Interlibrary loans, subscriptions and copyright in the UK academic library sector

Higher education institution (HEI) libraries in the UK undertake a variety of interlibrary loan (ILL) and document supply operations, against a current background of increasing budgetary pressures. This article considers the foundations in so-called library privilege exceptions in copyright law that underpin the long-standing practice of ILL, aiming to address recurring issues and questions around what is permitted within the legislation, and which limitations apply. The focus is on addressing the ILL situation as it exists for non-profit UK HEI academic libraries, including looking at some perceived 'grey areas'.

Keywords
interlibrary loan, ILL, document supply, copyright, database right

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Introduction

The UK higher education sector is under clear budgetary pressure at the time of writing (Office for Students [OfS], 2024). The recent increase in tuition fees seems unlikely to alleviate pressures (The Week, 2024). Against this background, university libraries are still spending significant amounts on transformative agreements (TAs) (Brayman et al., 2024). Transformative agreement describes the business model of institutions paying publishers for 'read and publish' deals that both allow read access and open access publishing for a single negotiated fee. This TA model aims to replace the traditional subscription deal, where content remains behind a paywall and articles published by the institution's authors remain subscriber access only unless an article processing charge (APC) is paid to make them open access. The TA model is not without its critics. This includes criticism of inequalities created (for example Pooley, 2020) but more relevantly criticism of the escalating costs of such deals, leading to some institutions cancelling 'big deal' TAs (Barr, 2025).

Increasing institutional competition for students, and financial pressures on libraries that are nonetheless still expected to source content, provides an opportunity to look again at alternative sources of materials. This can include sourcing open access publications made available via a gold, bronze or green route, but where no open access source is available can also include the practice of fulfilment of content requests via interlibrary loan (ILL) of content between institutions.

Library staff going about the ordinary daily business of supplying material perhaps do not routinely pause to consider the lawful basis for ILL that underpins the practice more broadly. Despite a 2015 survey demonstrating a majority of surveyed higher education institution (HEI) library staff indicating moderate or better awareness of copyright (Morrison & Secker, 2015), anecdotal conversations have shown many would welcome greater training and clarity on exactly what the law allows in the area of ILL.

This anecdotal evidence is perhaps supported by the findings of the 2023 ALA RUSA STARS International Interlibrary Loan Survey Executive Report (STARS International Interlibrary Loan Committee, 2024). In the most recent report, 34% identified copyright as a barrier to international ILL, with 55% of European respondents to the survey identifying copyright as an issue to supplying 'non-returnables' out of territory. We will return to the question of

international ILL and territoriality difficulties of copyright later. First, we will clarify a point about the nature of the loaned material and look at ILL within the UK.

The point is the use of non-returnables as a category in the ALA survey, which immediately highlights the nature of the materials being loaned. Morrison and Secker (n.d.) observed that ILL more often involves supplying copies of content than sending an original library holding, leading them to use the term 'interlibrary copying'. Cornish similarly makes the distinction between lending holdings and supplying copies of excerpts to another library in response to a user request (Cornish, 2015b).

'ILL more often involves supplying copies of content than sending an original library holding'

Morrison and Secker (n.d.) outline three scenarios in which libraries supply one another with copies of copyright works, as opposed to the original holdings documents:

1. Making single copies for the users of another library.
2. Making replacement copies of works for another library.
3. Making a single copy of a work for another library when it is not possible or practical to acquire the item anywhere else.

Most ILL activity between the libraries of UK HEIs is to fulfil requests under the first of these scenarios. It is the lawful basis for this activity that we review in more detail below.

Please note: copyright and contract law are extremely complex subjects. The author of this article is not a lawyer, and the opinions given are a good-faith interpretation based on the available literature. The opinions expressed are solely those of the author. This article does not constitute legal advice.

'copyright and contract law are extremely complex subjects'

The lawful basis for ILL

In the UK, ILL relies on a mixture of subscription licensing agreements setting out usage terms, and on the so-called library privilege exceptions in the Copyright, Designs and Patents Act 1988 (CDPA). The specific lawful basis under which a supplying library issues a copy of a work from their collection to a borrowing library varies, depending upon the source of the supplying institution's own copy. Below, we look at the main options and discuss the mechanisms of each.

ILL reliant upon copyright law

Part I of the CDPA contains a number of exceptions. Sections 37 to 44A set out the exceptions for libraries and archives. We are here predominantly concerned with section 42A (s.42A) – copying by librarians: single copies of published works. This exception will be the main one on which HEI libraries rely when issuing copies of material to other libraries, in fulfilment of requests from those other libraries' users. While there is also an exception for supply of copies from unpublished works (s.43), with similar though not identical requirements, the focus of this section will be on s.42A.

