Maintaining the Integrity of Digital Archives

June M. Besek, Philippa S. Loengard and Jane C. Ginsburg

Kernochan Center for Law, Media and the Arts
435 West 116th Street, Box A-17
New York, NY 10027
(212) 854-9869
# Table of Contents

Acknowledgements ................................................................. iii  
Executive Summary ............................................................. v  
1.0 Introduction ........................................................................ 1  
2.0 Material Removed from Databases and Archives ...................... 4  
3.0 Archives and Digital Archives ............................................. 9  
4.0 The Legal Landscape ........................................................... 12  
  Copyright Law and Archives Legislation ................................... 12  
  Moral Rights ......................................................................... 43  
  Defamation ............................................................................. 46  
  Mistake of Fact ....................................................................... 55  
  Invasion of Privacy ................................................................ 57  
  Censorship ............................................................................ 61  
  Internet Service Provider Limitation of Liability .......................... 64  
  Summary and Conclusions; International Law Considerations .......... 65  
5.0 How Libraries and Archives Encounter Removal .................... 66  
6.0 Development of Guidelines to Govern Publisher Retraction and Removal 70  
7.0 Libraries’ Contracts with Publishers ..................................... 73  
8.0 Digital Archives: Reducing the Risk of Removal ....................... 80  
9.0 Other Challenges to the Integrity of the Scholarly Record .......... 89  
10.0 Recommendations ................................................................ 90  
Appendices .................................................................................. App.-1
Acknowledgements

We would also like to acknowledge the many people who generously shared their time and expertise with us during the course of our study, including Joseph Branin, Ohio State University Libraries; Beverly Brown, NRC-CISTI; Mimi Calter, Stanford University Libraries; Stephen Chapman, Preservation Librarian for Digital Initiatives, Harvard University Library; Kenneth Crews, Professor of Law and Director, Copyright Management Center, IUPUI; Patricia Cruse, California Digital Library; Stephen Davis, Columbia University Library; Thomas Dowling, OhioLINK; Els Van Eijck Van Heslinga, Koninklijke Bibliotheek; Jackie Esposito, Penn State University Archives; Sharon Farb, UCLA; Eileen Fenton, Executive Director, Portico; Kirill Fesenko, Carolina Digital Library University of North Carolina at Chapel Hill; Martha Fishel, National Library of Medicine; Dale Flecker, Harvard University Library; Laura Gasaway, Professor of Law, University of North Carolina at Chapel Hill; David Gillikin, Chief, Bibliographic Services Division, NLM: Raimund Goerler, Ohio State University Libraries; Sarah Hill, NRC-CISTI; John Haar, Vanderbilt University Library; Peter Hirtle, Intellectual Property Officer, Cornell University Library; Karen Hunter, Elsevier; Carol G. Jenkins, Director Health Sciences Library, University of North Carolina at Chapel Hill; Roy Kaufman, Legal Director, John Wiley & Sons; Brewster Kahle, Internet Archive; Nancy Kopans, General Counsel, JSTOR; Tomas A. Lipinski, Associate Professor, School of Information Studies, University of Wisconsin—Milwaukee; Pamela Whiteley McLaughlin, Syracuse University Library; Elizabeth McNama, partner, Davis Wright Tremaine; Kent McKeever, Director, Arthur W. Diamond Law Library, Columbia Law School; Mary Minow, Esq. (coauthor of The Library’s Legal Answer Book); Samuel Mizer, Brown University Library; James Neal, University Librarian, Columbia University; John Ober, Office of Scholarly Communication, University of California; John Ochs, American Chemical Society; Ann Okerson, Associate University Librarian, Yale University; Erik Oltmans, Koninklijke Bibliotheek; Victoria Owen, University of Toronto at Scarborough; Janice T. Pilch, Associate Professor of Library Administration, University of Illinois at Urbana-Champaign; Mary Rasenberger, Library of Congress; Victoria Reich, Director LOCKSS Program, Stanford University Libraries; Carol Richman, Sage Publications; David S.H. Rosenthal, LOCKSS Program, Stanford University; Richard Rudick, former VP and General Counsel, John Wiley & Sons; Karen Schmidt, University of Illinois at Urbana-Champaign; Jean Shuttleworth, University of Pennsylvania Libraries; Sem Sutter, University of Chicago Library; Barbara Taranto, Digital Library Program, New York Public Library; Brad Vogus, Arizona State University Libraries; Lois Wasoff, former VP and Corporate Counsel, Houghton Mifflin; and Robert Wolven, Columbia University Library.

Our thanks also to those who helped us in the planning phase, including Joanne Budler, Deputy State Librarian, Michigan; Rebecca Cawley, Statewide Database Administrator, Library of Michigan; Sue Davidsen, Managing Director, Internet Public Library, University of Michigan; Paul Ginsparg, Professor of Physics and Computing and Information Science, Cornell University (and the creator of ArXiv); David Goodman, Associate Professor, Palmer School of Library and Information Science, Long Island
University; Carol Hutchins, Courant Institute of Mathematical Sciences Library, New York University; Rick Lugg, R2 Consulting; Jerome McDonough, Digital Library Development, Team Leader, Elmer Bobst Library, New York University; T. Scott Plutchak, Director, Lister Hill Library of Health Sciences, University of Alabama; Abby Smith, Council on Library and Information Resources; Jeffrey Ubois, Internet Archive; Kate Wittenberg, Director, Electronic Publishing Initiative at Columbia (EPIC); and Beth Yakel, Assistant Professor, School of Information, University of Michigan
EXECUTIVE SUMMARY

The goal of this study, sponsored by the Andrew W. Mellon Foundation, was to determine how digital archives can best structure themselves to avoid the removal of documents from their collections. Archives protect our cultural and intellectual heritage, and removal of materials diminishes the historical record and deprives scholars and researchers of the opportunity to fully understand past events.

Digital technology has provided wonderful new tools for scholarship and research, but it also presents challenges for long term preservation. Where libraries once collected scholarly journals in hard copy and served as an archive for back issues, they may now instead have a subscription for online access and rely on the publisher to ensure the long term availability of those journals. If the material is no longer available from the publisher, access may effectively be eliminated.

This project was prompted by a number of reports in the media of instances in which articles were removed from publishers’ databases or from websites. There are a number of reasons why articles may be removed, including concerns about copyright infringement or plagiarism, defamation, privacy rights, factual errors (whether due to mistakes or misconduct), censorship or national security. In some cases publishers remove materials because they no longer own the rights; in others, they do so in response to user criticism.

With the assistance of consultants in five other countries – Australia, Canada, France, Singapore and the United Kingdom – we investigated commonly cited legal bases for removing materials. The laws vary from country to country, sometimes in important respects. But in general, libraries and archives have no blanket exemptions from the laws, and are susceptible to some of the same concerns that prompt publishers to remove materials. In some cases, however, due to legal privileges, practical or economic considerations, libraries and archives do not have the same risk in making available materials that publishers feel compelled to remove. Nevertheless, there are cases in which libraries have removed problematic materials from public access.

Contracts between publishers and libraries usually permit publishers to remove material from the “licensed content” that raises legal issues or serious safety concerns. When removal is effected, that material is no longer available on the publisher’s website. We approached this problem in two ways. First, we looked at efforts by publishers and libraries to keep removals to a minimum through agreements and guidelines. Second, we looked at various types of digital archives developing in response to library concerns about long term availability of material received pursuant to subscriptions for online access. We considered how their agreements with publishers address removal, and ways in which they could structure their relationships to avoid removal of works and at the same time encourage the cooperation and participation of publishers in their endeavors.

Our recommendations, the basis for which is discussed in greater detail in the report, are as follows:
(1) Encourage the development of not-for-profit third party archives.

(2) Encourage the development of standard terminology and best practices for the treatment of corrections, retractions and removals.

(3) Encourage the modification of publisher guidelines that address removals and retractions to include appropriate internal controls, i.e., to require that removal decisions be made only by senior editorial staff, and only in consultation with counsel.

(4) Archives’ agreements with publishers should narrowly limit the circumstances in which publishers can request removal to those in which a publisher has determined, after consultation with counsel, that there is a genuine risk of liability or serious harm.

(5) Archives’ agreements with publishers should allow the archives to determine independently whether or not to remove material upon request by the publisher.

(6) Archives should create a restricted area, inaccessible to the public, in which to maintain any material it “removes” based on a publisher’s request or its own liability assessment. An archives should not agree to completely remove any material unless under direct court order to do so.

(7) Material removed from public access should remain listed in the archives catalog, with an appropriate notation.

(8) Material in the restricted area of an archives should be reviewed periodically, in cooperation with the publisher, to determine whether the circumstances warranting removal have changed.

(9) Archives and libraries should require publishers to provide notice to them when they remove articles. Archives’ ingest procedures should provide for an exception report when material is retracted or removed.

(10) Any pattern of removals that is detected should be brought to the attention of the publisher and the scholarly community.

(11) The scholarly community should monitor and, where appropriate, participate in litigation (by means of amicus curiae briefs) and administrative proceedings such as rulemakings that bear on issues relevant to libraries and archives.

(12) Concerns about the integrity of digital databases and archives beyond the STM community should be addressed.

(13) Certain specific changes in the law should be made, where necessary, to facilitate digital archiving.
a. Libraries and archives qualified for digital preservation should be permitted to copy and preserve publicly available web content.

b. Digital archives should be permitted to take of any legal exceptions generally applicable to libraries and archives.

c. Libraries and archives qualified for digital preservation should be permitted to make digital preservation copies of at risk works and maintain them in a secure digital repository.

d. Libraries and archives should, with appropriate safeguards, be permitted to use outside contractors in the performance of their preservation activities.

e. Limits on the number of copies that a library and archives may make that are meaningless in the digital environment should be eliminated, with restrictions placed instead on security and the number of access copies that can be made available.

(14) Other changes in the law may be necessary in the future, but it may be wiser to wait and see where genuine issues arise.

We recognize that under exceptional circumstances it may be necessary to limit public access to material in a digital archive, or in a publicly available website or database, at least temporarily. However, we hope through our recommendations to encourage practices that will ensure that the scholarly record remains intact.
1.0 Introduction

1.1 Overview

The goal of this study, sponsored by the Andrew W. Mellon Foundation, was to
determine how digital archives can best structure themselves to avoid the removal of
documents from their collections. We began with the general notion that archives are
repositories for documents and other materials that are collected and preserved to ensure
they will remain available for research and study. Historically, archives comprised
physical materials – publications, letters, diaries, business records – that, once collected,
remained in the archives. Archives protect our cultural and intellectual heritage, and
removal of materials from archives diminishes the historical record. Removal also
deprives users of the opportunity to evaluate independently problematic material and the
manner in which it has been addressed in the past.

Digital technology has provided wonderful new tools for scholarship and
research, but it also presents challenges for long term preservation. Where libraries once
collected scholarly journals in hard copy and served as an archive for back issues, they
may now instead have a subscription for online access and rely on the publisher to ensure
the long term availability of those journals. If the material is no longer available from the
publisher, access may effectively be eliminated.

Digital archives are developing to address concerns about the long term
availability of scholarly material. However, they face legal and logistical hurdles in
collecting, retaining and making available their collections that traditional archives did
not. Analog preservation is largely passive, and for most works requires intervention
only intermittently. Digital preservation requires regular monitoring to ensure that
contents are maintained and migrated to new formats as necessary to ensure that they
remain accessible. Best practices for long term preservation of digital materials are still
being developed and will likely change over time.

This project was prompted by a number of reports in the media of instances in
which material of value to scholars had been removed from publishers’ databases or from
websites. We began by looking at incidents in which publishers removed materials, and
the reasons why. Since potential legal liability was often cited, we looked at the possible
bases for legal liability and how the laws could affect the ability of libraries and archives
to retain and make available materials that publishers removed from their own databases.
We considered how digital archives, in the current environment, could structure their
relationships to avoid removal of works and at the same time encourage the cooperation
and participation of publishers in their endeavors.
There are exceptional circumstances in which it may be necessary to limit public access to material in a digital archive, at least temporarily. However, we hope through our recommendations to encourage practices that will ensure that the scholarly record remains intact. Our recommendations relate not only to steps that archives can take to ensure the integrity of the scholarly record, but also to measures that can be taken by the scholarly community.

We discuss below our approach to this study and the resources we used.

Part 2 describes various instances in which material has been removed from public access by publishers.

Part 3 discusses the concepts of archives in the law, in the library/archives community, and in popular understanding.

Part 4 addresses relevant law on copyright, moral rights, defamation, mistake of fact, privacy and censorship in the United States, Australia, Canada, France, Singapore and the United Kingdom.

Part 5 discusses circumstances in which libraries encounter removal and retraction of articles, and instances in which libraries themselves have removed materials.

Part 6 discusses the development of guidelines to govern retraction and removal.

Part 7 addresses relevant provisions of contracts between libraries and publishers, particularly those that relate to publishers’ right to withdraw materials from the licensed content, libraries’ right to archive the licensed material, and any rights or obligations regarding third party archives.

Part 8 discusses current examples of digital archives and considers the implications of different arrangements for legal liability.

Part 9 discusses other challenges to the integrity of the scholarly record. Many librarians, publishers and others raised concerns about problems other than removal by publishers, and although these issues are outside the scope of our study, they are worthy of attention.

Part 10 describes our recommendations.

1.2 Approach and Resources

In the initial phase of our project we examined the concept of “archives” in popular understanding and under the law, the reasons why material is removed from databases and archives, and the way in which archives are treated in copyright law.
The second phase involved a study of other areas of the law that might affect the decision of a publisher to remove material from a database or archive, such as tort liability for defamation, mistake of fact, invasion of privacy, censorship, and moral rights issues, and whether and how archives and libraries may be treated differently from publishers. We also did extensive factual research (including interviews and correspondence with librarians, archivists, legal experts and others) to discover, among other things, the extent to which libraries have encountered the “vanishing articles” problem, how removal of material is treated in the contracts that libraries and archives have with publishers, and whether they perceived other areas where there are gaps in the scholarly record. On the basis of our legal and factual research, we formulated recommendations for digital archives. Our primary focus has been on archives of scholarly material, but our discussion is relevant to other digital archives as well.

Digital archives made available over the Internet implicate laws of countries other than the United States. In addition to studying U.S. law, we investigated the treatment of archives in several other countries, including Australia, Canada, France, the United Kingdom and Singapore. We engaged legal consultants in each of these countries. They are listed below, with our primary contact for each country first, followed by the names of others on their research team, where applicable.

**Australia:**
- Andrew T. Kenyon, Director, CMCL – Center for Media and Communications Law, University of Melbourne
- Emily Hudson, Research Fellow, CMCL – Center for Media and Communications Law and IPRIA – Intellectual Property Research Institute of Australia, University of Melbourne

**Canada:**
- David Lametti, Associate Professor, Faculty of Law, McGill Centre for IP Policy
- Tara Berish, McGill Centre for IP Policy

**France:**
- Marie Cornu, Director of Research, CNRS (CECOJI) – Centre d’Etudes sur la Cooperation Juridique Internationale (Center for the Study of International Legal Cooperation)

**Singapore:**
- Ng-Loy Wee Loon, Associate Professor, Faculty of Law, National University of Singapore and Senior Fellow, IP Academy, Singapore
- Lee Su-Fern, IP Academy, Singapore
United Kingdom:

- Lionel Bently, Herchel Smith Professor of Intellectual Property Law, University of Cambridge
- Robert Burrell, Associate Professor in Law, TC Berne School of Law, University of Queensland, Australia and Associate Director ACIPA (Australian Centre for Intellectual Property in Agriculture)
- Paul Mitchell, Reader in Law, King’s College London

A synthesis of their reports is included below, principally in Section 4.0, and elsewhere as appropriate. The reports in their entirety are included as appendices.

2.0 Material Removed from Databases and Archives

While attempts to remove material sometimes occurred in the analog era, it is a matter of increasing concern as digital distribution of journal articles and other materials becomes more common. When journals were distributed exclusively in hard copy form, publishers had little ability to make changes once copies left their hands. They might publish “errata,” updates or pocket parts, but generally could not compel libraries or archives to remove materials. Publishers had less incentive to do so then; as they had no control over the use and further distribution of copies they sold, the continuing existence of the offending material in the archives’ collection was unlikely to increase substantially the publishers’ risk of liability.

However, the market is changing. Libraries increasingly get access to scholarly literature through subscriptions to databases maintained by publishers or aggregators. When the publisher maintains control over the material, as it does in the database subscription model, withdrawal of documents may be effected without the participation – indeed, sometimes without the knowledge – of the subscribing institutions. There are many reasons why material may be removed, as discussed below. Some of these deletions likely reflect publishers’ perceptions that the risk of liability in connection with ongoing distribution of offending material through a database is significantly greater than it was with respect to hard copies. Others may reflect business or personal judgments about the propriety of maintaining certain material in databases.

Whatever the reason, complete removal of documents has potentially adverse consequences for scholars and researchers. As columnist William Safire complained, in criticizing Bloomberg News’ decision to withdraw an article that had suggested that a relative of Singapore’s senior minister was appointed to an important position because of her connections: “I have not read [the] story because it has been expunged from the Bloomberg web site, digitally erased from the mind of man.”

Our research revealed several reasons for removal of articles, examples of which are described below. Some involve removal of materials not from “digital archives” but
from websites or databases, and in some cases the material was subsequently restored. Nevertheless, these examples provide insight into why documents might be removed from (or might fail to make their way into) a digital archive.

1. Copyright infringement/Plagiarism

There is a significant overlap between copyright infringement and plagiarism.4

Elsevier has removed several articles from its ScienceDirect database. One such article, by Nikitas Assimakopoulos, was found to have been lifted in large part from a book chapter by another author. The article was removed from ScienceDirect and replaced by the following notation: “For legal reasons this article has been removed by the publisher.”5

Another set of articles removed from ScienceDirect was co-authored by Richard W. C. Wong and Siu-Yuen Chan and originally published in Elsevier scientific journals in 2001. Significant portions of the articles apparently had been taken from another author’s earlier article in Nature Cell Biology.6

According to an Elsevier spokesman, the company “has not removed any article from ScienceDirect due to plagiarism,” but instead out of fear of potential liability for copyright infringement.7

In April 2003, users of ArXiv, the popular physics preprint database, noticed a striking similarity between one of Ramy Naboulsi’s articles and the BaBar Physics Book. After it was found that Naboulsi had plagiarized several of his papers, all 22 of his preprints were withdrawn from ArXiv.8 A search of the database in May 2007 revealed the citations for the articles and explanations for the withdrawal, but the withdrawn articles were not available.

2. Publisher’s/Database owner’s rights expire or are invalidated

In New York Times v. Tasini,9 the Supreme Court held that publishers of collective works (such as newspapers and magazines) do not have the right to license articles by freelance journalists to electronic databases such as Lexis/Nexis, unless specifically allowed to do so by contract. As a result of the Supreme Court’s decision, many articles by freelancers have been removed from databases. The Tasini decision, and subsequent developments, are discussed below.

3. Defamation

a) Denver Journal of International Law and Policy/Boise Cascade

In the spring 1998 issue of Denver Journal of International Law and Policy, two business professors at Boise State University, together with an environmental activist, wrote an article entitled “The Critical Need for Law Reform to Regulate the Abusive Practices of Transnational Corporations: The Illustrative Case of Boise Cascade
Corporation in Mexico’s Costa Grande and Elsewhere.” The authors argued that certain multinational corporations, particularly Boise Cascade, had committed “environmental abuses and had contributed to civil unrest in Mexico.” In October 1999 the University of Denver withdrew the article and instructed Lexis and Westlaw to terminate online access to it. According to an errata notice published in the summer 1999 issue of the journal, the article was “not consistent with the editorial standards” and parts were “clearly inappropriate and require elimination, revision or correction.”

The authors learned of the University’s actions only after they received “cease and desist” letters from Boise Cascade demanding that they stop distributing copies of the article and stop making false and defamatory statements about the corporation. The authors asked the university to reinstate their article. When the university refused, they sued for defamation, claiming the university’s actions breached their contract and damaged their reputations. The authors prevailed, winning an apology from the university, payment of an undisclosed amount, and the return of the copyright in their article. Whether the university made an independent judgment to retract the article or was pressured by Boise Cascade is a matter of dispute.

b) University of San Francisco Law Review

Professor Merle H. Weiner of the University of Oregon wrote an article for the University of San Francisco Law Review on child custody suits under international law where one of the possible homes for the child was potentially unsafe. In the article she made reference to a particular case under dispute, and one of the parties threatened to sue. Even though she engaged an expert who concluded she had a strong legal defense, her own university would not defend her. The law review, in consultation with counsel at the University of San Francisco, removed the problematic material from her article.

c) University of Rhode Island

Donna Hughes, a professor of women’s studies at the University of Rhode Island, was ordered to remove from her university website two articles she had written on international trafficking of women and children. A man and woman that Hughes had accused of sex trafficking in one of her articles engaged a London law firm. The firm wrote to Hughes threatening a lawsuit for defamation if she did not remove the articles from her website. She was told by the university’s lawyer that although the case “did not have merit” the university was concerned about the expense involved in defending it.

