previously described, the provision for a library to supply a researcher with one article from a periodical was first introduced in the 1956 Act. At that time the only way of reading a single article would have been to purchase the entire periodical issue. So an article was much more embedded as a constituent part of the whole. With the advent of e-journals and new purchasing models, in many instances it is now possible to purchase a single article from a periodical, but nevertheless the provision in section 42A remains. This arguably conflicts with a normal exploitation of the work and prejudices the legitimate interests of the rightsholder (though again it is a matter of judgement whether this is to an "unreasonable" extent). If the existence of section 42A(1)(a) may result in rightsholders being disadvantaged, is there any reason to need to give that consideration within the context of section 42A(1)(b)? To return to our earlier example of the opera chorus, a periodical issue is perhaps the closest equivalent to our musical anthology, being a collection of individual works, generally by different authors, compiled into a single edited publication. Does the fact that the periodical article can be copied for a researcher despite there being an option for them to purchase it themselves mean that, accordingly, a librarian can copy a whole work from a musical anthology even if that work is available to purchase individually?

6. Conclusion and Recommendations

²¹ See *Hubbard v. Vosper* per Megaw, LJ

²² Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society. This excerpt essentially reproducing the "three-step test" found in article 9(2) of the Berne Convention.

- 6.1 Library privilege exceptions apply to all types of copyright work, and excluding printed music from document supply services unfairly disadvantages researchers and practitioners in the field of music. This paper sets out current practice among libraries, interrogates the legislation and offers a range of possible interpretations.
- 6.2 Appendix 2 illustrates activities that respondents to the survey have stated they already undertake, placing them on a continuum from the most conservative interpretation of what might be considered a reasonable proportion to a more liberal reading.
- 6.3 Ultimately, it is for libraries to establish their own parameters, based on their institution's risk profile, involving senior managers in those policy discussions and documenting them clearly so that front-line staff are empowered to apply them. At least a basic level of musical literacy is likely to be required in all but the most clear-cut examples, so where this doesn't exist within a library's document supply team mechanisms should be established in order to secure input from music subject specialists within the library or wider organisation.

Appendix 1

CDPA 1988 Section 42A – Copying by librarians: single copies of published works

(1) A librarian of a library which is not conducted for profit may, if the conditions in subsection (2) are met, make and supply a single copy of—

- (a) one article in any one issue of a periodical, or
 - (b) a reasonable proportion of any other published work,
- without infringing copyright in the work.

(2) The conditions are—

(a) the copy is supplied in response to a request from a person who has provided the librarian with a declaration in writing which includes the information set out in subsection (3), and

(b) the librarian is not aware that the declaration is false in a material particular.

(3) The information which must be included in the declaration is—

(a) the name of the person who requires the copy and the material which that person requires,

(b) a statement that the person has not previously been supplied with a copy of that material by any library,

(c) 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 the copy to any other person, and

(d) a statement that to the best of the person's knowledge, no other person with whom the person works or studies has made, or intends to make, at or about the same time as the person's request, a request for substantially the same material for substantially the same purpose.

(4) Where a library makes a charge for supplying a copy under this section, the sum charged must be calculated by reference to the costs attributable to the production of the copy.

(5) Where a person ("P") makes a declaration under this section that is false in a material particular and is supplied with a copy which would have been an infringing copy if made by P—

(a) P is liable for infringement of copyright as if P had made the copy, and

(b) the copy supplied to P is to be treated as an infringing copy for all purposes.

(6) To the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of this section, would not infringe copyright, that term is unenforceable.

Section 43 – Copying by librarians or archivists: single copies of unpublished works

(1) A librarian or archivist may make and supply a single copy of the whole or part of a work without infringing copyright in the work, provided that—

(a) the copy is supplied in response to a request from a person who has provided the librarian or archivist with a declaration in writing which includes the information set out in subsection (2), and

(b) the librarian or archivist is not aware that the declaration is false in a material particular.

(2) The information which must be included in the declaration is—

(a) the name of the person who requires the copy and the material which that person requires,

(b) a statement that the person has not previously been supplied with a copy of that material by any library or archive, and

(c) 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 the copy to any other person.

(3) But copyright is infringed if—

(a) the work had been published or communicated to the public before the date it was deposited in the library or archive, or

(b) the copyright owner has prohibited the copying of the work,

and at the time of making the copy the librarian or archivist is, or ought to be, aware of that fact.

(4) Where a library or archive makes a charge for supplying a copy under this section, the sum charged must be calculated by reference to the costs attributable to the production of the copy.

(5) Where a person ("P") makes a declaration under this section that is false in a material particular and is supplied with a copy which would have been an infringing copy if made by P—

(a) P is liable for infringement of copyright as if P had made the copy, and

(b) the copy supplied to P is to be treated as an infringing copy for all purposes.

Appendix 2 – Risk Continuum