Which libraries can supply copies under section 42A?

Any library that is not conducted for profit, and which is either publicly accessible or a library of an educational establishment (as defined at CDPA s.43A(2)). Any member of staff at such a library may make the copy (CDPA s.43A(5)).

How much can be copied?

Section 42A(1) sets out the copying limit as follows:

> (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.

What constitutes a reasonable proportion is undefined but might be interpreted as meaning one chapter or up to 10% of a published book, whichever is the greater (Morrison and Secker (n.d.)). This is the extent of copying of a work ordinarily permitted under the Copyright Licensing Agency (CLA) higher education sector licence (Copyright Licensing Agency, 2024). Whether such an extent is correct in matter of fact is for case-by-case judgement, and for the courts to decide in the event of a legal dispute.

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Bear in mind that s.42A applies to any published work. It would, therefore, be theoretically possible to supply an extract of a reasonable proportion of a published sound recording or film, for example, although please note that the exception does not permit the override of any technological protection measures (TPMs) in order to make a copy of a work.

What other conditions apply?

The person requesting the copy must provide the supplying librarian with a declaration, which must include all of the following details (quoting from CDPA s.42A(3)):

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.

A set of template declaration forms is available from the UK Libraries and Archives Copyright Alliance (UK Libraries and Archives Copyright Alliance [LACA], 2019), and includes a version with the slightly different declaration wording required for copies from unpublished works made under s.43.

The s.42A exception relies upon the supplying librarian being 'not aware' that the user declaration is false in any manner. Level of knowledge here is undefined, and there are several possible interpretations of awareness. In the event of a claim of infringement by a copyright owner, the burden of proof would fall on the claimant to show that the librarian making the copy had, or ought to have had, awareness of the declaration being false. Declarations should be retained on file for six years to ensure protection against future infringement claims in line with the period set out in the Limitation Act 1980.

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How does this system work for ILL?

As noted by Cornish (2015a), either the library requesting the copy, or the library supplying it, or both, should retain a copy of the user declaration. This acts as their defence in the event of a legal challenge relating to awareness of a false declaration by a user, or in the event of a user making a false statement on a declaration leading to an infringing copy. In practice, the supplying library may take it that the requesting library has received a valid declaration from a user and that they will retain this on file.

In the case of ILL for journal articles, the effect of CDPA s.41(3) means that the library supplying the copy does not need to know of any user request, or receive the user declaration, in order to have a defence against infringement.

The reality is that it is perfectly possible for an individual to make several requests to different libraries that would, once combined, lead to them obtaining the whole of a book, or all articles in a single issue of a periodical. The supplying libraries would not commit any infringement individually or collectively by such supply, provided they were each in receipt of a declaration for the specific material they supplied and had no knowledge that the declaration was false in any particular.

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How do contracts affect ILL under section 42A?

CDPA s.42A(6) is a clause confirming that any term of a contract that purports to prevent or restrict the acts permitted by the exception is unenforceable. This clause was an addition to the CDPA in the 2014 updates to the Act, made after consultation on the Hargreaves Review recommendations (Intellectual Property Office [IPO], 2011). Therefore, where the supplying library has lawful access to a work, they may provide a copy as long as they adhere to the exception terms as detailed above, irrespective of any contract terms under which they receive such lawful access. Where, for example, lawful access was by an institutional subscription agreement, any term in such a subscription that sought to prevent supply of a copy under the terms of the above exceptions would be unenforceable (although please see the following section on ILL reliant upon subscription materials for considerations relating to the nature of the supplied collection). The government consultation specifically anticipated the example of libraries having licensed lawful access on terms that attempted to restrict use of a lawful exception (IPO, 2011), and this makes it clear that the intent of the contractual override is to prevent content providers from restricting a subscribing library's reliance upon exceptions. Resisting providers 'that try to dictate license terms restricting user rights' (Posner, 2012) can be seen as an ethical duty for librarians in ensuring wider access to knowledge.

What about supplying materials outside the UK?

The language of s.42A on supply of copies of published works does not specify any territorial limits. Nevertheless, the situation for supplying material outside the UK, in response to an ILL request from an overseas institution, is substantially less certain. This led to the British Library closing its international library privilege supply service in 2011 due to copyright concerns (Appleyard, 2015). Copyright law is territorial, so while the CDPA may mean that no copyright infringement occurs in the UK provided the terms of the exceptions enumerated above are observed, it is possible that there could be liability for a UK supplier as a result of variations in law in the receiving territory.