4. Factual errors

An independent investigation performed at CNN’s behest resulted in the retraction of a story broadcast on CNN and published in Time magazine. The story, which appeared in Time in June 1998, had claimed that the U.S. military used nerve gas in Laos in 1970. The New York Times characterized the retracted article as a “distortion” of the evidence (rather than a fabrication), based on flawed interviews consisting of hypothetical questions and vague responses. Editors of Time magazine
and CNN did not remove the story, but instead retracted it.\footnote{Withdrawal, removal and retraction are not always used the same way in the literature. We will generally use removal when an article is no longer accessible to the public and retraction when an article is repudiated but the article, with an accompanying retraction notice, remains available.}

5. Fictionalized accounts/unsupported research or other misconduct

a) *New Republic/Stephen Glass*

After it was discovered that Stephen Glass had fabricated many of the stories he reported for the *New Republic*, all of his discredited articles were removed from the *New Republic*’s online archives. In a letter to readers, the *New Republic* explained its decision: “When we post something to our archive, it is being continuously published, and that implies ongoing endorsement of its honesty and truthfulness.”\footnote{Withdrawal, removal and retraction are not always used the same way in the literature. We will generally use removal when an article is no longer accessible to the public and retraction when an article is repudiated but the article, with an accompanying retraction notice, remains available.}

b) *Wired News/Philip Chien*

*Wired News* removed three articles by a freelance space reporter, Philip Chien, from its website when the authenticity of his sources could not be confirmed. One of his sources, a professor of aeronautical engineering, denied having talked to Chien. Another of his sources appeared to be fictional; the contact information was an email account created by the reporter.\footnote{Withdrawal, removal and retraction are not always used the same way in the literature. We will generally use removal when an article is no longer accessible to the public and retraction when an article is repudiated but the article, with an accompanying retraction notice, remains available.}

c) *Cincinnati Enquirer/Chiquita Brands*

The editors of the *Cincinnati Enquirer* removed from the *Enquirer*’s web archives approximately 30 articles concerning an investigation of Chiquita Brands during spring 1998.\footnote{Withdrawal, removal and retraction are not always used the same way in the literature. We will generally use removal when an article is no longer accessible to the public and retraction when an article is repudiated but the article, with an accompanying retraction notice, remains available.} The *Enquirer*’s principal reporter apparently based his articles in part on voice mail messages illegally obtained from a Chiquita employee with access to the company’s voice mail system.\footnote{Withdrawal, removal and retraction are not always used the same way in the literature. We will generally use removal when an article is no longer accessible to the public and retraction when an article is repudiated but the article, with an accompanying retraction notice, remains available.} The *Enquirer* also paid more than $10 million to Chiquita to settle legal claims, and issued an apology to the company.\footnote{Withdrawal, removal and retraction are not always used the same way in the literature. We will generally use removal when an article is no longer accessible to the public and retraction when an article is repudiated but the article, with an accompanying retraction notice, remains available.}

d) *Science Magazine/Hwang Woo Suk*

In late 2005 it was discovered that Dr. Hwang Woo Suk, a South Korean scientist who claimed to have mastered the technology for cloning human stem cells, had falsified his research. *Science* magazine, which had published two papers by Dr. Hwang on human embryonic stem cell research, issued editorial retractions early in 2006. In light of the concerns raised by its publication of Dr. Hwang’s papers, the journal commissioned a special committee to review its practices in connection with the review and publication of scientific articles. The committee’s report, the retraction notices and the original articles are all accessible from a page on Science’s website that describes the incident and the journal’s response.\footnote{Withdrawal, removal and retraction are not always used the same way in the literature. We will generally use removal when an article is no longer accessible to the public and retraction when an article is repudiated but the article, with an accompanying retraction notice, remains available.}

6. Author or customer request (for business or personal concerns)
Elsevier removed the electronic version of an article published in the September 2001 issue of *Human Immunology*, and also requested libraries to remove the article from hard copies of the journal. The article apparently raised a “firestorm” because it referred to Jews in Gaza as “colonists” and said some Palestinians were living in “concentration camps.”

7. **Other (privacy, national security, censorship of various kinds)**

After September 11, 2001, many documents were recalled from federal depository libraries and removed from federal government websites. Some government websites were closed or made inaccessible to the public. Removed material includes the Environmental Protection Agency’s chemical plant risk-management plans, Federal Energy Regulatory Commission documents concerning dams, pipelines and other energy facilities, and many Defense Department documents.

Some librarians have expressed concern that such federal action will set a precedent for removal of material from state archives or for removal of material for political reasons rather than for pressing security concerns. Claims of politically-motivated removals have already come up, for example in connection with the withdrawal of reports concerning the effectiveness of condoms in AIDS prevention from the Center for Disease Control’s web site, and the removal of a report from the National Cancer Institute discrediting the notion that abortions increase the risk of breast cancer.

Whether the “homeland security” rationale for removing documents is being applied too broadly is unclear. Reports suggest that of the numerous federal web sites taken off the Internet after 9/11, only a few would truly help terrorists.

8. **Business disruptions**

Business disruptions and marketing decisions can also be the cause for removing materials from archives.

For example, in July 2002, Sage Publications, a major scholarly publisher, pulled its publications from the EBSCO and Proquest databases. Sage apparently felt that the availability of its content on these databases led directly to subscription cancellations.

The *Western Journal of Medicine*, originally published by BMJ Publishing Group and hosted by HighWire Press, was discontinued in 2002. As of February 2004 the back issues of *Western Journal of Medicine* were no longer available through BMJ or HighWire. The content was subsequently transferred to the open access archive PubMed Central.

* * *

As demonstrated above, when a legal issue arises with respect to a document in an archive, removal may be effected before a claim is even formally asserted, much less
adjudicated. Publishers may seek to avoid the risk of a lawsuit as well as to mitigate damages in the event that liability is established.

For each potential reason for removal, it is important to consider the risks and concerns that publishers and archives face, in order to make appropriate legal and/or policy recommendations. In most cases, a retraction notice or a legend will be sufficient. Rare circumstances, however, may require a publisher – or even an archive – to remove or limit access to a document.

3.0 “Archives” and “Digital Archives”

There appears to be no single, universally recognized definition of the term “archives” in the United States, or in many of the countries we studied. Below are two definitions of archives – one colloquial, the other more traditional.

*Cambridge Dictionaries Online* defines archives as:

1. A collection of historical records relating to a place, organization or family. 2. a place where historical records are kept. 3. A computer file used to store electronic information or documents that you no longer need to use regularly.31

*ODLIS, the Online Dictionary of Library and Information Science*, provides a different definition:

An organized collection of the noncurrent records of the activities of a business, government, organization, institution, or other corporate body, or the personal papers of one or more individuals, families, or groups, retained permanently (or for a designated or indeterminate period of time) by their originator or a successor for their permanent historical, informational, evidential, legal, administrative, or monetary value, usually in a repository managed and maintained by a trained archivist….Also refers to the office or organization responsible for appraising, selecting, preserving, and providing access to archival materials…. Archives can be classified in three broad categories: government archives (*example: National Archives and Records Administration*), in-house archives maintained by a parent institution, and collecting archives (manuscript libraries, film archives, genealogical archives, sound archives, personal archives, etc.).

The term is also used in academia to refer to a repository of electronic preprints, working papers, and similar documents, commonly called *e-print archives*. Used in this sense, there is no implication of archival management, which has caused some confusion….32
In Canada, an archive is generally understood to be “a compilation of public or private records of public value or significant interest. The administration of the record is not for profit.” Moreover,

Archival holdings differ from those of libraries in that they are, for the most part, unique and irreplaceable unpublished records. They may not be borrowed, nor are holdings duplicated in other institutions across the country. This dictates the way in which archival research is conducted.

Canadian practice distinguishes archives from libraries based on the nature of their holdings. Unlike the secondary sources collected by libraries that are more easily replaceable if stolen, lost or destroyed, “if an archival document is lost, stolen or irreparably damaged, the information it contains is lost forever.” The Canadian report cites the objectives of several Canadian archives, which include acquiring, preserving and providing access to materials of value (whether historical, cultural or other) for research purposes.

In the UK, archives have been understood as “comprising documentation that accumulates naturally over time, in particular, as the product of the business of government and other large organisations.” The UK report observes, however, an increasing tendency to use the term “archives” to describe collections of sound recordings and films as well as certain special interest collections.

In the traditional sense of the term, archives are institutions responsible for preserving material that results from various aspects of human activity. Archival preservation involves more than merely the physical saving of documents. Sound archiving practices ensure the authenticity, reliability and integrity of documents.

Traditionally, the term “archives” referred to collections of material that was considered no longer current. However, since the advent of digital technology, recent material is also being placed into archives (although not as systematically as scholars might wish). The ephemeral nature of digital material and changes in formats and technologies makes it as important to safeguard recently created material as it is to safeguard material that is decades old. Otherwise, material in digital form will be lost for future generations.

Digital technology has encouraged use of the term “archive” in a more colloquial sense. It is commonly used as a verb (“to archive” one’s e-mail messages, for example) in which the predominant – if not the exclusive – connotation is “to save,” as illustrated in the first definition above. People sometimes conflate “archive” with “backup copy.”

The term “archives” is used to refer to many different document retention and access systems. At one end of the spectrum is a traditional archive – a repository of physical documents owned by the archival facility or maintained by it with the authorization of the owner in a manner to ensure its preservation and safekeeping. At the other end of the spectrum are digital databases made by copying material on the Internet.
without authorization, and maintained without specific, systematic preservation arrangements.

While the concept of “archives” has evolved to encompass collections of works in digital form, one problem in defining a “digital archive” is the sheer abundance and diversity of digital service providers that call themselves archives. Not all databases are archives, just as not all archives are databases. It is the commitment and ability to provide long-term access, curation, and preservation of digital documents that distinguishes an archive from a database. Many data aggregators host content and make it available to customers or users without any commitment to ensure long-term preservation or access. They do not fulfill the role of preserving the permanent cultural and historical record, and should not be considered “digital archives.”

Our concepts of “archives” and “libraries” are both evolving. Traditionally, the fundamental mission of an archive has been to safeguard and preserve records; the fundamental mission of a library has been to select and maintain collections of material and make them readily accessible to users. Preservation was a natural corollary to libraries’ primary mission, but largely a passive activity: back issues of journals were retained and accumulated. Research libraries undertook more systematic preservation activities.

As libraries increasingly substitute database access for hard copy materials, their passive preservation activities are no longer sufficient to ensure that their patrons will have continued access to those materials if a subscription terminates or the publisher fails. They have begun to experiment with various approaches to archival preservation to ensure long-term access. At the same time, even traditional archives are digitizing part of their collections to make them more accessible to users in a way that could not be done before. The concepts and missions of libraries and archives are beginning to converge.

In our report, we will use the term “digital archives” to refer to a collection of materials in digital form (whether “born” digital or converted to digital form consistent with the law, maintained in a secure environment in accordance with current best practices for digital preservation by an institution with the commitment and financial ability to ensure their integrity and long-term preservation. We will also use the term to refer to the institution that collects and maintains those materials. The extent of permitted access (to whom and under what circumstances the material is available) does not determine whether or not a set of digital materials qualifies as a “digital archives,” but may in some cases affect the treatment of the digital archives under the law, as we will discuss below.

Currently there are many institutions developing or planning to develop digital archives, including publishers, libraries and archives, universities and governments. New digital preservation archives have been created with the participation of right holders (e.g., Portico) or with their acquiescence (e.g., Internet Archive). In section 8.0 below, we will discuss certain specific digital archives to illustrate various legal strategies or considerations.
4.0 The Legal Landscape

Why do publishers remove materials from a database or archives? Legal justifications predominate. Below we briefly review various areas of law that may influence publishers to remove or retract materials, and consider how libraries and archives may be affected under the laws of various countries. The areas we will explore include:

Copyright Law and Archives Legislation
Moral Rights
Defamation
Right to Privacy
Mistake of Fact
Censorship

In reviewing the discussion below, it is important to understand that laws do not always develop or operate in parallel from country to country (or even, in some cases, from state to state). We have tried to organize the discussions around certain central themes, but they do not always precisely track one another from one country to the next.

4.1 Introduction: Copyright Law and Archives Legislation

Copyright law has a particular relevance for digital archives, because almost every act involved in creating, maintaining, migrating and distributing copyrighted works in digital form involves making copies. In the sections below we look at how copyright law in the U.S. and other countries relates to archives and digital archives.

Most countries also have laws that create or enable certain specific types of archives, usually developed for traditional archives (for example, archives of government information or public records). Those laws vary from country to country. Some are directed to specific, government-funded archives of public records; others are more broadly applicable. Because our foreign consultants’ discussions of special archives laws and copyright laws were sometimes interrelated, we have included them in this section as well.

4.1.1 US: Copyright Law and Archives Legislation

The first section below contains a general overview of U.S. copyright law. The second section discusses exceptions that specifically mention archives or archival activity (although not all are relevant to digital archives). The third section discusses the unique role of the Library of Congress. The fourth and fifth sections address the implications of the current copyright law for digital archives, and initiatives to update the law. The final section addresses archives-specific legislation in the U.S.

A. Overview
Subject Matter of Protection. Copyright exists in any original work of authorship that is fixed in a tangible medium. A work is “original” if it has not been copied from a pre-existing work, and exhibits at least a small amount of creativity. Copyright lasts for the life of the author and seventy years thereafter.

Copyright law distinguishes between ownership of a copy of a work (even the original copy, if there is only one) and ownership of the copyright rights. Libraries and archives commonly receive donations of manuscripts or letters, but they generally own only the physical copies and not the copyright rights.

Rights. Copyright law provides a copyright owner with a “bundle” of rights, which include:

* The right to reproduce the work (the right to make copies).

* The right to create adaptations (also known as derivative works).

* The right to distribute copies of the work to the public. The distribution right is limited by the “first sale doctrine,” discussed below.

* The right to perform the work publicly. To perform a work means to recite, render, play, dance or act it, with or without the aid of a machine. Sound recordings have only a limited public performance right that protects them when the performance is by means of a digital audio transmission.

* The right to display the work publicly.

“Publicly” is a broad concept in copyright. To perform or display a work publicly means to perform or display it anywhere that is open to the public or anywhere that a “substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered.” Transmitting the performance or display to such a place also makes it public. It does not matter if members of the public receive the performance at the same time or different times, at the same place or different places. Making a work available to be received or viewed by the public over an electronic network is a public performance or display of the work.

Not all rights attach to all works. Paintings, for example, are not capable of being performed, although they are capable of being displayed. Other works have rights that are limited in certain respects. For example, reproduction of musical compositions in copies of sound recordings is governed by a compulsory license which sets the rate at which the copyright owner must be paid.

Exceptions. The rights under copyright are subject to many exceptions and limitations. Two general exceptions of particular concern for archives are discussed here,
and then in a separate section below we discuss exceptions specific to archives and archival activity.

The “first sale doctrine” limits a copyright owner’s distribution right by providing that the owner of a particular copy of a copyrighted work may sell or transfer that copy. The first sale doctrine prevents the copyright owner from controlling the disposition of a particular copy of a work after the initial sale or transfer of that copy. (There is no digital first sale doctrine, because a digital transmission involves making a copy, not merely transferring a copy.) It is primarily because of the first sale doctrine that copyright law historically has provided no obstacle to the operation of libraries and archives. When a library or archives purchases a physical copy of a copyrighted work, or receives it as a gift, it can lend that copy to users without implicating copyright rights.

The first sale doctrine does not apply to copies made without the copyright owner’s authorization. Hotaling v. Church of Jesus Christ of Latter-Day Saints involved a church library’s making available to the public unauthorized copies of genealogical research materials. The library had made multiple unauthorized copies of the work, included a reference to the work in its catalog, and made the copies available for circulation. The court held that these actions constituted distribution to the public under the Copyright Act, and remanded the case for further proceedings.

“Fair use” excuses otherwise infringing activity. Whether a use is fair depends on the facts of a particular case. Certain uses are favored in the statute: criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship and research. A nonprofit digital archive for scholarly or research use would be the kind of use favored by the law. However, favored uses are not automatically deemed fair, nor are other uses automatically deemed unfair. There are four factors that must be evaluated in every case: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used; and (4) the effect of the use on the potential market for or value of the copyrighted work.

Ownership of Rights. Usually the human creator of a work is the author and initial owner of copyright. The rights of a copyright owner can be transferred or licensed, separately or together. In some circumstances authors have a reversionary interest – that is, they can reclaim rights that they previously licensed or lost.

Several cases have addressed the rights of periodical owners to license the contributions of freelance journalists, originally published in their newspapers or journals, to electronic databases.

In New York Times Co. v. Tasini, the Supreme Court held that the New York Times and other publishers, in licensing back issues of their publications to electronic databases such as Lexis/Nexis, could not include the articles written by freelance journalists. The Times’ contracts with the freelancers did not address copyright ownership, so it relied instead on a provision in the Copyright Act that allows owners of collective works such as journals and newspapers to reproduce freelancers’ contributions in the collective work for which they were written, or any revision of it. The Court
held that the publishers exceeded the scope of this privilege because the databases did not preserve the context in which the freelancers’ work originally appeared; articles could be retrieved in isolation. Therefore, in the Court’s view, the electronic databases were not “revisions” of the original collective works. The Court contrasted the databases at issue with microfilm and microfiche, which fall within the scope of the privilege, as the articles appear in the same position as they appeared in the original publication. The Court decided that the freelance authors – and not the publishers – retained the rights to license use in electronic databases like Lexis.

The principle announced in *Tasini* affects many newspapers, magazines and journals. As a result of the *Tasini* case, many articles by freelancers were removed from electronic databases, although they generally remained available on microfiche. Through subsequent licenses and settlements with freelance authors, many of those articles have again become available through electronic databases.

*Faulkner v. National Geographic Society* presented a similar issue, this time with respect to articles and photographs by freelance writers and photographers in *National Geographic*. The National Geographic Society published *The Complete National Geographic*, including all of its issues since 1888, on CD-ROM and DVD. The freelancers sued, claiming that the Society had exceeded its legal privilege because the *The Complete National Geographic* was not a revision of the issues in which their work originally appeared. The court, however, distinguished the *Tasini* case and held that the Society had not infringed the freelancers’ copyrights, because the new publication was a privileged “revision” of the print product. The digital version consisted essentially of scanned magazine pages, with articles and photographs in the same context as the print version (although the digital version also contained search features and other materials that did not appear in the print version). Thus, the manner in which works are maintained in databases and displayed to users is highly relevant to whether the owner of a collective work can authorize use of freelancers’ contributions.

**Remedies for Copyright Infringement.** The principal remedies available in a civil suit for copyright infringement are:

**Damages.** A copyright owner whose work is infringed is entitled to an award in the amount of the actual financial damage suffered, and any profits of the infringer to the extent they are not already taken into account in computing damages. If the work infringed was registered in a timely manner, the copyright owner may opt for “statutory damages” in the amount of $750 - $30,000, “as the court considers just.” The amount can be up to $150,000 if the infringement is willful. “Willful” means with knowledge that the conduct is infringing. A court may not order statutory damages against an infringer who is an employee or agent of a nonprofit educational institution, library or archives acting within the scope of his or her employment, who copied the work in the reasonable belief that the copying was fair use.

**Injunctions.** Courts may grant temporary or permanent injunctions to restrain infringement. A typical injunction would prohibit copying or distributing the infringing work(s) and, in appropriate cases, performing or displaying them. The injunction order
may, however, be even more specific, explicitly prohibiting activities such as downloading, uploading or transmitting a copyrighted work. A plaintiff could also seek to prevent a digital archives from making an infringing work available online, though we are not aware of any such cases to date.

Impoundment. Courts may order impoundment and destruction or other disposition of infringing copies or devices or materials used to make them. An impoundment order is discretionary with the court and generally applies to copies or other materials in the infringer’s hands. Courts will at times issue “recall” orders to defendants. These are, in effect, injunctions requiring them to recall infringing merchandise already in the hands of third parties (usually distributors). However, courts are often reluctant to order recall due to the potential harm to defendant’s reputation and to innocent third parties, and so may look to other remedies (such as damages) to compensate the plaintiff.

Attorneys Fees and Costs. A court may also award reasonable attorney’s fees and other costs related to the lawsuit to the prevailing party, but a prevailing plaintiff may be awarded attorney’s fees and costs only if the copyrighted work at issue was timely registered.

Limitation of Liability for Internet Service Providers. The copyright law provides a “safe harbor” for internet service providers for material contained on or transmitted by their services. Internet service providers (a term that is broadly defined, and has been construed to include website host servers) are not liable for monetary damages with respect to certain activities: (i) where they are acting as “mere conduits” of transitory digital information that they did not initiate; (ii) with respect to automatic system caching of materials made available to users; (iii) with respect to information residing on their systems at the direction of users; and (iv) with respect to information location tools.

There are a number of detailed requirements to qualify for these “safe harbors.” One of them is compliance with a “notice and takedown” procedure. Upon receipt of a valid notice from a copyright owner claiming that her work has been infringed, the service provider must act promptly to remove or disable access to the allegedly infringing material. There is a mechanism by which the individual who posted the offending material can request that it be reinstated.

B. Copyright Exceptions Specifically Directed to Archives or Archival Activities

The Copyright Act contains a number of exceptions for libraries and archives or for archival activities, but does not define those terms.

Section 108. The principal exceptions are found in Section 108, which allows certain preservation and other copying by libraries and archives. To qualify for any of the Section 108 exceptions, the library or archives must be open to the public, or at least to researchers in a specialized field; the reproduction and distribution may not be for
commercial advantage; and the library or archives must include a copyright notice or legend on copies.67

Section 108(b) allows libraries and archives to make up to three copies of an unpublished copyrighted work in their collections “solely for purposes of preservation and security or for deposit for research use in another library or archives.” The work must be currently in the collections of the library or archives, and any copy made in digital format may not be made available to the public in that format outside the library premises.68

Section 108(c) allows libraries and archives to make up to three copies of a published work to replace a work in their collections that is damaged, deteriorating, lost or stolen or whose format has become obsolete, if the library determines after reasonable effort that an unused replacement cannot be obtained at a fair price. “Obsolete” means the machine or device needed to “render perceptible a work stored in that format” is “no longer manufactured or is no longer reasonably available in the commercial marketplace.”69 As with copies of unpublished works, copies in digital format may not be made available to the public outside the library premises. The Copyright Office has stated that this provision does not permit “preemptive archival activity to preserve works before they become obsolete.”70

Until the Digital Millennium Copyright Act (DMCA) was passed in 1998,71 the copying privileges in Sections 108(b) and (c) discussed above were limited to “a copy” of a work “in facsimile form.” The DMCA changed these Sections to permit up to three copies and to allow those copies to be made in digital form, in recognition of the changing needs of libraries and archives. The Senate Report accompanying the DMCA, however, suggests that these privileges were not designed to apply to digital archives available exclusively via the Internet:72

[Just as when Section 108 of the Copyright Act was first enacted, the term “libraries” and “archives” as used and described in this provision still refer to such institutions only in the conventional sense of entities that are established as, and conduct their operations through, physical premises in which collections of information may be used by researchers and other members of the public. Although online interactive digital networks have since given birth to online digital “libraries” and “archives” that exist only in the virtual (rather than physical) sense on websites, bulletin boards and homepages across the Internet, it is not intended that Section 108 as revised apply to such collections of information. The ease with which such sites are established online literally allows anyone to create his or her own digital “library” or “archives.” The extension of the application of Section 108 to all such sites would be tantamount to creating an exception to the exclusive rights of copyright holders that would permit any person who has an online website, bulletin board or a homepage to freely reproduce and distribute copyrighted works. Such an exemption would swallow the
general rule and severely impair the copyright owners’ right and ability to commercially exploit their copyrighted works.

As far as we are aware the scope of the amended Sections 108(b) and (c) has not been adjudicated.

Section 108(f)(3) allows libraries and archives to reproduce and distribute “a limited number of copies and excerpts of an audiovisual news program.” This exception was intended to allow libraries to make off-the-air recordings of daily newscasts of the national television networks “for limited distribution to scholars and researchers for use in research purposes.”

Section 108(h) allows a library, archives, or nonprofit educational institution to reproduce, distribute, perform or display in facsimile or digital form a copy of a published work during the last 20 years of its term, for purposes of preservation, scholarship or research. The exception applies only if the work is not subject to normal exploitation and cannot be obtained at a reasonable price. To take advantage of this privilege, an institution must first make a reasonable investigation to determine that the work meets these criteria and that the copyright owner has not filed a notice to the contrary in the Copyright Office.

Copies for Users. Sections 108(d) and (e) allow copying for library users under certain conditions. A library or archives may reproduce and distribute, in response to a user’s request, “no more than one article or other contribution to a copyrighted collection or periodical issue,” or “a small part” of any other copyrighted work from its collection or that of another library or archives. It may also copy all or a substantial portion of a user-requested work if it determines, after reasonable investigation, that a copy cannot be obtained at a fair price. However, these reproduction and distribution privileges have conditions: they apply only if “the library or archives has had no notice that the copy would be used for purposes other than private study, scholarship or research”; the copy becomes the requesting user’s property (so the exemption does not become a means of collection-building); and the library or archives displays a warning of copyright where it accepts orders.

Sections 108(d) and (e) do not apply to musical works, pictorial, graphic or sculptural works (other than illustrations or similar adjuncts to literary works), or audiovisual works (including motion pictures) generally.

The privileges under Section108 do not supersede any contractual obligations a library or archives may have with respect to a work that it wishes to copy. Section 108 also provides that if a library’s activities do not qualify for the Section 108 exemption, they may still qualify as fair use.

The Copyright Act also contains a number of other provisions that expressly permit archival copying under certain circumstances:

Section 112. Section 112 allows copying for archival preservation of certain types of “ephemeral recordings.” For example, authorized transmitting organizations may make and retain an archival copy of transmission programs, and governmental
bodies or other nonprofit organizations may make and retain an archival copy of transmission programs embodying the performance or display of a copyrighted work pursuant to Section 110(2) (the systematic instructional activities performance exemption). There are similar privileges with respect to archival copies of transmissions of a religious nature, or transmissions for the blind or handicapped, etc.

Section 117. Section 117 of the Copyright Act allows an owner of a copy of a computer program “to make or authorize the making of another copy or adaptation of that computer program” provided that the new copy or adaptation is for “archival purposes only and that all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful.”

Section 602. Section 602 provides that it is an infringement of the distribution right to import into the United States copies of a work that have been acquired outside of the United States without the copyright owner’s authority. However, a limited number of copies may be imported for library lending or archival purposes.

Section 1201(a)(1). The Digital Millennium Copyright Act (DMCA) prohibits the act of circumventing a technological measure that “effectively controls access” to a work protected by copyright. It also contains provisions that prohibit trafficking in devices that circumvent technological access controls or rights controls.

There are several specific statutory exceptions to the ban on circumventing access controls but none that accommodates archiving activities. However, the law provides for a triennial rulemaking proceeding conducted by the Copyright Office for creating new exceptions. In the most recent rulemaking proceeding the Office allowed an exception for

Computer programs and video games distributed in formats that have become obsolete and which require the original media or hardware as a condition of access, when the circumvention is accomplished for the purpose of preservation or archival reproduction of published digital works by a library or archive.

The Internet Archive, which sought the exemption, demonstrated that the ability to circumvent access controls on those works was critical to its preservation efforts.

C. The Library of Congress’s Role

Copyright owners are generally required to deposit two copies of the “best edition” of any work published in the United States, within three months of publication, with the Copyright Office for the benefit of the Library of Congress. Even if the copyright owner does not register the copyright in her work, she must comply with the deposit requirement. Failure to do so does not affect the status of the copyright, but it can result in fines. The Library may also demand copies of specific “transmission programs,” even though they are technically unpublished, or make a copy itself from the
A transmission program is “a body of material that, as an aggregate, has been produced for the sole purpose of transmission to the public in sequence and as a unit.”

The Library is entitled to keep the deposit copies of published works for its collections, or use them “for exchange or transfer to any other library.” The rights that the Library has with respect to deposited works pertain to the physical copies, not to the underlying rights. For example, the Library may not, merely by virtue of its receipt of deposit copies of motion pictures or musical works, authorize public performances of those works.

Certain types of works are exempt from mandatory deposit in whole or in part, either because the Library is not interested in acquiring them or because the requirement imposes a hardship on the copyright owner. So far, the Library has not required deposit of websites, or of e-journals. Among other things, it lacks the infrastructure to efficiently receive, manage and render such works. The Library plans to require deposit of such works in the future, but will likely require changes to the Copyright Act and the regulations concerning “best edition” to make the copies necessary to manage and preserve those works and make them available to library users.

In addition to acting as an archive with respect to selected works it receives through mandatory deposit or purchase, the Library has other archival functions. For example, the Library is charged with creating and maintaining the American Television and Radio Archives, and acts as an archive with respect to donated collections.

**D. Implications of Copyright Law for Digital Archives.**

Copyright law does not comfortably accommodate digital archives, since many of their activities implicate copyright rights in ways for which no specific exceptions are provided. Section 108 was passed before the advent of digital archives, and the management and use of digital archives implicate copyright rights in ways that archives of hard copy material do not. For example, maintaining and preserving digital archives requires that multiple copies be made, so the three copy limit in Sections 108(b) and (c) is unworkable. Making works available to users can also be problematic. The first sale doctrine applies to physical property, and so far neither the courts nor the Copyright Office have endorsed a “digital first sale doctrine” to allow users to retransmit digital copies over the Internet. While lending or on-site display of a physical copy does not implicate copyright rights, copying a protected work into a computer’s memory and displaying and/or distributing a work to remote users does. Making copies of a work available for public downloading over an electronic network qualifies as a public distribution.

Digital archives may also implicate copyright rights in the manner in which they acquire their material. An archive might digitize unpublished analog works under Section 108(b) or published analog works under Section 108(c) (replacement copies); Section 108(h) (works in the last 20 years of protection) or, in some circumstances,
Section 107 (fair use). It might acquire “born digital” works through purchase, license, or in reliance on fair use. However, making the works available to users implicates copyright rights. Works copied in digital form pursuant to Sections 108(b) or (c) may be made available to users only on library premises. Access to works digitized in reliance on fair use would have to be restricted to avoid adversely affecting the copyright owner’s market. For some works, remote access will be allowable, but for others, even use of the digitized version on the library premises could have a detrimental market effect. “Born digital” works frequently come with licenses that restrict how the works can be used and made available.

For all of these reasons, most of the digital archives under discussion here are created pursuant to agreement with the copyright owners. Web archives such as the Internet Archive may rely on an “opt out” strategy, which addresses the logistical difficulties in licensing this material but leaves it vulnerable to removal requests.

E. The Section 108 Study Group

The Copyright Office and the Library of Congress have long recognized the shortcomings of Section 108 in the digital world. The Library of Congress convened the Section 108 Study Group in 2005 to examine the provisions of Section 108 in light of digital technologies. The Group’s mandate is to recommend changes to the law to better balance the rights of copyright owners with the needs of libraries and archives to collect and preserve digital works. The Study Group’s report is expected in late 2007. Its recommendations will likely address many of the issues discussed above. The Copyright Office will then consider the Study Group’s recommendations, solicit the views of concerned parties on all sides, and formulate a proposal for specific legislative change.

F. Archives Legislation

There are many archives created by federal, state or local legislation. The principal archives of the United States government is the National Archives and Records Administration (NARA). NARA has the responsibility to preserve government records, including records of Congress, government agencies, the papers of U.S. presidents and other government officials, and a wide range of other documents from private sources – including motion pictures, photographs, and sound recordings – deemed “appropriate for preservation by the Government as evidence of its organization, functions, policies, decisions, procedures, and transactions.”91 NARA is developing an Electronic Records Archive (ERA) to make public records easily accessible electronically. Pursuant to an agreement with NARA, the Government Printing Office has responsibility for archival preservation of electronic government records available through GPO Access, such as the Congressional Record, the Federal Register and the Code of Federal Regulations.

Legislation relating to mandatory deposit and the Library of Congress is discussed above. It should be emphasized that while the Library of Congress does serve as an archive for certain collections, it does not retain all of the material it receives. Nor are its
archival collections composed solely of materials received through mandatory deposit: much of the material is acquired through donation or purchase.

4.1.2 Australia: Copyright Law and Archives Legislation

Under Australia’s Copyright Act, “archives” means “a nonprofit institution maintaining a collection of documents or material of historical significance or public interest for the purpose of conserving and preserving those documents or material.” The ability to be shielded from liability by the Copyright Act, however, only belongs to those archives and libraries “all or part of whose collection is accessible to the public directly or through interlibrary loans” and to parliamentary libraries. While archives may not be operated for profit, libraries may, in fact, be profit-making ventures. The newly adopted Copyright Act Amendment 2006 (“CAA 2006”) defines libraries in Sections 49 and 50 relating to the discussion of reproducing works. Section 49(9)’s definition of library – quoted above – is expanded in Section 50(10) to include parliamentary libraries and archives accessible to the public. Commenting on the dearth of case law in this area, the Australian report notes that the issues we are considering would benefit greatly from empirical research.

A. Copyright Laws That Specifically Address Archives

**Copying for Preservation or Maintenance** – Under Section 51A of the Australian Copyright Act, a library or archives may reproduce or communicate a work that forms or previously formed part of its collection for purposes of preservation. If it held the work in a published form, it may make or communicate a reproduction in order to replace works that have deteriorated, been damaged, lost or stolen. If the work is a published work, the provision applies only when an authorized officer of the library or archives makes a written declaration stating that the work is not commercially available. Similarly, if the work is an original artistic work or held in manuscript form, the library or archives may make or communicate a reproduction of it in order to preserve against loss or deterioration, or for the purpose of research carried out “at the library or archives” that holds the work, or at another library or archives. The Australian report notes that while this appears to cover both internal research and research by a user, the library or archives may need to retain the reproduction, in light of the provision’s use of the term “at” in its wording. The user would need to rely on another provision if he/she would like his/her own copy for research purposes. Australian law contains similar provisions for sound recordings and films.

Section 51A also permits a library or archives to reproduce a work held in its collection for “administrative purposes,” which is defined as purposes directly related to the care or control of the collection. The law does not contain a specific provision to allow libraries or archives to reproduce copyrighted material in a new format where the existing technology has become obsolete. Nevertheless, the Australian report suggests the possibility that this activity might fall under reproduction of a work for “administrative purposes.”
In cases where an original artistic work has deteriorated or been lost since a preservation reproduction of it was made, or where the artistic work is so fragile it cannot be displayed without significant deterioration, Australian copyright law allows a library or archive to make a preservation reproduction of the original artistic work “available to users online, on terminals installed within the institution’s premises from which a person cannot make an electronic copy or hardcopy or communicate the reproduction.”

Under another provision of Australian copyright law, a library or archives may, upon request, supply a reproduction of all or part of an article or published work from its collection to another library or archives, for its collection. Any such reproduction may be communicated “by or on behalf of the officer in charge of the library or archives” to officers of the requesting library or archives by “making it available online to be accessed through the use of a computer terminal installed within the premises of the library or archives.”

Additionally, Section 51B of the Copyright Act, added in the CAA 2006, discusses the making of preservation copies of “significant works” held in “Key Cultural Institutions.” Unfortunately, neither “significant works” nor “Key Cultural Institutions” is defined therein, although Subsection 1 says that the provision is to apply to works of “historical or cultural significance” to Australia. In relation to these documents, manuscripts and artistic works, the library or archive may make three reproductions provided that, in the case of published works, a copy of the work cannot be obtained commercially.

Provisions of Australia’s Archive Act 1983 (Cth) that establish the powers of the National Archives of Australia allow the archives “to make copies, by microfilming or otherwise, of archival material, but not so as to infringe copyright (other than copyright owned by the Commonwealth) subsisting in the material;” and “arrange for the publication of material forming part of the archival resources of the Commonwealth or works based on such material, but not so as to infringe copyright (other than copyright owned by the Commonwealth) subsisting in the material or works.”

Copies for Users – Under Australian copyright law, libraries or archives may reproduce or communicate all or part of an article or published work held in the library’s collection, in response to a user’s request for a copy for the purpose of research or study. In order to benefit from this provision, the user must make a request in writing, accompanied by a signed declaration. If the user requests a reproduction of all or more than a reasonable portion of a published work (other than an article in a periodical), an authorized officer of the institution must make a “commercial availability declaration,” stating that after reasonable investigation, the officer is “satisfied that a reproduction (not being a second-hand reproduction) of the work cannot be obtained within a reasonable time at an ordinary commercial price.” Under this provision, the library may provide the reproduction to the user in hard copy or electronic format. If the library communicates the reproduction electronically, it must provide the user with a copyright notification prior to the communication and the library or archives must destroy the reproduction after it is communicated (thereby preventing the library/archives from
amassing collections of electronic reproductions). In order for the library or archives to benefit from this provision, it must not charge the user more than it costs to make and supply the reproduction. In addition, it must keep specific records documenting the request (available for inspection by the copyright owner).

Australian copyright law allows a library or archives to supply a reproduction of all or part of an article or published work from its collection to a requesting library or archives to fulfill a written request made by a user of that library or archives for a copy for research or study on essentially the same terms as it supplies documents to its own users. All reproductions provided to requesting libraries made from works in electronic form require a commercial availability declaration, as do certain reproductions made from a hard copy.

Under Section 51 of the Australian Copyright Act, a user or an officer of a library or archives may make or communicate a reproduction of an unpublished literary, dramatic, or musical work or unpublished photograph or engraving, for a user, for the purpose of research or study, or “with a view to publication,” where copyright subsists in the work, more than 50 years have elapsed since the death of the author, and the work or a reproduction of the work is open to public inspection at the library or archives. In addition, an unpublished thesis or a similar literary work held in university libraries or in archives may be reproduced by an authorized officer on behalf of someone who requires the reproduction for purposes of research or study. This provision ensures that unpublished works may be used by researchers without the risk of infringing copyright.

**B. General Copyright Exceptions/Limitations Applicable to Archives**

In Australia, the fair dealing exception is not as open-ended as the U.S. fair use defense or Canada’s interpretation of fair dealing, discussed below. Under Australian law, fair dealing applies to dealings undertaken for the purpose of research and study, criticism or review, reporting the news, parody or satire, or a legal practitioner or patent attorney’s providing professional/legal advice. The Australian report notes that fair dealing is limited in scope to these defined purposes and may not apply to many activities of libraries and archives (e.g., under Australian law, copying for preservation purposes would not constitute fair dealing). In addition, the fair dealing defense appears more helpful for the library and archives’ users than for the institutions themselves, which may not be able to benefit from a fair dealing defense for actions performed on behalf of users. Consequently, until or unless Australian courts follow the Canadian example, Australian libraries and archives will need to rely on the library and archives provisions rather than on fair dealing.

CAA 2006 introduced a new exception to copyright violation: flexible dealing. The goal of flexible dealing is to “provide a flexible exception to enable copyright material to be used for certain socially useful purposes while remaining consistent with Australia’s obligations under international copyright treaties.” It applies to those uses which are made by or on behalf of the body administering a library or archive for the
purpose of maintaining or operating the library or archive and not made for any commercial advantage or profit.\textsuperscript{119} Four further requirements must be satisfied in order for a library or archive to take advantage of this exception:

(a) The circumstances amount to a ‘special case’;
(b) The requirements discussed above must be met;
(c) The use must not conflict with a normal exploitation of the work; and
(d) The use must not hurt the interests of the owner of the copyright.\textsuperscript{120}

These provisions mirror the three-step test found in Article 13 of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Because of the vagueness of these guidelines, however, one of our correspondents does not believe that many libraries will rely on flexible dealing.\textsuperscript{121} There have been no court cases to date on the issue.

\textbf{C. How Provisions Relate to the Digital/ Electronic Environment}

The Australian Copyright Amendment (Digital Agenda) Act 2000 extended the library and archives provisions of the Copyright Act to the digital environment. The library provisions were first introduced in the Copyright Act 1968, at a time when most copyrighted material was stored and accessed in analog form. Initially, these provisions only applied to libraries. Since then, they have been amended substantially. In 1980, in response to a report on the impact of photocopying, the law was amended comprehensively and provisions relating to archives were added. The Digital Agenda Act of 2000 introduced further amendments, specifically to enable libraries and archives “to use new technologies to provide access to copyright material for the general community, as long as the economic rights of owners of copyright materials are not unreasonably prejudiced.”\textsuperscript{122}

The Digital Agenda Act introduced several notable amendments. The Act:

- replaced the term “copying” with “reproduction,” thereby “extending the existing exceptions to the electronic reproduction and communication of material;”
- amended user request provisions to allow reproductions to be supplied in electronic format, when another reproduction of the work is not commercially available;
- introduced provisions permitting reproduction and communication of works for administrative purposes;
- introduced provisions permitting libraries or archives to make published works acquired in electronic format available online within the premises of the library or archives on terminals that do not allow the work to be communicated or reproduced electronically,\textsuperscript{123} and
• introduced provisions permitting “preservation reproductions of original artistic works to be made available online within the premises of the library or archives on copy-disabled terminals.”

The Australian government is reviewing the operation of the Digital Agenda Act amendments. Currently, little information is available regarding the extent to which libraries, archives, or other institutions rely on the provisions to make material acquired in electronic form available on terminals within their premises. In practice, public libraries and archives may rely more on licenses with regard to electronic databases, rather than on these provisions.

In 2004, the Australian Parliament passed the Free Trade Agreement between the United States and Australia. Not only did this extend the term of copyright in Australia to life plus 70 years, it mandated reform of the country’s penalties for circumvention of technological protection measures. These changes were introduced in CAA 2006. CAA 2006 addressed issues of time and space shifting of music and television and radio programs, format shifting and technological protection measures. There is an exception that allows libraries and archives to use copyrighted material for the maintenance and operation of the library or archive, for giving educational instruction and for obtaining copies of works in forms for people with disabilities. These exceptions are not unlimited. They may only be used if there is a special need, if the use does not “conflict with the normal exploitation of the work” and “if it does not unreasonably prejudice the legitimate interests of the owner of the copyright.” Libraries and archives may also make copies for administrative purposes, a term defined in CAA 2006 to mean those “purposes directly related to the care or control of the collection.” Of course, none of the uses may be for commercial profit. Libraries and archives may make replacement copies of damaged, lost, stolen or deteriorated materials (even if another copy is available for purchase). Furthermore, institutions designated as “Key Cultural Institutions” may make three preservation copies of certain types of materials.

The Australian Courts have also visited these issues. In Stevens v. Kabushiki Kaisha Sony Computer Entertainment, the Australian High Court held that a technological prevention measure must prevent infringement rather than prevent access after infringement has already occurred. The Australian Digital Alliance and the Australian Libraries Copyright Committee appeared as amici curiae on behalf of the plaintiff in the case but the Court’s decision did not reference their arguments in its decision.

D. Archives Legislation

Various statutes create federal and state archives to administer government records and other archival material. The statutes dictate the sorts of records to be collected, the management protocols governing the administration of the records, and the scope of public access to the records.
The Australia Report focuses particular attention on the 1983 Archives Act, which established and now regulates the activities of the National Archives of Australia.⑩ The National Archives works to identify, collate, manage, and preserve Commonwealth records (i.e., records belonging to the Commonwealth) and to make such records available to the public, subject to restrictions set forth in the Act.⑪ Because some Commonwealth records are outside the custody of the National Archives, the Act permits the National Archives to mandate public access to some records held by other government institutions or agencies.⑫ The Act additionally prohibits the unauthorized destruction or alteration of Commonwealth records.⑬ Though the Act exempts some records from public access, it generally mandates public access to Commonwealth records 30 years after the end of the year in which the document came into existence.⑭

4.1.3 Canada: Copyright Law and Archives Legislation

Canada’s Copyright Act defines “library, archive or museum” as:

(a) an institution, whether or not incorporated, that is not established or conducted for profit or that does not form a part of, or is not administered or directly or indirectly controlled by, a body that is established or conducted for profit, in which is held and maintained a collection of documents and other materials that is open to the public or to researchers, or

(b) any other non-profit institution prescribed by regulation.⑮

Thus, the Australian and Canadian definitions of archives ⑯ share the following concepts: a collection of documents or other material controlled by or in the custody of a body that does not maintain the materials for profit. The non-commercial or non-profit characteristic of archives can also be found in article 5(2)(c) of the EU Copyright Harmonization Directive, which allows exceptions to the reproduction right with regard to specific acts of reproduction “carried out by libraries accessible to the public, educational establishments or museums, or by archives, which do not seek any direct or indirect commercial advantage.”⑰

Under the Canadian definition, the institution’s collection must be open to the public or to researchers. The Canadian report states that only one case, CCH Canadian Ltd. v. Law Society of Upper Canada,⑱ has addressed the Canadian Copyright Act’s definition of “library, archive or museum.” The Law Society maintains and operates the Great Library at Osgoode Hall in Toronto, a reference and research library with one of the largest collections of legal materials in Canada. In determining whether the Great Library was eligible for certain exceptions in the copyright law, the court interpreted the Canadian Copyright Act’s definition of “library, archive or museum” in a straightforward manner. It stated that “[i]n order to qualify as a library the Great Library: 1) must not be established or conducted for profit; 2) must not be administered or controlled by a body that is established or conducted for profit; and 3) must hold and maintain a collection of documents and other materials that is open to the public or to researchers.”⑲ The court found that the Great Library, controlled by the Law Society and indirectly controlled by
lawyers who practice law for profit, did not need to rely on the library exemption (as its dealings with publishers’ works were fair). The court reasoned, however, that it would be entitled to do so, as the Law Society lawyers were not acting as a body established or conducted for profit when acting as administrators of the Great Library.148

A, Copyright Laws That Specifically Address Archives

Copying for Preservation or Maintenance. Canada’s Copyright Act contains a privilege allowing libraries, archives, and museums to copy a work or other subject matter in their permanent collection, whether published or unpublished: “if the original is rare or unpublished and is (i) deteriorating, damaged or lost, or (ii) at risk of deteriorating or becoming damaged or lost.”149 In addition, the Act specifies several other circumstances in which a library, archive or museum may make copies without infringing copyright, including “for purposes of on-site consultation if the original cannot be viewed, handled or listened to” due to its condition or “the atmospheric conditions in which it must be kept.”150 If the original is currently in an obsolete format or the technology required to use the original is unavailable, the library, museum or archive may make a copy in another format, without infringing copyright.151

Copies for Users. Canadian copyright law similarly allows libraries, archives and museums to reproduce a copy of certain works requested by patrons for research or private study. One such provision allows a library, archive or museum (or a person acting under its authority) to make a copy of “a work that is or is contained in an article published in (a) a scholarly, scientific or technical periodical; or (b) a newspaper or periodical, other than a scholarly, scientific or technical periodical, if the newspaper or periodical was published more than one year before the copy was made” for a person requesting the copy for research or private study.152 A number of limitations exist with regard to this provision. It does not apply to works of fiction, poetry, drama or music.153 Because the provision is limited to “reprographic reproduction,” this by its nature excludes audiovisual works (an audiovisual work cannot be photocopied). The library, archive, or museum may make the copy only if the following conditions are met: the requester must satisfy the library, archive or museum that he/she will use the copy only for purposes of research or private study; and the library, archive or museum may provide the user with a single copy of the work.154 The copy given to the patron may not be in digital form, and any intermediate copy must be destroyed once the copy is given to the patron.155

None of the Canadian library, archive, or museum exceptions may be carried out with a motive of gain (thus, to benefit from the provision, the institution must not recover more than the costs, including overhead costs, associated with the act allowed under the exemption).156 These exemptions do not apply to downloading a work from an electronic database or the Internet, “even if the same article had already appeared in a newspaper or periodical.”157

B. General Copyright Exceptions/Limitations Applicable to Archives
The Canadian fair dealing exception, as interpreted in *CCH Canadian Ltd. v. Law Society of Upper Canada*,\(^\text{158}\) is considered integral to the copyright balance, rather than as an “exception” or “simply a defense.” To avail itself of this exception, a defendant must prove: (1) that the dealing was for the purpose of either research or private study and (2) that it was fair.