'Copyright law is territorial'

An example may illustrate the area of uncertainty, and where the potential risk of infringement lies. To make this clear, we should briefly note that copyright grants the rights holder control of the restricted acts (Intellectual Property Office [IPO], 2015). These include the right to copy in any material form (the reproduction right) and the right to communicate electronically, such as online or via email or linking (the communication right). With these rights in mind, we can consider a scenario where University A, based in the UK, receives an ILL request from University B, located in Germany, in order that University B can fulfil an access request from one of their researchers. University A would make a copy, which implicates the reproduction right, and then send this electronically to University B, which action implicates the communication right. If University A observes the requirements of the CDPA as discussed thus far, they will not commit any copyright infringement in the UK; however this does not remove the possibility that the receipt of the article in Germany could create liability in that national territory.

There are possible mitigations of risk – for example, the ILL being solely non-commercial in nature, or a file being sent via a secure electronic delivery method that allows one-time-only access to the final researcher. While these are possible mitigations, they cannot remove the potential for copyright infringement. The complexity and variety of national copyright regimes allow the risk that the communication of the file could be deemed to have occurred, for liability purposes, in the territory where it is received, and targeted at, rather than where it originates.

Where the material to be loaned is part of a subscription access agreement, and the UK university's content access contract includes a clause permitting international ILL, that can be relied upon, provided any territorial permissions limitations are adhered to.

Has there been any case law in this area?

As of October 2024, a search of the Westlaw database showed there have been no cases in the UK concerning interpretation of, or infringement under, CDPA sections 41, 42A, or under s7 of the 1956 Copyright Act, with respect to supply of copies via ILL.

ILL reliant upon subscription materials

HEI libraries may receive requests for ILL of material which they do not own as a permanent collection item, but rather to which they have lawful access due to institutional subscription agreements. As already discussed, s.42A(6) is a contractual override clause ensuring that any contract term, purporting to prevent supply of a copy in compliance with the other conditions of the exception, is unenforceable.

The inclination might be, then, to turn immediately to the contractual override as justification for believing ILL activity with subscription materials can be treated exactly as with the copyright-reliant process outlined in the previous section. While in some cases that will be the case, some care is required due to the question of whether any other rights are implicated in the ILL activity.

Copyright or database right?

The sui generis database right is a related right to copyright. The right was established in the UK by The Copyright and Rights in Databases Regulations 1997 (CRDR), which were an implementation into UK law of Directive 96/9/EC (the Directive) on the legal protection of databases. It is intended to protect the investment made by a database compiler in the obtaining, verifying and presenting of the database's contents. The Directive defines a database as 'a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means'.

In brief, database right can be infringed by the unauthorized extraction (copying to another storage medium) or reutilization (essentially, making available to the public) of a substantial part of the contents, the meaning of which can be interpreted quantitatively or qualitatively. The nature of the sui generis right established by the Directive has been tested in several cases referred to the Court of Justice of the European Union (CJEU), for example, *British Horseracing Board Ltd v William Hill Organization Ltd* [2004] C-203/02, and also *Football Dataco Ltd and Others v Sportradar GmbH and Sportradar AG* [2012] C-173/11.

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ILL from subscription databases

For the current discussion, it suffices to observe the following points.

Firstly, whether a subscription's content will qualify for the database right may be open to interpretation. Some pre-Brexit precedential rulings of the CJEU have effectively held that if data is created and verified as part of an organization's usual business activity, rather than being gathered and obtained from independent sources, then this may not qualify for the sui generis right. For example, in *British Horseracing Board Ltd v William Hill Organization Ltd* [2004] C-203/02, the BHB database was created data, made during the course of business, and not obtained and verified from an existing source, and so did not qualify for the database right. Compare this to data sourced from external sources to obtain and verify customer details, for example, *Beechwood House Publishing Ltd (T/A Binley's) v Guardian Products Ltd* [2012] EWPCC 22. See also *Ryanair Ltd v PR Aviation BV* [2015] C-30/14 on the effect that a lack of both sui generis and copyright protection has on contractual protection of databases. In *Ryanair,* the database in question was created, rather than obtained and verified, however the lack of copyright or database rights rendered legal

exceptions to those rights irrelevant as defences for the defendant's actions and allowed contract terms to take precedence instead.

While by no means completely clear, and a judgement that a library must make based on the facts of the particular content provider, it could be argued that a publisher providing subscription access solely to their own published content is not further investing substantially in obtaining or verifying that content. While peer reviewers are not often paid, publishers do invest in systems to facilitate the peer review process and this may qualify as sufficient investment in obtaining and verifying to grant database right protection.