The *CCH* case involved, inter alia, copying services provided by the Great Library, a legal reference and research library operated by the Law Society. The Society provides a “custom photocopy service” for its members, the judiciary and other authorized researchers. The Great Library’s staff reproduces legal materials from the collection and delivers the reproductions in person, by mail or via fax transmissions to the requesters. The Law Society also maintains self-service photocopiers in the Great Library for use by patrons.

Legal publishers brought a copyright infringement action against the Law Society. On appeal, the court held that the Law Society does not infringe copyright when the Great Library makes a single copy of a reported decision, case summary, statute, or limited selection of text from a treatise in accordance with its access policy.\(^\text{159}\)

The *CCH* court noted that in the fair dealing context, “‘research’ must be given a large and liberal interpretation in order to ensure that users’ rights are not unduly constrained. . . research is not limited to non-commercial or private contexts.”\(^\text{160}\) The question of whether or not a dealing was fair is a fact-based determination which must be assessed on a case by case basis. “Fair” is not defined in the Copyright Act.

The *CCH* court adopted the following criteria as factors to consider in a fair dealing analysis: (1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the work. These factors are quite similar to those evaluated under the U.S. fair use analysis.\(^\text{161}\) The *CCH* court also stated that “a library can always attempt to prove that its dealings with a copyrighted work are fair under s. 29 of the Copyright Act. It is only if a library were unable to make out the fair dealing exception under s. 29 that it would need to turn to s. 30.2 of the Copyright Act to prove that it qualified for the library exemption.”\(^\text{162}\)

There have been a couple of important recent Canadian decisions regarding issues affecting libraries and archives. In *Zamacois v. Douville*, a newspaper was found to contain infringing work.\(^\text{163}\) Plaintiffs sought to have all copies of the edition of the paper which contained the work removed from the newspaper’s archive. The court denied the request because it found that the papers formed part of the newspaper’s archives and would not be sold. It is not clear whether the archives were open to the public or whether it would have affected the court’s decision if they were.\(^\text{164}\) In *Robertson v. The Thompson Corporation* et. al., the plaintiff sued a Toronto daily for copyright infringement.\(^\text{165}\) She also sought a restraining order against the paper in order to prevent the publisher from including the works in the paper’s electronic databases (which, interestingly, the court often referred to in its decision as the newspaper’s archives).\(^\text{166}\) The court’s decision
hinged on whether the archive’s arrangement and selection of the articles substantially reflected the look and editorial judgment of the newspaper. The Supreme Court held that the online archive did not, in fact, retain enough of a resemblance to the printed edition of the paper and, thus, the newspaper was forced to remove the offending articles from its online database. One of the threshold issues was the fact that the newspaper did not include all the articles from its print edition in its database. Furthermore, the database had a search engine that enabled users to search several newspapers at once, again altering the similarity between the printed edition of the newspaper and the archive.

C. How Provisions Relate to the Digital/ Electronic Environment

The Canadian Copyright Act was amended in 1997 to include the provisions addressing archives, and thus should already take technological changes into account. As the Canadian report notes, its legislature chose not to be more precise with regard to new technologies in the archives context. The report cites a discussion of how technology has affected the approach taken to archives. Prior to the invention of photocopiers, fax machines and microfilm:

> Researchers traveled to the archival institutions, holding the records needed to be studied, and took notes on the information relevant to their work. Modern technology has changed this. Photocopiers, fax machines and microfilm mean that a researcher does not have to spend weeks in an archives taking notes; instead he or she can spend a few days photocopying any documents that may be of interest and take them home to study at leisure. For more limited inquiries, the researcher may simply request the archives to send photocopies of the relevant documents. Accessibility no longer means simply that the documents are available for consultation in an archive; for the modern researcher, accessibility is virtually synonymous with the availability of copies.

With regard to whether an archives may make material available in digital form or otherwise, the Canadian report notes that “making available” is not currently illegal under Canadian law as Canada has not ratified the WIPO Copyright Treaty or the WIPO Performances and Phonograms Treaty. This principle was recently affirmed in *BMG Canada Inc. v. John Does*, which held that it is not illegal under Canadian law to upload music files on the Internet via peer to peer software. That decision is under appeal. In addition, the court in the *CCH* case explained that a fax transmission to an individual does not constitute a communication to the public, although “a series of repeated fax transmissions of the same work to numerous different recipients might constitute communication to the public in infringement of copyright.”

D. Archives Legislation

Canada’s archives are governed by the National Archives of Canada Act which dictates that archives be the “permanent repository of records of government institutions and ministerial records” as well as facilitate access to those records. Otherwise,
archives legislation is generally state-specific. In Ontario, for instance, the Archives Act gives the State Archives a specific mandate to preserve the history and culture of Ontario, including the state’s vital records.174 Manitoba’s archive is more concentrated on record-keeping than cultural preservation,175 while Nova Scotia’s Public Archives Act also discusses the archives role in record management.176

4.1.4 France: Copyright Law and Archives Legislation

France’s copyright law does not define “archives,” but the French law on archives does contain a general definition of the term:177

[T]he body of documents, regardless of their date, their form and their format, produced or received by any person or entity or any service or organization, public or private, in the exercise of their activity.178

The French report notes the general nature of the terms in this definition of archives—which includes the following elements, “the existence of a medium containing information, a person able to collect the mass of documents on the occasion of an activity.” The report identifies three major archival functions described in this law: “1. Archives are instruments of proof; 2. They permit good management of services; and 3. They constitute a useful record/memory for research, particularly historic research.” 179

A. Laws That Specifically Address Archives

The French report refers to several laws which contain provisions related to and defining archives, including the law on archives/records, the law on freedom of communication, the law on legal deposit and the law on confidence in the digital economy discussed below.

B. The Copyright Law’s Application to Archives

General Copyright Exceptions/Limitations

The French Code of Intellectual Property protects creative works, including writings of all kinds, photographs, drawings, etc. The French report notes that to the extent that archival records are considered to be creative works, all of the relevant copyright exceptions may apply (including citation and private copying).180

Archives’ and Libraries’ Liability for Copyright Infringement

French courts have held publishers and distributors liable for the dissemination of infringing works.181 While a publisher might be able to turn to an author for compensation if it has an agreement with him or her guaranteeing the originality of the work, our correspondents do not mention whether distributors (such as libraries) could have similar contracts with publishers, protecting them from costly litigation and damages.182 What is more of a concern to libraries in France is a ruling that an author’s
grant of rights to a periodical for publication of a work does not allow that library to use the work online. 183

Whether or not archives are liable for disseminating works that infringe copyright depends on the type of archive involved, the type of access involved and the type of work in question. 184

Public archives and the documents in their collection that are products of work conducted by the government are to be made available for public viewing without constraint. 185 When public officials create documents that could be seen as creative, the state retains the copyright in the work. If, however, the archive wants to display the document in an online collection or photocopy the document for its own use or that of a patron, they must ensure that its copyright status allows for such reproduction. 186

As discussed above, public archives may allow patrons to view the materials but not reproduce or digitize the materials unless certain requirements are met. If a patron gains access to a document and then uses it in an infringing manner, the archive would not be liable because it provided access to the material. 187 Archives that hold private materials, however, could be held liable for giving access to the material. 188

The courts, in deciding damages against an archive for the provision of infringing material to a patron, will look at the scope of the dissemination of the offending use. 189 Most cases regarding these issues are, however, settled out of court and, thus, it is hard to make any concrete statements. 190

Our correspondents report that fear of liability for copyright infringement has caused publishers to refrain from using any image that might lead to litigation. 191 While the report says private archives are much more cautious about what materials they retain and contract with donating parties to obtain any clearances necessary, it appears that public archives are less careful. 192

C. How Provisions Relate to the Digital/Electronic Environment

The French report notes that while the digital environment did not alter the principles concerning the application of copyright to archives, it did require some specific adjustments to the law. Two such adjustments under French law were the extension of the system of remuneration for private copying of digital recordings, and the prohibition of private copying of electronic databases. While these legal changes do not specifically concern archives, they affect electronic archives. 193

Pursuant to Article L332-1 of the Code of Intellectual Property, adopted on June 21, 2004, authors and their assignees may ask a magistrate to confiscate all illicit reproductions of their work and any revenues they have generated. 194 This includes suspending any online service which contains the material. 195 These sanctions would be in addition to any other penalties, including monetary damages, that might also be awarded. 196
Another law which does not directly affect archives and libraries but is nonetheless worth mentioning is the Law of September 30, 1986 which states, “The liberty of communication is only limited, to the extent necessary, on one hand by the respect of human dignity, or the liberty of others, of the pluralistic character of the expression of current thoughts and opinions and on the other hand, by preserving public order, by the needs of national defense, by the requirements of public service, by technological obligations inherent to means of communication as well as by the necessity for audiovisual services to develop audiovisual production.”

The French report also mentions the Law for Confidence in the Digital Economy which was adopted in its current form in August of 2006, reinforcing the liability of “persons or entities which ensure, even on a free basis, the making available to the public by services of communication to the public online, the storage of signals, writings, images, sounds or messages of any nature” when they are aware of the illicit character of the contents. The institutions involved can be libraries, archives or publishers, or associations collecting and holding the publishers’ archives/records. Under the legislation, once the institutions are informed of illicit content, they would be obliged to remove the document from its place online. Under Article 6 Sections 2 and 3, libraries and archives would not be civilly or criminally liable for storing information of an illicit nature at a recipient’s request if “they acted promptly to remove this information or to make it impossible to access it” as soon as they learned of its nature.

D. Archives Legislation

While the Australian, Canadian, and UK reports focus primarily on copyright law related to archives, the French report focuses on other laws in France relevant to archives. Consequently, we will discuss those French provisions in this section. Although the French Code of Patrimony seems to deal with physical manuscripts and not electronic archives, we have included it in our discussion below for completeness.

Provisions Related to Acquisition and Conservation of Material

The French report discusses a number of privileges related to archives’ acquisition and conservation of material and making the material available to the public. In France, the law provides circumstances under which public institutions and certain private institutions may acquire records/archives. The right of preemption on public sale, for example, is a privilege allowing the State, local communities, and certain associations and organizations to substitute themselves for the acquirer at auctions. This privilege is generally applicable to many categories of cultural goods that make up archives.

The Code of Patrimony specifically provides that the right of preemption may be exercised over documents from private archives. Article L212-30 and article L622-19 provide that in the case of legal liquidation of a company, “before any sale or destruction of the records/archives of the debtor, the liquidator must so inform the competent administrative authority to conserve the records. This authority has a right of
French law also allows the State to condition the export of a work/document from a private archives on the reproduction of all or part of the document when it is of interest (e.g., for historical research), and to make the reproduction.

The French report notes that several institutions are responsible for conserving archival materials in France.

(a) The Obligation to Conserve Public Documents

Specific provisions of French law relate to the obligations of archives to conserve public documents. For example, the General Code of Local Communities provides the State with scientific and technical control over regional, departmental and community archives/records. This control extends to the conditions of management, collection, selection, and elimination of documents as well as the treatment, classification, conservation and communication of the records/archives.

(b) The Preservation of Private Records by Public Archives

In cases where the State or public collections receive private archives/records, the conditions of preservation may be specified in the contracts by which the institution acquired the private materials. Article L213-6 of the Code of Patrimony provides that when the State or the collections of its territories receive private archives by gift, legacy, or revocable deposit, the depository administrations are held to respect the conditions on the preservation and communication of these archives imposed by their owners.

(c) Library and Museum Collections

French libraries and museums may also hold collections of archives/records. While library and museum holdings are generally publicly accessible, it is still possible for certain documents to be removed from public view, particularly when they contain illegal content. The French report describes provisions of the law on archives empowering the State to control the establishment, treatment, preservation and communication of collections and documentary resources of community libraries.

(d) Private Institutions Preserving Private Records/Archives

Certain private institutions insure the preservation of private archives in France (e.g., The Institute of the Memory of Contemporary Publishing is an association that collects publishers’ archives via deposit). In these cases, the obligations and terms of preservation and communication of the documents in the collection are specified by contract.

(e) Legal Deposit

The French law of legal deposit requires works to be deposited with depository institutions once they are made available to the public. The law currently applies to
“printed, graphic, photographic, sonorous, audiovisual, and multimedia works, regardless of the technical process of production, publication or dissemination.”

Software, databases and products of artificial intelligence are also subject to legal deposit. Although the law of legal deposit does not contain the term “archives,” its goals – collection, conservation, retention and dissemination of intellectual heritage, by means of national libraries, and allowing consultation with documents for research purposes – are similar to those of the law on archives. The French report notes that the question of whether websites must be submitted under the legal deposit obligation is currently being debated. The proposed law of implementation, if adopted, would modify the Code of Patrimony to add “signs, signals, writings, images, sounds or messages of all nature which are the object of a public communication online” to the types of works required to be deposited.


(a) Public Records: Administrative Documents

The French law on archives addresses access to public documents; it provides for time delays and various forms of communication ranging from simple consultation to the handing over of a physical copy. Among public records/archives, certain documents are considered “administrative documents” and are subject to a particular regime of communication. The French right of access with regard to administrative documents contains certain restrictions concerning classified information. Accordingly, the public can be denied access to administrative documents that refer to information whose disclosure could jeopardize certain public interests (e.g., secrets of the national defense, foreign politics, currency, public credit, safety of the state, public security), and certain private interests (e.g., private life, personal medical files).

The law concerning administrative documents specifically addresses copyright in the context of obligations to allow access to and communication of those documents. French law provides that the custodians of administrative documents are required to allow free consultation on the premises (unless the preservation of the document precludes it) and communication in the form of a copy to the user who requests it. The reproduction may be in the same medium as used by the administration or on paper, at the user’s preference, with the caveat that any charges (for the copy) must not exceed the cost of the reproduction. Several conditions apply. Article 10 of the Law of 1978 reconciles the right of access to and communication of administrative documents and copyright, stating: “Administrative documents are communicated subject to the rights of artistic and literary property. The exercise of the law/right to communication instituted by the present title excludes, for its beneficiaries or third parties, the possibility to reproduce, disseminate or use for commercial ends the documents communicated.”

Unlike the law on administrative documents, the law on archives does not refer at all to copyright. Questions arise with regard to terms of access and possible reproduction from public documents. With regard to access to public documents, the law on archives
provides only a right of consultation with the public records and not the right to obtain copies of them. At least one French case allowed the reproduction of public documents (notes of ministers, correspondences, etc.). Certain decisions have recognized copyright (e.g., in speeches of politicians or in the courses of professors of the colleges of France) in public documents. Other decisions have denied the author his rights. The future law of implementation should bring more certainty.218

(b) Access to and Communication of Documents of Legal Deposit

The French report discusses law related to access to and communication of the documents of legal deposit. The law specifies the conditions under which access to the documents may be gained.

Currently, French law allows a researcher in the course and within the limits of his research, to consult with documents deposited in depository institutions, provided that the researcher accesses the work on a purely individual basis (and not with a group or with a team), and the consultation with/access to the work takes place on the premises of the depository institution. Under this law, the researcher cannot access the work remotely online.219

The French report notes that the bill of implementation, which has not yet been adopted, will likely modify the current system, to make it possible for depository institutions (the National Library of France, the National Institute of the Audiovisual (INA) and the National Center of Cinematography) to accomplish certain acts that are indispensable to the mission of legal deposit, without requiring the authorization of the author.220

(c) Provisions related to the Communication of Private Archives

The French law of 1979 provides that, when the State acquires private archives/records, whether by way of gift, legacy, transfer or revocable deposit, the administration must respect the conditions to which the preservation and communication of these records/archives can be subjected, at the request of the owner.221 In practice, there is often a thirty-year period after which the communication of the documents is unrestricted. During this period, the owner can require that all communication of the materials in the archives requires his/her consent. If the contract or instrument of transfer is silent on the matter, it is up to the administration to decide the rules governing the communication of the materials in the private archive. Private archives must respect copyright, although this law does not directly address copyright. Thus, in order for private records/archives to be rendered accessible or communicated, archives must obtain the necessary authorizations.222

4.1.5 Singapore: Copyright Law and Archives Legislation

Under Singapore’s Copyright Act, nonprofit223 institutions that hold “a collection of documents or other material of historical significance or public interest . . . for the
purpose of conserving and preserving those documents or other material qualify as “archives.” Because Singapore modeled its Act on the Australian Copyright Act, this definition closely follows Australia’s.

A. Copyright Law Provisions That Specifically Address Archives

*Copying for Preservation or Maintenance* – The Singapore Copyright Act permits an archive or library to lawfully reproduce a copyrighted work that “forms, or formed,” part of its collection (i) “for the purpose of preserving the original version against loss or deterioration;” (ii) “for the purpose of replacing the work” if the “work is held in published form but has been damaged or has deteriorated;” and (iii) “for the purpose of replacing a work” if the “published form . . . has been lost or stolen.” The Act narrows this privilege by requiring “an authorized officer of the library or archives . . . after reasonable investigation, [to] ma[ke] a declaration stating that he is satisfied that a copy (not being a secondhand copy) of the work cannot be obtained within a reasonable time at an ordinary commercial price.” Separate provisions of the Act provide similarly for sound recordings and films. The Act takes care to note that a copy of an unpublished work made pursuant to either purpose (i), (ii), or (iii) and supplied to another library or archive to assist with research being conducted at the latter does not “constitute publication of the work” and thereby violate the Copyright Act.

The Act contains an additional catchall provision exempting the making of a single copy “for a purpose other than” those outlined in (i)-(iii). Though this provision seemingly invites a broad construction, no Singapore court has interpreted the exemption (or any provision specifically governing archives), leaving its scope uncertain.

Regarding acquisition, a recent amendment to Singapore’s Copyright Act allows an archive or library to circumvent a technology access control measure protecting a work not otherwise available to the archive or library for the purpose of determining whether to acquire a copy of the work. A separate provision exempts libraries and archives from the criminal liability attached to circumvention activities.

The National Heritage Board Act governs activities undertaken by the National Archives of Singapore. The Act requires that the National archives “take necessary measures to . . . preserve and restore public records.”

*Copies for Users* – Subject to several limitations, Singapore’s Copyright Act permits archives and libraries to reproduce copyrighted works in response to a patron’s request for a copy for the purpose of research or study. Some limitations apply to requests for particular types of works; others apply to any request for a copyrighted work. Under provisions similar to those found in Australian law, Singapore law allows libraries or archives to supply a reproduction of a copyrighted work to requesting libraries or archives seeking to fill a written request made by a patron of the latter.

Limitations applicable to specific sorts of works vary. For example, archives and libraries may lawfully copy an artistic work for their patrons only if the work is
incorporated into an article, thesis or literary, dramatic, or musical work for the purpose of explanation and illustration."\(^{236}\) If a patron requests that the archive copy more than a reasonable portion of a literary, dramatic or musical work (other than an article in a periodical publication), the archive must reasonably investigate the availability of a copy of the work, obtainable within a reasonable time at an ordinary price.\(^{237}\) Separate but similar provisions govern the copying of unpublished works (including films and sound recordings). Archives and libraries may reproduce such works for their patrons (even if the patron requires the copy “with a view to publication”), provided certain conditions are met.\(^{238}\)

Other limitations apply to all requests. A declaration detailing the circumstances and intentions of the patron must accompany any request for reproduction of a copyrighted work.\(^{239}\) The declaration requires that the patron affirm “that he requires the copy for the purpose of research or study and will not use it for any other purpose” and that “he has not previously been supplied with a copy of that article or other work, or the same part of the article or other work, . . . or lost, destroyed or damaged any such copy” previously supplied to him by the library or archive.\(^{240}\) Moreover, archives and libraries do not enjoy these patron-related exemptions if the “charge . . . made for making and supplying a copy . . . exceeds the cost of making and supplying the copy and a reasonable contribution to the general expenses of the library.”\(^{241}\)

Recent amendments to Singapore’s Copyright Act permit archives and libraries to digitally fill patrons’ requests. An archive may supply its patrons with an electronic copy of a work, provided the archive (i) notify its patron that “the electronic copy has been made under this section and that the article or work might be subject to copyright protection” and (ii) destroy the electronic copy made in accordance with the Act and held by the archive, “as soon as practicable after the electronic copy is communicated to the [patron].”\(^{242}\) Additionally, provided an archive acquires an article in electronic form, the archive may make the work “available online within the premises of the . . . archive in such a manner that users cannot, by using any equipment supplied by the library or archives” make an electronic copy of the work or communicate the work.\(^{243}\) Archives may also “copy” and “communicate” unpublished “thes[es] or other similar literary work[s] . . . if the copy, thesis or other work is supplied (whether by communication or otherwise) to a person who satisfied an authorized officer of the library or archives that he requires” the work “for the purpose of research or study.”\(^{244}\)

**B. General Copyright Exceptions/Limitations Applicable to Archives**

In addition to the detailed exceptions discussed above regarding the copying of works, two other copyright exceptions bear on the activities of Singapore’s archives. First, pursuant to a general exemption, archives may make back-up copies of computer software, provided the copy is used (i) by or on behalf of the owner of the original and (ii) in lieu of the original copy only in the event that the original copy is lost, destroyed, or rendered unusable.\(^{245}\)
Second, the Singapore Act provides for a defense of “fair dealing.” Research and study, criticism and review, and the reporting of current events are purposes specifically sanctioned by the defense, but other purposes may fall under the defense’s protection. In scrutinizing activities allegedly protected by fair dealing, courts examine the purpose and character of an archive’s dealing, the nature of the work or adaptation dealt with, the amount and substantiality of the part copied taken in relation to the whole, the effect of the dealing upon the potential market for the work, and the possibility of obtaining the work within a reasonable time at an ordinary commercial rate. The Singapore Report notes that no court has decided whether the defense of fair dealing applies to archives and libraries and that the legislative intent of the Act is murky, leaving unsettled the issue of whether libraries and archives may avail themselves of this defense.

C. How Provisions Relate to the Digital/ Electronic Environment

In January of 2005, Copyright Act amendments relating to activities undertaken by archives in a digital environment came into effect. We have discussed these amendments in detail; briefly, they include:

- provisions permitting archives and libraries to make electronic reproductions for their patrons;
- provisions allowing archives and libraries to make available online electronic forms of certain works;
- provisions permitting archives and libraries to communicate (electronically and otherwise) certain unpublished works to their patrons.

Each exemption is subject to certain restrictions, outlined in greater detail above.

D. Archives Legislation

Two Acts relate specifically to governmental archival activities. The first, the National Heritage Board Act, confers on the National Archives the power to secure public records for archiving purposes. Access to these public records is generally reserved to officers of the National Archives, though a member of the public may view records for the purpose of research or reference, provided she obtains written approval to do so by the director of the National Archives. The Act additionally endows the National Heritage Board with decision-making authority as to which public records may be destroyed.

The National Library Board Act governs the archival activities of the National Library. The Act mandates that the Library provide a repository for library materials published in Singapore, acquire and maintain a comprehensive collection of library materials relating to Singapore and its people, and compile and maintain a national union catalogue and a national bibliography. In addition to requiring every item published in the country to be deposited in the National Library within four weeks of publication, NLB has begun a digitization of a selection of very rare books and other library materials
which they have deemed to be of great historical significance. “This project ensures the preservation, conservation and access to such library material, by the general public in Singapore via the public libraries. These books and/or documents have been placed online on their website and can be accessed by various online users, whether they are researchers, library patrons or a fee paying member.”

4.1.6 UK: Copyright Law and Archives Legislation

Like most of the other countries we surveyed, the UK has specific provisions addressed to archives in its copyright laws. The UK’s Copyright Designs and Patents Act of 1988 (“CDPA”) does not define “archives.” Most of its relevant provisions, however, apply to “prescribed archives.” “Prescribed archives” are defined in Regulations made by the Secretary of State and described in the UK Report as follows:

(i) For the purposes of Section 43 (supply of an unpublished work to a person who requires the copy for purposes of private study or noncommercial research) all archives in the United Kingdom are prescribed . . .

(ii) Similarly, for the purposes of Section 42 (making copies of a work for preservation purposes) all archives in the United Kingdom are prescribed for the purposes of making and supplying copies, but any receiving archive must be an archive “not conducted for profit.”

(iii) For the purposes of Section 40A an archive is prescribed if it is not conducted for profit.

The UK report observes that these regulations do not provide any real guidance as to how to identify an “archive.” Thus, it might be possible, according to the report, to interpret the regulations as applying to “new forms of archives as the term expands to include, for example, online document storage services.” The issue of whether a particular collection constituted an archives would ultimately be up to a court, but, as the UK report indicates, there have been no decisions.

A. Copyright Laws That Specifically Address Archives

Copying for Preservation or Maintenance – The UK’s copyright law contains a preservation provision as well. Under this Section, a librarian or archivist of a prescribed library or archive may, under certain conditions, make a copy of a literary, dramatic, or musical work (and any accompanying illustrations or the typographical arrangement) in the permanent collection: (1) “to preserve or replace the item by placing the copy in its permanent collection in addition to or in place of it,” or (2) to replace a copy at another library or archive, that has been lost, destroyed or damaged. The replacement/preservation copy provision is limited to situations in which it is not reasonably practicable for the library or archives to purchase a copy of the item in question. This provision does not restrict the medium onto which a copy can be made. Thus, as the UK report suggests, it might be possible to rely on this Section to make a copy of a work on a CD-ROM or onto an intranet service. As this provision does not include “communication to the public” but only allows the making of a copy, the
provision would not seem to allow placing a copy of a work onto the Internet. Nor does it appear to allow copying of material from the Internet for preservation purposes, as the Regulations require that the work copied be “in the permanent collection” of the archive “maintained wholly or mainly for the purposes of reference on the premises of the library.” The Legal Deposit Libraries Act 2003 (the “2003 Act”) introduced the new Section 44A of the CDPA, which grants power to the Secretary of State to promulgate regulations regarding deposit libraries’ copying of certain works from the Internet under specified conditions. No such regulations have been issued yet.

The UK’s CDPA contains additional provisions related to copying on behalf of other libraries to maintain, preserve, or, in one case, expand the collection of a library. Section 41 of the CDPA allows the librarian of a prescribed library to make and supply a copy of an article in a periodical or part of a published edition of a literary, dramatic or musical work to another prescribed library to broaden the collection of the receiving library. The provision related to a published edition of a literary, dramatic or musical work does not apply if, when the copy is made, the librarian knows or could ascertain by reasonable inquiry, the name and address of a person entitled to authorize the making of the copy.

Copies for Users – The UK copyright law contains provisions allowing the librarian of a prescribed library to make and supply a single copy of an article in a periodical, or of part of a published work, for users who satisfy the librarian that the copy is required for non-commercial research or private study. The librarian may supply a copy only to persons that satisfy him/her that they require the copy for non-commercial research or for private study and will not use it for any other purpose. These provisions allow the library “to make and supply a copy.” This wording seems to limit the scope of the provision to the extent that the copy supplied must be the same copy as that made. Thus, as the UK report notes, while the provision does not explicitly exclude the possibility of electronic supply, the one copy requirement could preclude it.

The UK’s copyright law allows archives “to make and supply a copy of an unpublished literary, dramatic, or musical work (and any accompanying illustrations or the typographical arrangement) to a person who requires the copy for the purposes of private study or non-commercial research.” According to the Library Regulations, the researcher must provide the archives with a written, signed declaration that the work will be used for such purposes. No express restriction exists on the type of medium on which the copy can be made (e.g. the copy could theoretically be made onto a CD-ROM). Nevertheless, as the Section allows an archivist only to “make and supply a copy” of a work, it appears that the copy that is made must be the same copy supplied to the researcher. Thus, supplying a copy of an unpublished manuscript via e-mail would not qualify under this provision as the scanning of the work into a computer would involve making additional electronic copies that will not be supplied to a reader. The UK response notes that it is unclear whether this reasoning would apply where the work was already in digital form (if its scanning were legally justified). It might depend on the interpretation of the “transient and incidental” copying provision of the UK copyright law.
Under another provision of UK copyright law that deals with very old unpublished works, where an unpublished literary, dramatic or musical work has been open to public inspection in any institution in the United Kingdom, it may be copied by any person without infringing copyright in the work or any accompanying illustrations, as long as the following conditions are met: the work is over one hundred years old; the author has been dead for at least fifty years; and the copy is made for the purposes of private study or research, or “with a view to publication.” Thus, the Section allows for reproduction of part or all of a work that meets these criteria for the purposes of publishing it. Furthermore, Section 7(8) provides that if part or all of the old work is published, it will not be a copyright infringement of the work to broadcast or transmit it “to subscribers to a diffusion service.”

B. General Copyright Exceptions/Limitations Applicable to Archives

The UK report notes that the CDPA, if read literally, does not prevent an archivist copying on behalf of a reader from qualifying for the Section 29 fair dealing defense. The CDPA does specify that copying by a librarian does not constitute fair dealing if the librarian does anything under Section 40 regulations (concerning restrictions on production of multiple copies of the same material) that would not be permitted under Sections 38 and 39 (which deal with libraries making single copies of articles in periodicals or parts of published works for users who require them for private study or research). As Sections 38 and 39 only apply to libraries, the above-mentioned provision does not by its terms prevent archives from seeking to rely on the fair dealing defense when copying outside the scope of Section 38 and 39 (e.g., making a copy of an unpublished artistic work for research or private study purposes). Nevertheless, the UK report states that as a practical matter, the lack of clarity regarding the extent to which copying an unpublished work or all of an artistic work for the purpose of research or private study is fair, deters librarians and archivists from relying on fair dealing.

C. How Provisions Relate to the Digital/ Electronic Environment

The UK exceptions have not been amended to address changes in technology. Our UK consultants report that while the UK exceptions continue to function in the digital environment to some extent, they do not permit certain activities, as discussed below.

The UK exceptions related to libraries and archives were developed to deal with physical copies, in response to the threat of photocopying. Although they do not restrict the format in which a copy may be made, their wording does not cover activities in the digital context that could be considered functionally equivalent to acts allowed in the hard copy world. For example, the exceptions’ current limitation of a single copy, precludes supplying works by electronic copies or lending documents via electronic transfer (even where the recipient destroys his/her copy when finished with the work).

D. Archives Legislation
The UK still awaits regulations made pursuant to the Legal Deposit Libraries Act of 2003. The Act’s designers intended to protect activities undertaken by six UK “legal deposit” and/or “copyright” libraries in moving to non-print forms of publication. Importantly, the Act permits persons acting on behalf of these libraries to copy works made available online without infringing the owner’s copyright, provided the copying complies with regulations promulgated under the Act. No such regulations, however, have been issued.

4.1.7 Adequacy of Current Copyright Law

As is evident from the discussion above, copyright laws around the world have not kept pace with advancing technology. In some countries the ability to create and maintain digital archives is limited by restrictions on use adopted long ago that are simply unworkable in the context of digital technology. Countries such as the United States are reexamining their laws to provide libraries with greater latitude in using technology for digital preservation in a way that will not threaten the ability of authors and publishers to earn their livelihood from writing and publishing works of authorship.

4.2 Moral rights

Moral rights (or droit moral) protect the personal or reputational interests of the creator of a work. The principal international copyright treaty, the Berne Convention for the Protection of Literary and Artistic Works, requires member countries to recognize two moral rights: the right of attribution (the right of an author to have her name associated with her work), and the right of integrity (the right of an author to prevent any mutilation or distortion of her work prejudicial to her honor or reputation). Some countries also recognize additional moral rights, such as the right of withdrawal.

4.2.1 US: Moral Rights

In joining the Berne Convention, the United States relied on an amalgam of laws to claim that it provided moral rights to authors, including the "derivative work" provision of the Copyright Act, federal and state law dealing with trademarks and unfair competition, the rights of privacy and publicity, the law of defamation, and moral rights statutes in California and New York. In 1990 Congress added a moral rights provision to the Copyright Act. Section 106A grants the right of attribution and integrity to authors of works of visual art. However, a “work of visual art” is defined narrowly to include only photographs, paintings or other artworks that exist in a single copy or a limited edition of 200 or fewer, numbered and signed by the author. There are many exclusions from this definition, and the rights provided by Section 106A do not apply to any reproduction of a work of visual art in a magazine, periodical, database, electronic information service, or electronic publication.

Section 1202 of the Copyright Act, passed as part of the DMCA, provides protection for “copyright management information.” Copyright management information
includes certain information conveyed in connection with copies, performances or displays of a work (including in digital form), such as the title, the names of the author, the copyright owner and performer, terms and conditions of use, and other identifying information. Although Section 1202 is not a true “moral rights” provision – it provides no affirmative duty to attach the author’s name to the work – it can protect against removal or alteration if the name is included as part of the copyright management information.

Under Section 1202, it is illegal to provide or distribute false copyright management information “knowingly and with intent to induce, enable, facilitate or conceal infringement.” It is also illegal to intentionally remove or alter copyright management information without authority, or to distribute works knowing that the copyright management information has been removed or altered, knowing or having reasonable grounds to know that it will “induce, enable, facilitate or conceal infringement.” Given the high threshold for liability under Section 1202, the possibility of a digital archives incurring liability is remote. Moreover, nonprofit libraries, archives and educational institutions are not liable for damages if they demonstrate that they were not aware and had no reason to believe their acts constituted a violation of the law.

4.2.2 Australia: Moral Rights

Under the Copyright Amendment (Moral Rights) Act 2000, Australia instituted moral rights for all literary, dramatic, musical and artistic works and films. The country acknowledges an author’s right to attribution, a right not to have authorship falsely attributed and an author’s right to the preservation of the integrity of his work. Our correspondents note that because librarians tend to remove potentially offensive materials from their collections rather than face possible suit, libraries and archives in the country tend to hire the creators to plan exhibits or ask them to create any derivative works needed.

Perhaps because of these precautions, Australian courts have seen few claims based on moral rights. Those that have been brought have concerned relatively minor offenses such as poor color matches or improper attribution. Moral rights in Australia cannot be assigned and can only be held by individuals. Artists can, however, contract to allow an act to be performed that would normally not be allowed. Creators who have created works not as part of their employment may agree to provide a written consent to an act or omission that, without said consent, could be an infringement of his or her moral rights. Contributors to film and video projects may agree to waive their rights even before their work on a project has completed – they do not have to have finished creating the work nor do they have to specify the work that may be created as a result of their contributions.

Australian copyright law does not have a work-for-hire doctrine; employees have the same rights as non-employees to exert their moral rights.
4.2.3 Canada: Moral Rights

Canadian law does not grant creators a right of withdrawal – the right of an author to remove one’s work from circulation.294 According to our correspondents, however, there has been no case where this issue has gone to trial.295

But Canada does give the creator some moral rights including the right to the integrity of the work, the right of attribution and the right to remain anonymous.296 Since infringement of moral rights is only deemed to have occurred if the work is altered “to the prejudice of the honour or reputation of the author” it is unlikely that an archive would, in the normal course of business, infringe.297 Moreover, under Section 28.2(3) of the Act, “steps taken in good faith to restore or preserve the work shall not, by that act alone, constitute a distortion, mutilation or other modification of the work. Under the Act, moral rights may not be assigned but may be waived, in whole or in part.298 Where moral rights are waived in favor of an owner or licensee of the work, that owner – and anyone who is authorized by the owner or licensee – may invoke the waiver of the moral rights attached to the work.299 Any act that might infringe on a moral right is presumed to do so absent contrary indications from the author.300

Remedies for the infringement of moral rights include all penalties applicable to any violation of copyright including injunction and damages.301

4.2.4 France: Moral Rights

France has a strong commitment to moral rights. The law acknowledges an artist’s right to attribution, the right against false attribution, the right of integrity of the work and the right of withdrawal.

While an author has no right to withdraw a work once he has transferred the physical item,302 this does not mean that the work can be put online.303 Furthermore, an author cannot use the right of withdrawal for a purely economic motive. An author must compensate those who are harmed by his exercise of this right.304 There are further restrictions on civil servants who have created works in the course of their employment. Our correspondents believe civil servants cannot oppose access to the document in a public archive as the public interest in the document would outweigh any challenge.305 Article 17 of the Intellectual Property Code further enjoins the civil-servant author from opposing any modification of his work if the public is better served by the modification and the change does not harm the creator’s honor or reputation.306 He or she can also not exercise his or her right of withdrawal without permission from his or her superior.307

Generally, authors cannot contract away their moral rights and, thus, our correspondents raise concerns about new licensing regimes (e.g. Creative Commons) which allow one to waive the right to modification of the work.308 Publishers, too, are not allowed to modify an author’s work without his or her permission.309 This includes instances where the publisher believes the author’s work includes content that could be
defamatory or infringing. All the publisher can do in cases where the author does not consent to the change is refuse to publish the work.\(^\text{310}\)

4.2.5 Singapore: Moral Rights

Singapore authors do not benefit from moral rights except the right of false attribution.\(^\text{311}\) Others may not alter an author’s work and put it forth as unaltered or “publish, sell or let for hire . . . a reproduction of the work as being a reproduction made by the author of the work.”\(^\text{312}\) The country does not abide by Article 6bis of the Berne Convention and does not have the right of integrity or the right of paternity.\(^\text{313}\)

4.2.6 UK: Moral Rights

Copyright law in the UK does not provide for a right of withdrawal but it does provide for three statutory moral rights: the right of attribution, the right against false attribution and the right of integrity in the work.\(^\text{314}\)

The right of libraries and archives to make copies is limited by moral rights. A library might be liable for supplying a falsely attributed work\(^\text{315}\) as moral rights can be invoked when the mistakenly attributed, unattributed or altered work is communicated to the public (provided the work does not fall under the Copyright Act of 1956 as discussed previously).\(^\text{316}\)

Libraries may also unwittingly expose themselves to potential liability in creating a digital collection if they do not impose a process to ensure that moral rights in all posted works are properly preserved. This is because, with regard to literary works, liability for infringement of the right of paternity and the right to object to derogatory treatment attaches when the work is published commercially, performed in public or communicated to the public.\(^\text{317}\) Section 20 of the Copyright Act defines ‘communicate to the public’ as communicating via electronic transmission. Thus, our correspondents believe that, while a library or archive would not be liable for infringement of moral rights for holdings in a traditional collection, they could encounter liability issues if their collection is digitized.\(^\text{318}\)

Since moral rights are a new addition to British law – the rights of attribution and integrity were only introduced in 1989 – these issues have not played out in the courts.

4.3 Defamation

Generally, defamation occurs when a person communicates false statements that injure the reputation of another. There are, however, important variations from country to country on such matters as the defenses that are available to a claim of defamation, the assignment of responsibility for proving elements of a claim such as “truth” or “falsity,” and the nature and scope of the likely remedies. All of these factors are important in assessing potential liability.
4.3.1 US: Defamation

Defamation is a state law cause of action, and can vary in some respects from state to state. We have focused in this section on New York law, but included references to the law of other states where relevant to the potential liability of libraries and archives.

Defamation embraces two torts. Libel occurs when defamatory statements (i.e., statements false and injurious to another’s reputation) are published in writing, and slander occurs when defamatory statements are made in spoken words or non-written forms of communication. In order to reconcile the law of defamation with the First Amendment, the courts have held that public figures must meet a higher burden of proof and can prevail in a lawsuit for defamation only if they demonstrate that the false statement was made with “actual malice,” that is, with knowledge that the statement was false or with reckless disregard of whether it was false or not. Also for constitutional reasons, most courts hold that plaintiff has the burden of proof in proving the alleged defamatory statement to be false, regardless of whether the defendant is a public or a private figure. There are a number of defenses to defamation under the law (e.g., truth, pure opinion), as well as privileges and qualified privileges (e.g., fair reporting).

Publishers of defamatory statements may be liable along with the original speakers. Actual malice on the writer’s part will not be imputed to the publisher, whose state of mind must be assessed separately. Distributors and vendors are not liable unless they know or have reason to know of the defamatory content in the material they distribute.

Libraries are traditionally considered distributors. “The requirement that a distributor must have knowledge of the contents of a publication before liability can be imposed for distributing that publication is deeply rooted in the First Amendment,” and libraries enjoy this higher standard of liability as long as they do not exercise editorial control over the materials they distribute. Thus a library would not be liable for any defamatory remarks contained in the collections it currently holds if the library took no active role in editing the collections and neither knew nor had reason to know of any defamatory material contained in them.

The statute of limitations for a libel claim is typically one year from the date of publication. The date of publication is “the date on which the libelous work was placed on sale or became generally available to the public.” New York follows the “single publication rule” whereby any “single integrated publication, such as one edition of a newspaper or book… gives rise to only one cause of action, regardless of the number of times it is exposed to different people.” The statute of limitations runs from the date of the single publication, even if the work remains available to the public for some time thereafter.

Many states have retraction statutes that provide for a limitation of damages if a defamatory statement is promptly retracted. Those statutes vary from state to state and
do not apply to all defamation defendants. They generally require the publication of a statement of correction or retraction.\textsuperscript{329}

It is well-settled that the dead cannot be defamed – in other words, statements about individuals who are already deceased cannot give rise to any defamation liability. Nor can relatives of an individual who is insulted after his death bring a claim for defamation in the name of the deceased or one alleging ancillary harm to their own reputations.\textsuperscript{330}

The remedy for defamation is damages, and the courts generally will not issue non-damage remedies. Nevertheless, publishers may be motivated to issue retractions or even to remove material, where it is possible to do so, to avoid a suit or mitigate damages.

Even if a library were not the original publisher of a work, digitizing it and posting it online could be considered a “republication” of defamatory material. A republication of defamatory material through a deliberate redistribution of a new edition begins the statute of limitations running anew.\textsuperscript{331} Whether a defendant has effected a republication is determined on a case-by-case basis.\textsuperscript{332} Republishers, however, are entitled to rely on the veracity of material culled from other publishers, absent a showing that they had or should have had suspicions about the original source’s accuracy.\textsuperscript{333}

New York’s highest court has explained that the republication exception to the single publication rule is justified where “the subsequent publication is intended to and actually reaches a new audience.”\textsuperscript{334} Where a defendant posted allegedly defamatory material to its website, the court held that there was not a republication for defamation purposes each day that material was available on the website merely because defendant regularly added new, unrelated material to the website. The statute of limitations ran from the item’s initial posting.\textsuperscript{335} However, on remand the appellate court ruled that plaintiff had stated a cause of action for republication where the state library moved the material to a different internet address as part of its website revision project.\textsuperscript{336}

Even if a library were found to be a publisher of online content, it could be immunized from liability by the federal Communications Decency Act (“CDA”). The CDA creates a federal immunity from defamation liability for interactive computer service providers.\textsuperscript{337} Section 230(c)(1) of the CDA states:

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

The CDA was designed to promote freedom of speech online by minimizing government interference with internet communication, and to encourage self-regulation of content among internet service providers by removing the legal consequences attached to the exercise of editorial control, which previously could trigger “publisher” liability.\textsuperscript{338}
Under the CDA, the question is not whether a library is a publisher or a distributor, but whether a library is an “interactive computer service provider” or an “information content provider.” The CDA provides the following definitions:

The term “interactive computer service” means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.\(^{339}\) (Emphasis supplied.)

The term “information content provider” means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.\(^{340}\)

Thus the statute immunizes libraries acting as providers of an “interactive computer service” that allows patrons to access information via the Internet, so long as the information they provide was prepared by “another information content provider.” [emphasis added] \(^{341}\)

Under the broad definitions in the statute, a library or archives appears to occupy the role of “service provider” rather than “content provider” for patrons who use its website to access the online collections to which it subscribes. Although the definition of an “information content provider” is also broad, it apparently would apply not to a library or archives but to the organizations that first created the collections’ content.

The leading case on immunity under the CDA, Zeran v. America Online, Inc., found that the statute immunizes internet service providers from both “publisher” and “distributor” liability for defamation.\(^{342}\) The Fourth Circuit in Zeran called distributor liability “merely a subset, or a species, of publisher liability” which was therefore precluded by Section 230(c)(1)’s reference to a “publisher or speaker.”\(^{343}\) The California Supreme Court reached a similar conclusion in Barrett v. Rosenthal,\(^{344}\) decided in 2006. The court in Barrett interpreted the CDA to immunize even a distributor who actively selected and posted disparaging material. The court acknowledged that “[a]t some point, active involvement in the creation of a defamatory Internet posting would expose a defendant to liability as an original source.”\(^{345}\) In the court’s view, however, republishing an article without changes did not indicate active involvement.

We are not aware of any case that applies the CDA to a library with regard to defamatory content in its own online collections or databases. One California case applied the CDA to preempt claims brought by a parent whose child had accessed pornography through a library internet connection.\(^{346}\) However, assuming that the Barrett interpretation of the CDA prevails, it appears that as long as the library or archives can claim that it is the provider of an interactive computer service and the defamatory material originated with another content provider, it will enjoy immunity. This is a very fluid area of the law, however, so libraries and archives must be cautious in
how they make available material known to be defamatory. Also, as discussed below, there are additional risks in making such material available in other countries whose defamation law is not limited by First Amendment considerations.