The situation seems clearer where a content provider is not a publisher of their own obtained content but is rather an aggregator and distributor of content sourced from separate publishers. Aggregators more straightforwardly appear to meet the definition of having invested in obtaining, verifying and presenting a collection of independent works.

If a collection of content is protected by database right, does that mean a library cannot make use of it for ILL without a clear term in the subscription agreement? In reality, many such agreements will have a clear term regulating supply of copies for ILL purposes, thus avoiding the question. As an example, the Jisc model journals and datasets licences (Jisc, 2024) both include a term allowing supply of single copies to other libraries (at clause 3.1.6), though notably this is limited to supplying other libraries in the UK. What of a supply agreement for content with database protection and no clear ILL clause?

'If a collection of content is protected by database right, does that mean a library cannot make use of it for ILL'

The database right has much narrower and more restrictive exceptions in statute compared to the wider range of uses defensible in the case of copyright. There is a fair dealing exception to the right in s.20 of the CRDR. While this would allow extraction of a substantial part of the database content by a lawful user, it does not further allow reutilization, so would not permit communicating a substantial part online to another library in response to an ILL request. Extraction and reutilization of an insubstantial part by lawful users is not an infringement (s.19(1)), and the right to do so cannot be restricted by contract (s.19(2)), so that might allow supply of insubstantial amounts for ILL notwithstanding any subscription contract term. What exactly qualifies as insubstantial is an area of uncertainty, however, as this is again measurable in both quantitative and qualitative terms. Some guidance is available when we consider that substantiality is measured relative to the investment made by the database owner, as it is this investment that the Directive aimed to protect. Repeated and systematic extraction and reutilization of insubstantial amounts can itself be a substantial amount but would have to result in a substantial part of the source database being reconstituted to become an infringing extraction or reutilization (*British Horseracing Board*, 2004 at [91]).

'substantiality is measured relative to the investment made by the database owner'

The ambiguity of where the line lies, in the event of a legal challenge by a database owner, may make some libraries reticent about ILL from protected database content in the absence of clearly permitted contractual acts or limits. Whether the extent of ILL provision reached a substantial part of qualifying databases would be down to the extent of the source collection and the facts of the particular supplier, and of the supplying library's reutilization therefrom.

What about lending?

As already noted, we have so far discussed the case of making copies of parts of works, or of articles. This activity does not lend any original holding and so implicates the reproduction right. That right, for supply of copies purposes, is covered by the library privilege exceptions detailed above. Actual lending of a library's owned holdings implicates the lending right and is treated separately in the statute.

CDPA s.36A permits that lending of copies by educational establishments does not constitute infringement of either copyright or the distribution right. Lending includes supplying an original of the work. Lending is here defined as 'making a copy of the work

available for use, on terms that it will or may be returned, otherwise than for direct or indirect economic or commercial advantage, through an establishment which is accessible to the public' (CDPA s.18A(2b)).

Hence, the establishment lending the copy may not make any direct or indirect profit from that loan. A library is entitled to make a charge to cover only so much as is necessary to cover operating costs of the service. If the end recipient of the loaned material were to use it commercially, and if a copyright owner could show a real commercial benefit to the library (an indirect one, presumably, as direct profit would require the service to charge a fee at a profitable rate), then such use could be infringing. Where the source library had no actual knowledge of such use, or gained no commercial benefit, this would be permissible lending under s.36A and s.18A(2b).

'A library is entitled to make a charge to cover only so much as is necessary to cover operating costs of the service'

Summary

As we have discussed, there is a substantial provision in legal exceptions for the supply of copies between libraries, often described using the terms interlibrary loan or document supply in UK HEIs.

Institutions and staff engaged in ILL provide a valuable service widening access to knowledge, and HEI libraries should ensure staff engaged in ILL feel confident and aware of that framework and how it supports them. To help achieve such confidence, it is essential to provide adequate support and training to staff engaged in copyright-related activities, and to encourage staff to use and benefit from those professional support networks available, from regional consortia best-practice groups to national email lists such as Jisc LIS-COPYSEEK (Jiscmail, 2024).

'it is essential to provide adequate support and training to staff engaged in copyright-related activities'

It would doubtless be a trivial task to find those dissatisfied with copyright legislation for varied reasons. Nonetheless, the legal draughtspersons of the CDPA and its updates created a framework that allows the ongoing practice of ILL, and all the associated benefits for societal sharing of knowledge, and which practice has so far operated without notable challenge.

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Abbreviations and Acronyms

A list of the abbreviations and acronyms used in this and other *Insights* articles can be accessed here – click on the following URL and then select the 'full list of industry A&As' link: http://www.uksg.org/publications#aa.

Competing interests

The author has declared no competing interests.

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