The CDA applies to other types of liability a service provider might incur with respect to the transmission of information, except for copyright infringement (addressed by Section 512, discussed above) and criminal liability.347

U.S. and UK defamation law is often compared. Their laws differ in some important respects, and defamation plaintiffs generally prefer to bring suit in the UK if possible.348 The UK’s defamation laws will be discussed further below but in the UK, for example the defendant tends to have the principal evidentiary burdens – for example, it is the defendant’s burden to demonstrate the truth of the disputed statement. In addition, defenses are more narrowly construed. As a result, it is easier to succeed in a claim for defamation in the UK, although the damage awards in a successful suit tend to be significantly lower than they are in the U.S.349

4.3.2 Australia: Defamation

In 2006, each Australian state ratified uniform defamation statutes which supplement the national common law and apply to all materials published after January 1, 2006.350 Previously, defamation had been defined by each state individually. Defamation is defined as disparaging remarks that intimate moral culpability, lower one’s estimation in the public eye or make one subject to ridicule.351 While the burden of proof is on the plaintiff, there is a wide spectrum of defendant liability. A defendant may be liable even if he or she was not the original source.

Two of the main defenses to defamation in Australia do not seem to help archives wishing to preserve controversial documents for the historical record. The Innocent Dissemination defense requires that the archive have no knowledge of the defamatory content in the materials it holds and this lack of knowledge must not be due to negligence.352 While this might protect libraries from liability for initially carrying a newspaper with a defamatory article in it, it does not do much to help libraries or archives who wish to preserve the piece for the historical record.353 In Thompson v. Australian Capital Television Pty Ltd.354 the High Court of Australia held that a television broadcaster who re-transmitted a program produced by another broadcaster was nonetheless liable for its defamatory content because it had had the opportunity to vet the program prior to broadcast. This decision has led commentators to believe that internet intermediaries who host content, such as internet service providers, will not be allowed to use the Innocent Dissemination defense due to a technical, even if impractical, ability to control the material they disseminate.355

The Broadcasting Services Act (1992) may provide more protection for online archives and libraries but it has not been tested in the courts and, again, only applies to content which the archive does not have reason to believe is defamatory. The Act states that no law may require an Internet content host to monitor or keep records of content

50
that it hosts. It defines “internet content host” as a person who plans to host any data kept on a data storage device that is available for access using an internet carriage service. It provides protection to those repositories provided they had no knowledge nor should have had any knowledge of the offensive materials. Thus, it appears that the defense would apply if a library unwittingly disseminated defamatory materials, but not if it actively selected and continued to make available materials removed by the original publisher.

The Defamation Acts created a new statutory defense where publication is made to a person with an interest in a particular subject and the publication of such utterance is reasonable under the circumstances. Libraries and archives might have a defense as long as there is limited access granted to the material, that access is for scholarly and research purposes only and the content is labeled as being subject to an allegation of defamation.

4.3.3 Canada: Defamation

Defamation is a provincial tort in Canada, generally encompassing libel and slander. Generally, defamation is the act of harming another’s reputation by saying, writing or otherwise supplying information about an individual that attacks the person’s character or good name. To establish defamation, a plaintiff must show the words to be defamatory – that they had the potential to lower esteem or respect for the plaintiff in the minds of the ordinary person. They must be communicated or repeated to a third person and they must be reasonably understood as referring to the plaintiff.

Case law surrounding the dissemination of defamatory materials relies, according to our correspondents, on a decision handed down in 1900 by the Queens Bench. This case lays liability for defamation on every person who takes part in the publication, including writers, editors, printers and distributors. This wide swath of liability is tempered by the Innocent Dissemination Defense. As described in *The Law of Defamation in Canada*, vendors, carriers, librarians and other distributors who play a subordinate role in the dissemination of defamatory materials are not liable provided they have no knowledge nor have any duty of knowledge of the alleged defamatory material. Furthermore, anyone who publishes a defamatory libel that they know is false faces up to five years in prison.

4.3.4 France: Defamation

Defamation is defined as “any allegation or implication of a fact which undermines the honor or reputation of the person or body to whom the act is defamation. The direct or indirect publication by means of reproduction of the allegation is punishable . . .” Defamation requires bad faith on the part of the person who issues the defamatory statement. A showing of good faith will absolve the author of the work but not the publisher.
France has a Law of the Press which governs “crimes and offenses committed by the press or any other means of publication,” including defamation. Our correspondents report that the concept of publication is broadly interpreted and includes not only audiovisual communication but also any electronic communications. Defamatory materials on the Internet, however, seem to be dealt with under different provisions of law.

One of the first differences between defamation in print and defamation on the Internet is the statute of limitations. For defamation on the printed page or through audiovisual or electronic communication, the statute of limitations is three months from the commission of the offense. Our correspondents report that some French courts have ruled that the offense of defamation on the Internet is continuous and, therefore, has no statute of limitations, but the Conseil constitutionnel (or Constitutional Council) has censured this ruling saying it makes an unjust distinction between the written press and the press which utilizes the Internet and is overly harsh. It seems that, in any case, the term of the statute of limitations varies depending on the type of material on the Web. For material which is originally published online and not in another medium, the statute of limitations begins when the material first appears on the Web. Of most import to archives, however, is the ruling that the statute of limitations starts anew for materials originally in printed form that are posted online. The Paris Cour d’appel has ruled that, when they place their materials online, libraries are attempting to attract patrons and are not merely using the Internet as a repository for preservation. Thus, they argue, the statute of limitations should begin again with each new publication. This idea concerned French lawmakers and is addressed in the Law for Confidence in the Digital Economy. Under this law, materials that are first published in a fixed medium and then put online would not have their statute of limitations renewed. This has met with opposition, however, and it is uncertain where the law currently stands.

When determining liability, the Law of the Press cites publishers as the party principally responsible for the dissemination of offensive information. An author can, however, indemnify a publisher although it is unclear whether these indemnifications would hold up in a court of law. Interestingly, our correspondents believe that archivists would be considered publishers under the law because of their active role in providing content. They note that no judicial analysis has been done on this issue, however.

In determining remedies, the courts will not take an archive’s non-profit status or good faith into consideration when determining whether or not the institution infringed on someone’s rights.

4.3.5 Singapore: Defamation

The test for defamation in Singapore is set forth in Aaron v. Cheong Yip Seng and further clarified in Chiam See Tong v. Ling How Doong. These cases define defamation as words that tend to lower the plaintiff in the estimation of right-thinking
members of society generally. There seems to be no definition of what a right-thinking member of society, is, however.

Of particular concern to libraries and archives is Singapore’s definition of publication. Our correspondents report that a library’s or archives’ mere holding of defamatory materials would not be considered a publication but making them available to the general public would. They report that those who are merely involved with the circulation of defamatory materials have been held to be publishers. It appears that anyone with a tangential connection to the offensive material may be charged with defamation.377

There are a number of defenses to the tort. For example, in *Chen Cheng v. Central Christian Church* the court ruled that if the words complained of were comments based on fact and on a matter of public interest - and provided they were of such a nature that a fair-minded person might honestly make them on the facts proved – a defense of Fair Comment may be used. Our commentators believe, however, that whether or not a defendant was successful in a suit would depend on the circumstances under which the statement was made and the context of the entire article.378

Truth is also a defense to defamation but the language of the Defamation Act is rather complex. The Act states that the truth of every charge does not need to be proven provided the words not proved to be true do not materially injure the plaintiff’s reputation.379 This defense, like the defense of Fair Comment, is negated by evidence of malice.

There is a defense of Qualified Privilege but it is quite limited. There must be circumstances that give rise to a legal, social or moral duty to make the statement and a corresponding interest or duty to receive the statement.380 The fact that people who might not have a need to receive the information also receive it does not on its face negate the privilege but malice aforethought does.

Singapore also allows those who claim they innocently published defamatory material to attempt to negotiate a private settlement with the defamed. If the plaintiff rebuffs the defendant, the defendant can prove the statements were made innocently, that he made the offer and is willing to still commit to the terms of the offer. According to our correspondents, this offer is one prong of the innocent dissemination defense. It is worth noting that words are treated as published innocently if the publisher did not know that the words were defamatory on their face, that they could be considered defamatory that the words could be understood to refer to the plaintiff and that the defendant exercised all reasonable care in relation to the publication.381 Importantly, the defense does not apply in relation to the publication by any person of words of which he is not the author unless he proves that the author wrote the words without malice.382

Any intent to cause harm negates any defense to defamation and is punishable by up to two years in jail. Any person who sells or distributes material known to be defamatory is considered equally liable with the original publisher.
Our correspondents noted that there are situations in which newspapers have settled defamation suits before litigating the case, such as a 2002 case involving Bloomberg LP and an allegedly defamatory article they published regarding the Prime Minister’s daughter-in-law.  

4.3.6 UK: Defamation

If a library in the United Kingdom is the recipient of materials that have been alleged to be defamatory, the normal practice is for the library to remove the material until such time as the cause of action has “disappeared through passage of time.” British law does not distinguish between publisher and archive. All that is required is for the defendant to be a party to the communication of defamatory material. Those peripherally involved in the communication do have a defense under the Defamation Act 1996 (Section 1) which exempts anyone (except the author, editor or publisher) who did not know or have reason to know that the material could contain defamatory material. To be able to use this defense, the archive must have some monitors on incoming material – which may not be feasible in a real world application. Our correspondents believe, however, that an archive could be considered an editor of a work as the law includes those who make the decision to publish under the umbrella of ‘editor.' Publishers are defined as those who issue material to the public. According to our correspondents, it is possible that those – especially those who host Internet indexes – may be considered publishers. Finally, our correspondents report that it is possible an archive would be a responsible party if it retains “inherently scurrilous” publications in its collections. This raises the question of whether a library is risking liability merely by subscribing to certain publications such as tabloid newspapers or by ordering certain authors’ works and what kind of chilling effect this law produces.

It is interesting to note that the placement of a warning on materials that could possibly be deemed offensive may be enough to stave off liability as the courts would interpret this as an act of good faith.

In determining liability, courts are influenced by the scope of public access to the materials. So it is possible that if an archive keeps materials solely for preservation purposes or with limited access, it may have a reprieve from liability. There is also an exemption for communications necessitated by a duty or interest, but this appears to be very limited. Also, the courts have found that where the material is communicated to the masses (such as when on public display, one would assume), this defense is lost.

Finally, it is important to note that our correspondents believe that if the courts deem an article defamatory and an archive continued to hold the publication (even if only to preserve it) the archive could be considered a publisher and held liable for defamation. The only indication that the archive might avoid some liability is the 2002 decision Loutchansky v. Times Newspapers Ltd. in which the judge noted the social value of
archives and the fact that they are not the primary means of dissemination of contemporary materials and concluded that they should not be held to the same standards as ordinary publishers. In that case the court also ruled that each time the article in question was accessed from the newspaper’s own archive, the newspaper would be liable anew for defamation. It decided that the defense of qualified privilege did not apply because the newspaper did not act in accordance with the standards of responsible journalism.

Archives and libraries that retain defamatory materials have been held liable and forced to pay damages although such actions are rare. In *Vitzelly v. Mudie’s Select Library Ltd.*, the library in question was held liable for defamation because it was deemed negligent in failing to be aware of advertisements placed by the publisher in the *Publisher’s Gazette* (a trade newspaper) and *The Athaeneum* and retained the papers in its collection. Since this case is more than a century old, however, it is unclear whether libraries would be held to the same standard today. In fact, an 1896 case involving the British Museum held the Museum negligent but not liable because of the Museum’s “vast public duty” to receive all books available. Whether the British Museum has a greater exemption than other archives due to its nature as the country’s main repository has not been addressed in case law. Because the British Library acquires approximately 2.5 million items per year, it is not feasible for it to screen all items for potential liability. In general, our correspondents report that libraries are loath to take materials out of circulation unless compelled by the courts. It should also be noted that, in the UK, there is no remedy of recalling offensive materials.

Internet distributors seem to be a common target of suit in Britain because they do not have the means necessary to defend such a suit. Also, because they do not generally feel as great a duty to maintain the integrity of their sites as libraries and museums, the most common way Internet hosts deal with complaints is to take the potentially offensive material off the web page. Many of the complaints Internet hosts encounter come from corporations sensitive to unflattering information, which might make things particularly difficult for an archive that includes business materials.

There is one case that highlights many of the issues faced by British archives. In *Aldington v. Tolstoy*, a pamphlet accused Lord Aldington of complicity in war crimes. The pamphlet was found to be defamatory and Lord Aldington was awarded significant damages. His attorneys sent letters to libraries indicating that the book on which the pamphlet was based was also part of the defamation suit and that any library which continued to lend the book was opening itself up to liability. Most libraries that received this letter refused to lend out the book thereafter. “Today,” our correspondents write, “it remains impossible to borrow a copy – although, strangely, it is easy to buy one – despite the fact that Lord Aldington is now dead and no liability could arise.” It does seem as though there is a great chilling effect.

### 4.4 Mistake of Fact
In some jurisdictions, the unintentional publication of inaccurate information can lead to liability.

4.4.1 US: Mistake of Fact

The general rule in the United States is that publishers are not liable for mistakes of fact. *Winter v. G.P. Putnam’s Sons* illustrates this principle. Plaintiffs used The Encyclopedia of Mushrooms published by Putnam in collecting wild mushrooms and determining which were safe to eat. As a result of erroneous information in the book, plaintiffs ate a type of mushroom that caused them to become critically ill. They sued Putnam for products liability, negligence, and a host of other claims. The court granted summary judgment for the publisher, concluding that the threat of such liability would have a chilling effect on the free flow of information and ideas.

One exception to this rule is aeronautical charts. Courts tend to treat aeronautical charts that graphically depict geographical features or instrument approach information for airplanes as a product for purposes of products liability law, much like they would treat a compass.

One other exception to the general rule deserves mention. *Rice v. Paladin Enterprises, Inc.* was a civil action for wrongful death involving a murderer who followed the advice in a detailed and graphic how-to book about being a killer for hire. The court refused to dismiss plaintiff’s claim that the publisher aided and abetted the murder. The court acknowledged the general rule that publishers should not be liable for harm that results from the use of “how to” books, but distinguished the case on the facts. It concluded that “the notable absence from the text of the kind of ideas for the protection of which the First Amendment exists, and the book’s evident lack of any even arguably legitimate purpose beyond the promotion and teaching of murder, render this case unique in the law.”

4.4.2 Australia: Mistake of Fact

Australian law penalizes negligent misstatement in circumstances where the defendant is in a class of people who are owed a duty of care and it was reasonable for the reader (as a member of the class to which the paper owes a duty of care) to rely on the comments. Our correspondents also believe that the prohibition against corporations engaging in misleading or deceptive conduct would not apply to libraries because of an exemption for those who carry on the business of providing information.

4.4.3 Canada: Mistake of Fact

The Canadian courts have ruled that truthfulness is but one factor in deciding whether to hold a newspaper liable for libel. At least one court has also held a newspaper liable when it wrongly linked the plaintiff to a criminal charge and published an incomplete retraction. And in a lower court case, a telephone company was held
liable for lost profits when it listed a competitor’s number for a business rather than the proper advertiser.416

4.4.4 France: Mistake of Fact

A publisher can be sued for inaccurate information in a work, based on Articles 1382 and 1383 of the Civil Code.417 It appears, however, that a publisher can turn to the author for indemnification.418

4.4.5 Singapore: Mistake of Fact

Our correspondents in Singapore did not report on this issue.

4.4.6 UK: Mistake of Fact

The UK report does not specifically discuss issues of mistake of fact but does note that the Consumer Protection Act 1987 imposes liability on the producer of defective products that cause injury to the consumer.419 They note that libraries and archives could be potentially liable under this Act but the circumstances are so attenuated as to make it seem very unlikely.420

4.5 Invasion of Privacy

Most countries have laws that protect individuals from the disclosure of certain types of private information, although those laws vary considerably.

4.5.1 US: Invasion of Privacy

Privacy law in the United States encompasses four separate torts:421

(1) Intrusion into the solitude of another. The intrusion need not be physical and encompasses intrusion into the private affairs and concerns of that individual.

(2) Publication of private facts. In some cases courts have found liability for the publication of factual material under circumstances that were highly offensive or embarrassing. Although the First Amendment will usually protect the publication of truthful information lawfully obtained, the courts have declined to hold that publication of truthful information can never be punished.422

(3) Publicity that casts someone in a “false light.” To be actionable, the “false light” must be something that would be “highly offensive to a reasonable person” and the defendant must have known or acted “in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.” There is a significant overlap between this tort and defamation, though it is possible to be cast in a false light without technically being defamed.423
(4) Appropriation of an individual’s name or likeness. Usually this tort arises where the defendant makes use of someone’s name without permission for commercial or advertising purposes, but it can apply whenever the use is for defendant’s “own purposes and benefit.”\textsuperscript{424}

Common law privacy rights can vary from state to state, and some states (like New York) do not recognize all of the causes of action.

In many respects privacy law is similar to defamation law. (In fact, in some cases a “false light” privacy claim is pleaded in the alternative to a claim for defamation.) As with defamation, the remedy for a “false light” privacy claim or one based on publication of private facts is almost invariably money damages.\textsuperscript{425} Courts will more readily issue injunctions in cases involving physical intrusion or commercial appropriation of another’s name or likeness.

Where internet distribution of digital material is concerned, Section 230 of the CDA (discussed above in section 4.3.1 in connection with defamation) could immunize libraries and archives from common law privacy claims with respect to internet content that they had no role in creating or developing but obtained from another content provider.

\textit{Personal Data Protection Laws}

Another group of laws that fall within the broad category of “privacy laws” are those that protect the security of personal data and information. The United States, unlike the European Union and other countries, has no comprehensive law to protect the confidentiality of personal data. We do, however, have a patchwork of laws that protect various kinds of personal information from various types of uses. For example:

\begin{itemize}
\item The Privacy Act of 1974\textsuperscript{426} protects personal information held by U.S. government agencies. It allows individuals to see records that agencies have compiled about them; requires government agencies to comply with certain “fair information practices” in collecting and maintaining personal data; restricts the way in which government agencies can share data with the public and with other government agencies; and allows individuals to sue government agencies for violating its provisions.

\item The Fair Credit Reporting Act\textsuperscript{427} restricts the manner in which information contained in credit reports may be made available, and permits individuals to access and challenge inaccuracies in their credit reports. Individuals may sue for violations of the Act and collect damages, but creditors and reporting agencies are immune from suits based on defamation, invasion of privacy or negligence unless the information was furnished with malice or with “willful intent to injure” the consumer.\textsuperscript{428}

\item The Health Insurance Portability and Accountability Act of 1996 (HIPAA)\textsuperscript{429} required the Department of Health and Human Services to promulgate regulations to address the privacy of medical records. The regulations do not cover all health and
medical records, however, but only those maintained by health care providers, health plans, and health care clearinghouses. There is no private right of action under HIPAA.

There are many other federal and state statutes that govern the privacy of personal data, including laws dealing with identity theft, children’s privacy, motor vehicle records, video rental and purchase information, etc. Even though many of these statutes would not provide a right for an individual to sue a publisher, certain types of protected, private information (e.g., medical information) could be the subject of a state law privacy claim.

One possible situation in which privacy issues might arise for scientific, technical or medical journal articles, is where the identity of the subject of a social science or medical study or procedure is inadvertently disclosed. Such disclosure could be a violation of a privacy right; it could also be a violation of a contractual undertaking by the researcher not to reveal individual identifying information.

4.5.2 Australia: Invasion of Privacy

Australia’s Privacy Act of 1988 governs rights regarding having one’s personal records sealed from public view. The Act applies to both public and private archives. It regulates access to and maintenance of the “collection, storage and accessibility of personal information [contained in records] or an opinion (whether true or not) and whether in material form or not about an individual whose identity is apparent or can be ascertained.” Those materials held in a library or museum for the purposes of reference, study or exhibition, however, are not considered records. Exactly what this means has not been tested in the courts. Our correspondents hypothesize that the wording is intended to draw a distinction between the publicly accessible portions of an archive and those with restricted access. It is possible that if the collection were closed to the public – i.e. unavailable for reference and study – then the regulations could apply.

The Privacy Act is a federal Act but each state also has privacy regulations. Victoria, for example, passed the Victoria Privacy Act in 2001, and our correspondents believe it applies to the holdings of archives and libraries. The Act regulates the dissemination of personal information using the same standard and definition as the national Act except it excludes information to which the Health Records Act 2001 applies and, more importantly, information contained in a document that is archived within the meaning of the Copyright Act 1968. Archived documents under the Copyright Act include those materials in specified institutions and in archives, museums and galleries more generally. Again, there is no relevant case law to turn to as disputes tend to be settled by the federal privacy commissioner.

4.5.3 Canada: Invasion of Privacy

Our correspondents report that the tort of invasion of privacy is not uniform throughout Canada. They report “Certain provinces provide statutory causes of action . . . but the common law situation is much less clear.” British Columbia’s Privacy Act is
apparently representative of those in Manitoba, Saskatchewan and Newfoundland.\textsuperscript{440} It sets out the following elements for the tort:

1. The claimant must enjoy a right to privacy, the scope of which is “reasonable under the circumstances”;
2. The nature of the defendant’s action must result in a violation of that right (keeping in mind the nature of the relationship of the parties);
3. The violation must have been willful; and
4. The defendant must have no claim of right for the violation.\textsuperscript{441}

It is interesting to note that one need not prove damages to prevail in a claim of invasion of privacy.

There is no specialized tort of invasion of privacy in Canada. Most courts have addressed privacy complaints through other causes of action such as trespass and nuisance.\textsuperscript{442}

In Canada, personal information collected by a government agency may only be used for the purpose it was solicited for, and must be accurate. Information collected by a private agency may be gathered only for a “reasonable purpose” and used only for that purpose.\textsuperscript{443} Again, bringing a suit to federal court is a last resort and has not frequently occurred.\textsuperscript{444}

\textbf{4.5.4 France: Invasion of Privacy}

The invasion of privacy is a tort under the French Civil Code.\textsuperscript{445} Breaches to one’s honor or reputation are considered invasions of privacy as is the right to control one’s personal image.\textsuperscript{446} Our correspondents note that, when an image is used for the public good (such as part of a news story) or where a picture was obtained in an instance where there was no expectation of privacy, the courts have ruled the use not to be in violation of the Code.\textsuperscript{447} When the use is deemed not to have been for the public good or where the subject did have an expectation of privacy, the courts have held the media outlet which broadcasts or publishes the image responsible for invasion of privacy unless they have permission to use the image from its subject.\textsuperscript{448}

Materials contained in public archives that are the result of the creative efforts of a private citizen may not be made accessible to the public without the express consent of the owner of the work and the author.\textsuperscript{449} In one instance reported by our correspondents, an individual who wrote a private letter to another individual objected to the letter being made available to the public in a digitized collection. It is unclear whether this work was removed from the online collection, but the letter-writer’s objections were based on a violation of his moral rights (through the disclosure of the letter) and his economic rights.\textsuperscript{450}

Archives’ retention of personal data is governed by the Law of August 6, 2004, which describes when such data can be collected and how it can be used and retained.\textsuperscript{451}
Article L212-4 of the same law also discusses the use of personal data and mandates the destruction of any information gathered which lacks scientific, statistical or historical interest. Article L-211-3 sets a standard of confidentiality for civil servants in charge of archives which handle personal information.

4.5.5 Singapore: Invasion of Privacy

The Singapore Report does not discuss the issue of the public disclosure of private facts.

4.5.6 UK: Invasion of Privacy

In general, the tort of invasion of privacy is new in Britain and still being developed. Our correspondents report there is a limited right to privacy in photographs and films. This is a very limited right that applies only to those that were commissioned for private and domestic purposes. Our correspondents highlight one issue that could arise that would unwittingly place archivists and librarians in jeopardy of breach of the 1988 Act. This could occur if the library displayed the items in their facility. While no copyright permission is needed to do so, there is still a right to privacy that might be violated in such a situation. There is also a right of consent to copying of one’s personal materials which was discussed under our discussion of moral rights.

4.6 Censorship

“Censorship” is a broad concept and it can mean different things to different people. In this report, we focus on restrictions on speech in publications that are imposed or enforced by a government.

4.6.1 US: Censorship

The First Amendment restricts the government’s ability to impose censorship laws in the United States. Accordingly, there can be no blanket prohibitions on insulting, offensive, or racist speech. However, the First Amendment does permit regulation of speech in certain circumstances. These include, for example,

- National security
- Speech designed to incite (“fighting words”), usually relevant only in the context of face to face speech
- Defamation and right of privacy (these areas are discussed separately, above)
- Child pornography
- Obscenity
There is a constant tension in the law as restrictions are imposed and their constitutionality challenged. For example, many of the cases decided on First Amendment grounds have been devoted to determining how to define material that is “obscene” and how that material can appropriately be restricted in a manner that is not overbroad. Many of the obscenity cases focus on the circumstances under which the material is made available. Certain material may be obscene under some local community standards but not in others; certain material may be obscene for children but not so for adults.460

Libraries are sometimes drawn into First Amendment controversies when local governments or school boards attempt to ban books considered offensive.461

There are many aspects of U.S. laws that can be deemed censorship (e.g., the Child Internet Protection Act’s requirement that libraries that receive federal funding install filters on internet access available to children; the FCC’s regulation of the broadcast media in connection with the broadcast of obscene and indecent material, particularly at times when it is to be expected that children will be in the audience; regulations on advertising and other commercial speech; privacy laws, etc.). However, the circumstances in which liability in respect of censored material would create legal liability in the United States for academic journal publishers or for digital archives or libraries seem highly speculative.462

Finally, many characterize removal of materials from government websites, or government requests to depository libraries to return materials, as a form of censorship. We discuss government material separately in section 9.0, below.463

4.6.2 Australia: Censorship

Our Australian correspondents did not note any instances of government censorship.

4.6.3 Canada: Censorship

Canadian courts have upheld state censorship of library materials in instances where there is a “pressing and substantial” justification.464

In 2003, employees of the Ottawa Public Library complained to their union about what they considered a hostile workplace. They felt that the non-filter policy potentially exposed them to offensive materials on the Internet.465 Since then, the libraries have adopted a filter policy whereby all terminals have a filter, but that filter can be removed by patrons over the age of sixteen.466

4.6.4 France: Censorship

Our French correspondents did not discuss any instances of government censorship.
4.6.5 Singapore: Censorship

Singapore has extensive government censorship. Two government organizations, The Ministry of Information, Communication and the Arts (“MICA”) and its subsidiary the Media Development Authority (“MDA”) formulate Singapore’s regulatory policies. According to the MICA website, MICA’s goals are to:

- Preserve Singapore’s traditional Asian values
- Maintain racial harmony and religious tolerance
- Protect Singapore’s social fabric and ensure social cohesion
- Protect children and young persons from corruption by undesirable materials.

Publications deemed to be inappropriate for distribution are banned. For example, *Cosmopolitan* magazine was banned in 1982 for “espousing extreme liberal values which local authorities viewed as offending family and moral norms.” All materials that could be viewed as offensive are reviewed by the Censorship Review Committee (“CRC”).

The MDA also monitors newspaper and media entities for compliance with the Newspaper and Printing Presses Act 2002, the Undesirable Publications Act 1998 and the Public Entertainment and Meetings Act 2001. Both the Newspaper and Printing Presses Act and the Undesirable Publications Act regulate the publication of all printed material in Singapore. The government can prohibit the “printing, publication, sale, issue, circulation or possession” of anything that could lead to disharmony in the country. This includes not only documents or publications but photographs, sound recordings or drawings. Furthermore, all printers in Singapore must license their presses with the government.

Anyone who “makes, prints, possesses, posts, distributes or has under his control” any document containing any incitement to violence or disobedience to the law can be fined or jailed under the Singapore Penal Code. This law – and the similarly inclusive Sedition Act – appears to apply to libraries and archives.

The National Library Board (“NLB”) reports that MICA and MDA provide libraries with guidelines regarding censorship. The National Library of Singapore does subscribe to third-party materials (such as Lexis and Westlaw) which can contain material which would be offensive under Singaporean law. Because, however, these digital databases do not own the copyrights of the works on their sites, any taking down of material or other editing of content must be done jointly between the database operator and the owner or licensor of the materials. It is unclear from our correspondents’ report whether or not they have had to discuss this issue with database operators.
The NLB is concerned about websites produced outside of Singapore. To avoid violating the law, “selection librarians” assess as much of the content as possible and filter any objectionable material. They reserve the right to block access to any material they deem inappropriate. There is a significant chilling effect as libraries do not wish to be liable for violating any of Singapore’s strict censorship rules and most of these Internet database suppliers have a clause in their contracts saying they are not liable for any violation of state law.

Works that are determined to be offensive are restricted from public viewing. Reference titles may be retained in the State Reference Library, although our correspondents also report that some material may be destroyed. No acknowledgement that the work has been removed will be given in the catalogue, although the NLB will indicate so on the “List of Restricted/Banned Publications.”

If scholars want to access materials that have been removed they must apply for access and sign the “Request to Consult Restricted/Confidential Publications” form. Also, any contributor may ask for his or her work to be removed from the libraries or archives.

Section 10 of the NLB Act provides that the State library is to take steps to maintain and preserve its collection. In addition to requiring every item published in the country to be deposited in the National Library within four weeks of publication, NLB has begun a digitization of a selection of very rare books and other library materials which they have deemed to be of great historical significance. “This project ensures the preservation, conservation and access to such library material, by the general public in Singapore via the public libraries. These books and/or documents have been placed online on their website and can be accessed by various online users, whether they are researchers, library patrons or a fee paying member.”

Finally, Singapore regulates access to public records by the public. All records which, “in the opinion of the Board” are “of national or historical significance” must be transferred to the National Archives. Only officers of the National Archives are allowed to view them.

4.6.6 UK: Censorship

Our British correspondents did not discuss any instances of government censorship.

4.7 Internet Service Provider Limitation of Liability

U.S. laws providing for limitations of liability for internet service providers are discussed above in connection with copyright and defamation law. All of the countries we discuss in this report have or are considering some form of limitation of liability or “safe harbor” for certain activities of internet service providers. In general, those laws provide protection for service providers who act as “mere conduits” for the transmission
of information over the Internet, and for activities such as “caching” (the automatic, temporary storage of information provided by users) or “hosting” (storage of information at the request of users).

An internet service provider must meet certain conditions in order to take advantage of these safe harbors. For example, a service provider hosting illegal third party content can usually rely on the legal limitation only when it is unaware of the illegal nature of that content. Moreover, a service provider is generally required to act expeditiously to remove illegal material once it does learn of it.

To the extent a library or archives is acting as a service provider under the terms of these laws, it could be eligible for the safe harbors. However, the safe harbor in respect of hosting protects the service provider from liability for material it hosts at the request of another party, not from liability for its own material. Nor does the safe harbor for hosting protect against liability for third party material the service provider knows to be illegal.

4.8 Summary and Conclusions; International Law Considerations

As the discussions above illustrate, authors and publishers face potential liability when their works violate the law or infringe on the rights of others. The existence and scope of possible claims varies from country to country. In some areas, the laws may be fairly similar. In others – and censorship laws are a notable example – there are profound differences.

Copyright laws tend to be similar in basic provisions due to the existence of international treaties setting minimum standards of protection, such as the Berne Convention. They are more likely to differ in the exceptions and limitations they provide, particularly where new technologies are concerned. Copyright laws of different countries vary in the accommodation they provide for digital libraries and archives. The laws in some countries, including the United States, have not kept pace with technology in this respect. They lack provisions that specifically address the requirements of digital preservation, which entails making numerous copies in the course of maintaining works and migrating them to new formats as required, and making them available when needed.

While some types of claims can lead to injunctive relief to compel withdrawal or removal of the offending material, in others, damages are the only available remedy. Where injunctive relief is granted – for example, in a successful suit for copyright infringement – a publisher can be enjoined from activities such as the further reproduction or distribution of an infringing work. Such an injunction would preclude the publisher from making it available electronically or authorizing others to do so. Courts generally do not enjoin activities of someone who is not a party to the suit and over which defendant has no control, but such a party could be sued separately.
It is common knowledge, borne out by our research and discussions with publishers, that when individuals assert claims that their rights have been violated, efforts are made to resolve the matter without litigation. It is difficult to get reliable information on how often claims are asserted and settled, in part because publishers are reluctant to disclose information about settlements (and may be bound by confidentiality agreements). In general, publishers for business reasons resist removing or withdrawing materials unless compelled to do so by the nature of the claim or the offending material. Corrections or retractions are the preferred approach, if a change to the record is necessary.

Libraries and archives have no blanket exemptions from the laws governing publishers in any of the countries we studied, though in some cases there are special exceptions from liability or limitations on damages for certain activities. There have been relatively few cases against libraries and archives to date, possibly because where physical copies are concerned, the continued distribution of a work with illegal content was in the form of lending the work or keeping it on the shelf for review on the premises. Potential plaintiffs likely regard this type of distribution as different from that of the publisher. And on a more pragmatic note, libraries and archives – frequently government or not-for-profit entities – are not particularly “attractive” defendants for a plaintiff seeking to get a substantial damages award. (The considerations are different where government censorship laws, such as those in Singapore, are involved, however.)

The past is not necessarily predictive of the future, however. Where a library’s or archives’ distribution takes the form of making a work available online, the offending work has the potential to be distributed much more widely, and a plaintiff might see the library or archives as fulfilling a role similar to that of the publisher. Still, the risk that a library or archives faces in distributing a work would likely differ from that of the publisher for a variety of reasons (e.g., the library or archives may still be less likely to be sued, particularly if it adopts a policy of takedown upon complaint, there may be applicable exceptions or limitation on damages under the law, etc.).

Another important factor to consider in assessing potential liability is the international nature of electronic distribution. Where a library or archives makes illegal or infringing material available around the world (whether through open access or to members of its user community), it faces possible liability under the laws of other countries. Jurisdictional rules vary, but often an entity can be sued in a country where it distributes or makes available illegal or infringing material, under the laws of that country.

In short, although there have been relatively few cases involving libraries and archives in the past, there are different risks with electronic distribution that have to be taken into account.

5.0 How Libraries and Archives Encounter Removal
In our research here in the U.S. we asked librarians and archivists to relate any specific instances they had encountered involving (i) requests that the library or archives remove a work from its collections or (ii) removal of material from a publisher’s database. We begin by summarizing the responses to those inquiries. We then discuss the responses of our foreign correspondents to questions concerning how libraries and archives react when they learn of offending or potentially offending materials in their collections, and in particular, if there are practices and conventions short of removal.

**United States** – Our interviews with librarians revealed that requests for removal of all or parts of works in hard copy were rare, but did happen occasionally. Most frequently cited were incidents in which the federal government, after 9/11, requested government depository libraries to remove and destroy documents – in one case, documents related to the water supply in the U.S., and in another, documents that related to civil and criminal asset forfeiture. One librarian reported a request by the Federal Depository Library Program to remove a USGS Professional Paper that falsified data results. They generally complied with such requests because they do not own the material and are required to do so under the terms of the depository library program.

Many librarians mentioned receiving occasional errata pages, which they filed along with the original work. One librarian reported receiving a *New England Journal of Medicine* replacement page that corrected a misplaced decimal in a morphine drip table. He replaced the page.

One librarian who specialized in Eastern European material mentioned that Stalin-era Soviet publishers would sometimes send new pages of an encyclopedia with a request that the older pages be cut out and discarded, or simply send an entirely new replacement volume, as the political winds shifted. The library practice was not to discard, but to retain both the new and the old versions.

Concerning electronic content, again the most frequently-cited incidents involved removal of content from government websites, and the removal of material by freelancers from the sites of many publishers and aggregators in the wake of the *Tasini* case, discussed in section 2.0, above.

In two instances, librarians mentioned specific publications that were removed from databases to which they subscribed. In one case, a Scandinavian geology journal left the publisher Taylor and Francis in order to self-publish. In another, Duke University journal titles were withdrawn from Project Muse.

Many of the librarians we spoke to were aware of the controversy raised a few years ago when it was discovered that Elsevier had removed journal articles from its database, but had not personally encountered a situation where an article had been removed from a database. This is not surprising, since the number of journal articles removed is small. Moreover, as one university librarian explained, “We only learn of these incidents when students let us know, and students can be opportunistic researchers.
When they can’t find an article they’re looking for, they will often substitute another rather than continuing to pursue the first.”

Interestingly, two instances of preemptive removal that came up in the course of our discussions with university libraries involved a discredited thesis or dissertation by a former student. In both cases, the material was removed from public access but retained in the university archives. We also described examples of removal by universities in section 2.0. It is apparent that universities share publishers’ concerns about problematic materials when they act as publishers.

**Australia** – In an effort to reduce liability, Australian archives attach copyright “disclaimers” to potentially offending material (digital or otherwise). A disclaimer typically (1) states that the archive has made reasonable efforts to locate the work’s copyright owner without success (2) and invites any person who believes her rights have been infringed to contact the archive. According to the Australian Report, these disclaimers might reduce a discretionary award of damages but have no other legal effect.

Several Australian institutions reported reviewing material for potentially defamatory or offensive content prior to including the material on publicly accessible web sites. Others suggested that they might refrain from posting such material online if it is available in print or over a broadcast medium.

**Canada** – Canadian practices vary, depending on the potentially offending information. If Canadian courts impose a publication ban on a judicial opinion, legal databases will remove the opinion from their online service. Even allowing scholars to view the information would leave the institution “vulnerable to potential contempt charges.” While our correspondents report no case law on this issue, one case that raised similar concerns was *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)* in which an archive was not forced to allow access to a draft report which was in their collection. While there are procedures individuals and the media can use to attempt to gain access to banned materials, our correspondents report that these are not often successful. Archivists remove personal information (e.g., social insurance numbers, pension account numbers, the names of minors) from documents subject to publication. The Civil Law Library of McGill University has no policy regarding the removal of offensive material (e.g., anti-Semitic or racist tracts) from their collection. The policy of the National Library of Canada requires librarians to balance the interests of copyright owners and the public when considering preemptive removal (e.g., to avoid a possible claim) of a document from public access.

**France** – The France Report notes that judges sometimes impose a “disclaimer” rather than “removal” penalty on libraries and archives: a library or archive must include information indicating the offending elements of the work held in its collection. That judges sanction this remedy suggests to them that libraries or archives themselves could attach precautionary disclaimers to questionable material so as to avoid liability. The
France Report cites no specific instances of preemptive removal, but concludes that such removals likely occur when the threat of litigation is sufficiently high.501

In France, two laws specifically govern access to archives holding public records: the Law of January 3, 1979 on Archives (the “Law of 1979 on Archives”) and the Law of July 17, 1978 on Administrative Documents (the “Law of 1978 on Administrative Documents”).502 Public access to a particular record typically begins thirty years following the creation of the document, though exceptions exist: some records are deemed too sensitive for release even after the thirty year lapse, and some records become available earlier as they were subject to public scrutiny even before arriving at the archives.503

Because permitting public access to some records may potentially violate a person’s right to privacy, administrators at the archive will sift particularly sensitive materials out of files prior to a viewing by a member of the public.504 Researchers looking to browse sensitive materials may seek exemptions from the archive’s general viewing policy.505 So long as the archive acts pursuant to the aforementioned laws when supplying access, it is not liable for violations of privacy perpetrated by the researcher.506 The France Report suggests, however, that an archive might be liable to individuals for invasions of privacy if, in digitizing material, it opens access to private information too widely.507 The Report expresses concern that this might lead to a chilling effect as archivists fail to open records to the public for fear of liability.508

UK – The UK Report describes a “wait-and-see” standard among libraries and archives: an institution will sometimes block access to a work until it ceases to offend. Alternatively, libraries can often shield themselves from liability by attaching a warning to the offending material: “Where it is known that archive material is or may be defamatory, the attachment of an appropriate notice warning against treating it as the truth will normally remove any sting from the material.”509

The UK Report cites but one instance of the removal of offending material prior to a complaint being made.510 The material was a letter defaming a living scientist and contained in correspondence donated to a learned society’s library. Generally, though, librarians and archivists do little to identify potential future legal liability; the materials libraries acquire daily may be too vast to monitor in this manner.511 Moreover, British librarians seemingly place great value in maintaining expansive public access to materials—even if there may be concerns about exposing themselves to liability—such that they will await an official legal determination prior to removing a work.512

Singapore – The Singapore Report includes several practices adopted by archives that potentially limit the archives’ liability.513 Archives may in some cases choose to place sensitive material in a “Restricted” or “Banned” collection. The report notes that when considering withdrawal, archives typically “err on the side of caution.”514 Following such placement, the institution may choose to annotate its catalogue to include the reason for reclassification, or it might opt to remove the catalogue entry altogether. At least one institution permits limited public access to “Restricted” or “Banned”
materials for research purposes; users complete and sign a form detailing the nature and purpose of their use. Aside from restricting or banning certain works, an archive may label questionable works with warnings, serving to inform users of a work’s questionable content or language.

The Lee Kong Chian Reference Library maintains a list of banned and censored works; members of the public looking to review the list must seek permission from the Director of the National Library, who grants such requests on a case by case basis.\footnote{515}

### 6.0 Development of Guidelines to Govern Publisher Retraction and Removal

Digital publishing, and the ability to remove completely articles from the public record, is still a relatively recent phenomenon. Over the past several years, a number of guidelines and models have been developed to guide publishers’ decisions concerning the retraction or removal of scholarly articles.

*Elsevier*

The experience of Elsevier, a prominent publisher of scientific, technical and medical journals, illustrates problems faced by users – and publishers – in maintaining access to a comprehensive archive of digital materials, and one publisher’s attempt to find a workable solution. When Elsevier’s web platform ScienceDirect was created in 1998, there was no official Elsevier policy concerning withdrawal of online journal articles. After several articles were removed with little explanation – including the controversial *Human Immunology* article discussed above – Elsevier established such a policy, involving senior publishers in decisions concerning potential removal of problematic articles. However, academics, librarians and scholars continued to criticize Elsevier for jeopardizing the integrity of the scholarly record, and called for a stricter and clearer removal policy. After consulting the affected parties, Elsevier released a revised article withdrawal policy in June 2003, and has revised it again as recently as 2006.\footnote{516} The new policy has generally had a favorable reception in the academic and library community.\footnote{517}

The revised policy recognizes the importance of the integrity of the scholarly record and of maintaining articles intact and unaltered “as far as is possible.” It states, however, that “under exceptional circumstances” articles may have to be retracted or removed.

**Retractions:** Elsevier’s policy states that retraction will be the practice for infringements of ethical codes, multiple submissions, plagiarism, use of fraudulent data and the like. A retraction note will be included in a subsequent journal issue and will accompany the online version. The online retraction notice will link to the original article, which will contain a watermark indicating it has been retracted.

**Removal:** Elsevier’s policy is to remove articles only “in an extremely limited number of cases” where it is necessary due to “legal limitations” upon the publisher,
author or copyright holder, including “where the article is clearly defamatory, or infringes others’ legal rights, or where the article is, or [Elsevier has] good reason to expect it will be, the subject of a court order, or where the article, if acted upon, might pose a serious health risk.”518 If an article is removed, only the title and author’s name will remain listed in the database, together with a notice indicating that the article was removed for legal reasons. When an article might pose a significant health risk, the authors can choose to replace the flawed original with a revised version. In that case, a retraction note will link to the corrected article and a history of the document.

In 2002 Elsevier entered into an agreement with the Koninklijke Bibliotheek, the National Library of Netherlands,519 which serves as a digital archive for all Elsevier journals. It provides on-site access to these materials and, should Elsevier or a successor cease to make them commercially available, may provide remote access.520 Elsevier has since also signed on with Portico to archive its e-journals. (The Koninklijke Bibliotheek and Portico are discussed further in section 8.1, below.) Elsevier (along with other STM publishers) also licenses content to several institutions who host it locally, which makes it less likely that articles can truly “vanish”.

Joint IFLA/IPA Statement

A joint steering group of the International Federation of Library Associations and Institutions (IFLA) and the International Publishers Association (IPA) subsequently issued a joint statement on “best practices” concerning the retraction or removal of journal articles from online databases.521 The statement was issued in 2005 and amended in 2006. It begins by recognizing the importance of the scholarly archive as a “permanent historic record;” the role of libraries as custodians of the published record “even when this record has later been modified;” and the role of journal editors in making decisions concerning publication and the constraints placed on the editor by legal requirements.

The joint statement:522

(1) Affirms the basic principle that “Articles that have been published shall remain extant, exact and unaltered as far as is possible.”

(2) Recognizes that retraction or removal of an article “may occur under exceptional and rare circumstances” such as

(a) “infringements of professional ethical codes, such as multiple submission, bogus claims of authorship, plagiarism, fraudulent use of data or the like”;

(b) legal limitations on the publisher, author or copyright holder; or

(c) false or inaccurate data that could pose a serious health risk.
According to the statement, “[e]ven in these rare circumstances, retraction is highly preferable to removal.”

(3) Provides that, in order to preserve the historical record,

(a) Libraries may continue to store articles retracted or removed from the published database “and provide appropriate access in accordance with best practice.”

(b) Publishers should retain in their database the citations and abstracts for the retracted or removed articles, the reason for the retraction or removal, with a link to the full text of the article or information on how to obtain it.

(c) Publishers should make copies of the retracted or removed material available to libraries that wish to keep a record for archival purposes.

(d) The official archive of the publisher should retain all versions of the article, including those retracted or removed.

*International Association of Scientific, Technical and Medical Publishers*

In March 2006 the International Association of Scientific, Technical and Medical Publishers (“STM”) issued its own guidelines. Like the IFLA/IPA statement, the guidelines recognize the principles of independent editorial judgment and the importance of preserving the scholarly record. They state that removal or retraction should only occur “in exceptional circumstances,” citing the same three circumstances as the IFLA/IPA guidelines: professional misconduct, legal limitations (such as infringement or defamation), and false or inaccurate data that could lead to a serious health risk. The guidelines also affirm the principle that retractions should be favored over removal “in virtually all cases.”

The guidelines address specifically what is perhaps the most common type of copyright infringement claim that arises in the context of journal publishing: double publication, where the author(s) have submitted their work to two journals and both of them publish it, each unaware of the other. The guidelines encourage STM publishers not to require other STM publishers to remove the later-published article, but instead to publish an erratum in the second journal (i.e., the journal that acquired publication rights later) explaining the double publication and referring the reader to the first journal.

Accordingly, the STM publishers agree in principle that they will follow a practice of retraction (retaining the original article but publishing an erratum for the printed journal and/or including an appropriate link to the electronic version of the offending article in cases of double publication (as explained above), correction of authorship claims, attribution, or bibliographic data, plagiarism, errors in data (whether or
not intentional) or lack of compliance with professional codes (such as conflicts of interest).

They agree in principle to delete articles only in the case of “an inappropriate violation of privacy of a research subject,” errors that might lead to a significant health risk, or “clearly defamatory comment.” They agree to retain in the database the citation for the removed article and an explanation of the circumstances for the removal. (The guidelines do not seem to address infringement claims other than those involving double publication.)

The STM guidelines caution, however, that no examples or list can deal with all the circumstances that arise.

Comparison of the guidelines

These are of course not the only “guidelines” on retraction and removal that exist; many organizations, journals and professional societies have their own guidelines. PubMed and PubMed Central’s policies are discussed below under “Digital Archives.” Not all guidelines are as relevant as these, however, as many professional societies focus on scientific misconduct and not some of the legal issues here.

All three sets of guidelines discussed above are similar in critical respects. All acknowledge the importance of maintaining the integrity of the scholarly record, the principle that most serious problems should be resolved through issuing a notice of retraction, and that removal of articles should occur only in certain extraordinary circumstances. Principles concerning access to removed material are an important aspect of the IFLA/IPA guidelines, but not present in the STM guidelines. A commitment to make some provision for access would be an important addition, recognizing that publishers may have concerns about how far they can go in committing to make available material they know to be problematic.

The publishers we spoke to affirmed that they do comply with the STM guidelines and consider removal only where they feel compelled to do so, principally in the face of strong legal claims.

After the incidents that prompted it to revise its retractions policy in 2003, Elsevier reviewed all of the articles that had been withdrawn and were no longer available on ScienceDirect. Many were restored to the database, accompanied by retraction notices. As of October 2006, only about five had not been restored, on advice of counsel.

One useful addition to all of these guidelines would be a commitment that removal decisions would be made only at the highest editorial level, and if based on legal concerns, only in consultation with legal counsel.

7.0 Libraries’ Contracts with Publishers
In this section we look at relevant provisions in contracts between publishers and libraries that relate to the archival record. (Contracts relating to LOCKSS, a digital archive, are discussed in section 8.1)

Removal of Content from Licensed Material

Contracts between publishers and libraries almost invariably contain a clause that allows the publisher to remove material from the Licensed Material. The following clause from Sage Journals Online is typical:

SAGE reserves the right to withdraw from the SAGE Journals Online Material any item contained in it or any part of it if SAGE believes that such item contains any material which may be legally objectionable, on whatever grounds.\textsuperscript{526}

Some licenses provide for notice to Licensee of the removed material and/or an adjustment if a substantial part of the Licensed Material is withdrawn. For example, Blackwell Publishing’s Site License Agreement provides:

The Publisher reserves the right at any time to withdraw from the Licensed Material any item or part of an item for which it no longer retains the right to publish, or which it has reasonable grounds to believe infringes copyright or is defamatory, obscene, unlawful or otherwise objectionable. The Publisher shall give written notice of such withdrawal. If the withdrawn material represents more than ten per cent (10\%) of the book, journal or other publication in which it appeared, the Publisher shall make a pro rata refund of part of the Fee, taking into account the amount of material withdrawn and the remaining unexpired portion of the Subscription period.\textsuperscript{527}

Publishers include these clauses to ensure that they can remove content not only if they are required by law to do so, but also if they deem it prudent to do so, e.g. in avoidance or settlement of a lawsuit, or, in rare cases, for health or safety reasons. As discussed below, digital archives include similar provisions in their user agreements. We are not aware of any U.S. case in which a publisher sued a library to compel removal pursuant to such a provision.

Perpetual Access/Archiving

What do library-publisher agreements provide with respect to a library’s right to continued use of the Licensed Material if the subscription terminates or the publisher is unable to fulfill its contractual obligation to deliver it? Increasingly, such agreements provide for “perpetual access” in some form. The nature and scope of those provisions vary, however. Many agreements provide that upon termination of the agreement, the publisher must provide the library
with the Licensed Material published during the term of the subscription, either by means of continued access to that material online (either through the publisher’s website or a third party), or by providing the library with a complete archival copy. There may be a fee for continued online access to the content. Some agreements allow the library to purchase access to, or a copy of the backfiles for an additional fee.

For example, one of the publishers we spoke to has a standard termination provision that guarantees the library access to the licensed journals published during the calendar year(s) of the library’s subscription, “either by continuing online access to the same material on [Publisher’s] server or in an archival copy in the electronic medium selected by [Publisher], at a cost-based fee.”

While libraries may be guaranteed the Licensed Material on a digital storage medium at the termination of the agreement, many would prefer online access, since they aren’t prepared to invest the resources in developing a content delivery system. At the other end of the spectrum, there is a small group of libraries/consortia that have chosen to host publishers’ content locally, and also archive that content.

Increasingly, libraries seek to get from publishers some assurance that they will continue to have access to the Licensed Material after the subscription ends or in the case that the publisher discontinues its business. California Digital Library asks for the following in its subscription agreements:

1. A royalty-free perpetual license to use “any Licensed Materials that were accessible during the term of the agreement,” in a manner “substantially equivalent to the means by which access is provided under this Agreement.”

2. A requirement that publisher, on termination of the subscription or upon request, provide the library with a machine readable copy of the Licensed Materials in a mutually-acceptable format from which the library may “make such further copies in perpetuity as it may deem necessary for purposes of archival preservation, refreshing or migration, including migration to other formats, so long as the purpose of such copying is solely for continued use and/or archival retention of the data and does not violate or extend the use rights contained in this agreement.”

3. A provision that requires the publisher deposit, or allow the library to deposit the Licensed Materials with a “trusted third party archives or cooperating archiving endeavor”; allows the library to use the third party system to access or store the Licensed Materials for use consistent with the Agreement; and permits the third party archival system to make the Licensed Materials available to other system participants who demonstrate a right to them.528
The terms described above are based on the NorthEast Research Libraries Consortium (NERL) model license. Our research suggests that for most libraries, for most licensed material, these terms are more aspiration than reality and do not reflect existing agreements. The underlying concepts are certainly making progress, as libraries and publishers try to find workable archiving solutions. But a contractual undertaking that a publisher will cooperate with a specific third party archive with which the publisher has an established relationship is likely more achievable than one which gives the library broad discretion.

One difficulty in assessing the current state of perpetual access and archiving clauses is that publishers point to their standard agreements and libraries to model licenses. Both are sometimes reluctant to disclose negotiated licenses that demonstrate where they were willing to yield on important issues.

Most of the library representatives we spoke to said they tried to get perpetual access provisions into their contracts but the terms varied. The recent report *E-Journal Archiving Metes and Bounds* stated,

Concern over reliance on leased, rather than owned, electronic content has led libraries to include “perpetual access” rights in their licenses. According to the 2005 ARL member survey, 98% of contracts included a provision for some form of backfile access if a library cancels its electronic subscription.529

Libraries are clearly negotiating for some form of perpetual access, but it is more commonly achieved by relying on the publisher to provide copies or access at the termination of the agreement, rather through an archive of the Licensed Material created by the Licensee. The respondents in Sharon Farb’s 2005 study of library licensing reported that only 36% of their license agreements included the right to archive.530 As noted above, some libraries, even if they had the right to archive, might not take advantage of it, because of the expense it would entail. However, there are other archiving possibilities being developed, as discussed below.

We also asked our foreign correspondents whether contracts address removal of material for legal reasons, or perpetual access and archiving issues.

*Australia* – The Australia Report reviewed contractual licenses between archives and publishers but saw none that specifically addressed the removal of infringing material, though its sample size is admittedly small.531 They did find licenses, however, that permit the publisher to alter the licensed product, which could seemingly allow the publisher to demand removal of the offending work from the archive (assuming the archive holds the work through a license).532

The Australia Report found that publishers typically make no warrant that the use of licensed products will be uninterrupted or error-free.533 One such license disclaimed
the product owner’s liability “‘for any offensive, defamatory, or infringing materials’” in the licensed products.

A consortium of state, territory, and national libraries has formed the National & State Libraries Australasia Consortium (“NSLA,” formerly the Council of Australian State Libraries (“CASL”)). The contracts reviewed by our consultants contained no terms covering the permissibility of archival or preservation copying of database materials by libraries or archives. The NSLA, however, addresses this issue in the Statement of Principles Guiding License Negotiation (the “SPGLN”): “‘The Consortium requires perpetual access to electronic information to which it has subscribed. A License should specify who has permanent archival responsibility for the Product and under what conditions the Consortium may access or refer Users to the archival copy.’”

NSLA aims to “‘simplify licensing arrangements, improve cost benefits for member libraries, and to explore opportunities for making electronic products more widely available to Australians, regardless of where they live.’” SPGLN recommends that: “‘A License should require the Vendor to defend, indemnify, and hold the Members harmless from any action based on a claim that use of the Product in accordance with the License infringes any patent, copyright, trademark or trade secret of any third party. The License should include a procedure for dealing with infringements.’” Moreover, the “‘License should include a warranty that the Vendor has the right to grant the License and that the Members’ use of the resources contained in the Product will not infringe the Intellectual Property rights of any person.’”

Canada – The Canada Report references no contracts between archives and publishers that address the issue of removing a work from a collection. Nor does the Report cite any contractual arrangements in which publishers limit their liability related to offending materials, or any judicial opinions interpreting such contracts.

Boilerplate provisions in the typical publisher-library contract do, however, forbid libraries from making archival or preservation copies of materials to which libraries have access through databases. Libraries can negotiate with publishers for such a privilege, but, even if secured, practical constraints frequently prevent libraries from exercising the privilege.

France – Our French consultant uncovered no information with respect to contracts addressing the removal of offending materials, the permissibility of creating preservation or archival copies, or whether courts have construed these sorts of terms.

The France Report does, however, state that clauses precluding liability are inadmissible in tort actions. Thus, publishers may require that authors indemnify them in the event of the publisher’s liability for the offending material (but may not expressly seek liability releases from libraries or archives through contract).

Singapore – Contracts between archives and publishers are generally rare, according to the Singapore Report. The Report therefore includes scant information
concerning contract terms governing the removal of offending materials, terms employed by publishers to shift or avoid liability, terms granting reproduction privileges for archival or preservation copies, or judicial decisions interpreting these terms.  

The Report notes two exceptions: (1) the National Archives of Singapore (“NAS”) and its various contributors and (2) libraries and their online data providers. With respect to (1), when acquiring works from copyright owners (whether private individuals or organizations), NAS contracts with the owners as to public access to the works. NAS complies with an owner’s preference regarding public access to the work. The owner may grant complete access, selected access (e.g., opening particular portions of the work), future access to the public (e.g., access begins five years following the owner’s death), or no access to the public. Though NAS does not currently contractually limit their liability to content owners, they intend to begin doing so. The Report cites no judicial decision addressing the scope or validity of these provisions.

Regarding contracts between libraries and online data providers, the Report notes that contracts typically allow a library to request removal of offending materials. The Report cites two examples of contracts that permit libraries to create archival copies of material: first, if libraries wish to archive materials delivered via compact disc (e.g., Proquest CDs), they may do so via contract. Second, a library may also contract with web site owners to archive web materials so as to make them accessible through the library’s own portal.

There are some digital materials which the NLB would like to keep in their archives. For these materials, the NLB contracts with the materials’ provider to negotiate a long-term contract. These contracts do not give the NLB the right to make copies of the materials.

UK – The British Report notes that the Joint Information Systems Committee (JISC)—made up of various UK funding councils—has developed “model licenses,” suggesting contractual terms to govern library-publisher relationships. The report points to the JISC Model License for datasets as an example of a contractual provision addressing the removal of offending material:

The Licensee agrees to notify the Licensor immediately and provide full particulars in the event that it becomes aware of any actual or threatened claims by any third party in connection with any works contained in the Licensed Work. It is expressly agreed that upon such notification, or if the Licensor becomes aware of such a claim from other sources, the Licensor may remove such work(s) from the Licensed Work. If the Licensor may remove such work(s) from the Licensed Work, the Licensee agrees to remove such work(s) from the Licensed Work on its Secure Network and to notify any designated third parties that they must do the same. Failure to report knowledge of any
actual or threatened claim by any third party shall be deemed a material breach of this Agreement.\textsuperscript{555}

Thus, actual or threatened claims might result in the removal of works from libraries or archives. The English Report includes no findings as to the prevalence of similar contractual terms governing non-dataset works; nor does the Report find any case law interpreting such provisions.

The JISC Model License suggests that publishers do in fact seek to avoid liability related to offending material (or at least dataset material) through contract; clause 11.2 of that license provides:

\begin{quote}
While the Licensor has no reason to believe that there are any inaccuracies or defects in the information contained in the Licensed Work, the Licensor makes no representation and gives no warranty express or implied with regard to the information contained in any part of the Licensed Work including (without limitation) the fitness of such information or part for any purposes whatsoever and the Licensor accepts no liability for loss suffered or incurred by the Licensee, Authorized Institutions or Authorized Users as a result of their reliance on the Licensed Work.\textsuperscript{556}
\end{quote}

The JISC Model License includes no such indemnification provision, instead requiring the publisher to indemnify the Licensee for any liability resulting from the infringement of the intellectual property rights of a third party stemming from the use of a work in accordance with the terms of the license.\textsuperscript{557}

The UK report points to another JISC Model License (for e-books) for an example of a provision that addresses the permissibility of creating archival or preservation copies under publisher-library contracts. It provides:

\begin{quote}
Upon termination of this License, the Licensor undertakes at no charge either to provide or to make arrangements for a third party to provide each Authorized Institution with an archive of the full text of the book title(s) selected and paid by such Authorized Institution from the Licensed Material. The archive will be supplied to Authorized Institutions in an electronic medium mutually agreed between the Licensor and each of such Authorized Institutions. Authorized Institutions wishing to network the archive within their institution may do so at their own costs. Continuing archival access and use is subject to the terms and conditions of use of the Sub-License Agreement.\textsuperscript{558}
\end{quote}
This JISC Model License for e-journal content issued in 2007 contains much more detailed provisions regarding archiving and perpetual access (similar to those in the CDL/NERL model above. However, again, it is difficult to know the extent to which such provisions are included in contracts as described.559

8.0 Digital Archives: Reducing the Risk of Removal

8.1 Examples of Digital Archives

In this section we will discuss various types of digital archives (using Koninklijke Bibliotheek’s e-Depot, Portico, PubMed Central, and LOCKSS as examples) and the terms under which they collect and make available the archived material. We will then talk about Mandatory Deposit or Legal Deposit Archives, which are being developed in Europe and under contemplation in the United States.

Koninklijke Bibliotheek, The National Library of the Netherlands

Koninklijke Bibliotheek, The National Library of the Netherlands (“KB”) is a pioneer in long term preservation of digital publications. It has the responsibility of providing archiving and permanent access for Dutch electronic publications, but it has developed a digital archiving system known as “e-Depot” for academic publications around the world, regardless of where they are published. E-Depot is planning to expand its digital preservation initiative to other types of e-publications such as e-books and websites.

Deposit of the material in e-Depot is achieved by means of agreements with publishers, not through a legal deposit requirement.560 The KB has entered into agreements with many of the major STM publishers around the world, including Elsevier, Kluwer Academic, BioMed Central, Blackwell Publishing, Oxford University Press, Taylor & Francis, Sage Publications, Springer, Brill Academic Publishers, and IOS Press and estimates that more than 70% of STM journals are stored in e-Depot. Pursuant to those agreements, KB preserves the e-journals deposited by publishers and is permitted to make them available onsite. E-Depot is not primarily an access system, although its agreements allow it to provide remote access to a publisher’s content on an interim basis if the publisher is unable to do so for a considerable period of time, or if the publisher goes out of business and has no successor.561 (BioMed Central allows KB to provide remote access to its open-access journals.)

Although KB does not allow material to be removed from its archive, it does allow publishers to remove material from public access. A typical contract provides:

[Publisher] and KB understand that on occasion modifications to the content of an article in the KB Archive after it has been delivered by [Publisher] to the KB may be reasonably required. While individual cases will be handled as they occur, it is agreed that nothing will be permanently deleted from the archive, although [Publisher] may request that an article be “sequestered” by removing it from public access and substituting a
notice of its unavailability. This would only be done in very extraordinary circumstances, such as under court order, serious copyright violation or where an article is found to have information that is faulty or of great danger to human health if followed.562

Material that the publisher has removed will be kept in a “shadow archive.” The shadow archive is inaccessible to the general public, but requests by scholars to see that material, e.g., for research on plagiarism, would be handled on a case-by-case basis in consultation with the publisher. No one has yet asked to see a work in the shadow archive.563

Portico

Portico is an e-journal archive launched in 2005 with start up support from JSTOR, Ithaka, the Library of Congress and the Andrew W. Mellon Foundation. Its mission is the preservation of scholarly electronic journals to ensure their continued availability to scholars and researchers. Its primary funding on an ongoing basis will come from annual contributions from publishers and from libraries, but it expects some continuing support from government agencies and charitable foundations.

Many of the larger journal publishers are working with Portico, as is an impressive list of libraries.564

Portico ingests the source files of a publisher’s electronic journal articles, converts them to an archival format and commits to future content migrations as technology changes. Portico’s focus is preservation rather than current access. Portico is considered a “dim” archive. It does not provide ongoing access to users, but it allows each library to name up to four staff members who are given secure access to the archive for verification and testing purposes.

Portico can deliver archival versions of journals to participating institutions when a “trigger event” occurs. Trigger events include (1) the publisher is no longer in business, or no longer in the business of publishing or providing access to previously published issues of scholarly journals; (2) the publisher has stopped publishing and is no longer providing access to the journal and its back issues; (3) the publisher stops offering or providing access to some or all of the back issues of the journal for a period longer than 90 days; or (4) the publisher experiences a catastrophic failure for a period of longer than 90 days due to technical difficulties, business interruption, bankruptcy or business failure.

Publishers may (but are not required to) use Portico as a means of fulfilling perpetual access commitments. If the publisher uses this option, former purchasers and subscribers to the publisher’s electronic content can request a copy of that content from Portico. Upon verification, Portico will deliver an archival version of the content (but does not itself provide online access).
Concerning removal of material from the archive, Portico’s agreement with publishers states:

In the event of a dispute with respect to any Publication or portion thereof, or the Archival Version thereof, Portico shall have discretion to suspend Delivery of the Archival Version, remove such Archival Version from its archive and otherwise take such action as it deems necessary to comply with applicable law. If Licensor receives a written claim by a third party that a Publication or portion thereof infringes the copyrights, trade secrets or other proprietary rights of such third party and determines in good faith upon the advice of counsel that the continued Delivery of such Publication by Portico exposes Licensor to Damages . . ., it shall so notify Portico in writing and Portico agrees to suspend Delivery of such Publication until (A) such dispute has been resolved, (B) such third party has agreed to hold Licensor harmless from any Damages in connection with such Delivery by Portico, or (C) Portico agrees in writing to indemnify Licensor against any such Damages . . . 565

Portico’s contract with libraries states:

. . . Licensee agrees to notify Portico of any infringement, libel, or other claim pertaining to any Materials of which Licensee becomes aware. Upon such notification or if Portico learns of such a claim from another source, Portico may suspend availability of such Materials or remove such Materials from the Archive pending the resolution of such claim.566

Portico works with publishers to develop a “profile” for the publisher’s content so that they know when they get a substantive correction. Their preference is to receive a statement of retraction or updated article recognizable as such in machine readable form so that the system can create a link between the original version and the update. It does not remove the original version. Once Portico develops that publisher profile, an update that did not comport with the protocol established for corrections or retractions would be identified in system reports, causing Portico to investigate and, if necessary, to go to the publisher. Portico’s philosophy is that its long-term preservation goal is more likely to be met if there are checks at the point of ingest.567

**PubMed Central**568

PubMed Central (“PMC”) is a free digital archive of biomedical and life sciences research journal literature. It is managed by the National Library of Medicine (NLM) in the National Institutes of Health (NIH). Participation by publishers is voluntary but only journals that qualify based on the scientific quality of the journal and the technical quality of their digital files can be included. It includes only peer-reviewed research. PMC has been designated as the repository for research funded by NIH Public Access and Wellcome Trust Open Access.
PMC opened in 2000. It was developed in response to the trend toward publishing exclusively online, with the goal of permanently preserving the e-journal literature, and improving access to biomedical information. Some publishers deposit their content in PMC immediately. Others, however, wait for a time in order to avoid adversely affecting their own market. PMC strongly encourages deposit of full articles within one year of publication and other editorial content within three years.569

NLM’s contracts with publishers, called participation agreements, commit it to archive the content provided by the publisher and make that content freely available to the publisher and PMC users, whether or not the agreement is still in effect. NLM is also permitted to provide publishers’ content to certain authorized international archives ("PMCI archives") that are required to comply with the terms of the agreement between NLM and the publisher. Publishers give NLM a nonexclusive license to use their content in accordance with the agreement. They may specify whether articles are to be made available to the public immediately upon deposit or at a specified date after publication, although NLM staff and its contractors have access from the time of deposit to ensure the integrity and accuracy of the files. Participation agreements include the following provision:570

The Participant may, at any time, request NLM to prevent access via PMC to an item in the Participant’s Content that the Participant reasonably believes to be illegal or an infringement of any person’s rights. In order to maintain the historical record, in keeping with international library guidelines, including those published jointly by the International Federation of Library Associations and Institutions (IFLA) and the International Publishers’ Association (IPA), NLM shall retain the subject item in its internal PMC archive, but prevent access to it via the public PMC online system and withdraw it from any PMCI archive to which it was distributed previously. PMC users will be able to see a citation (title, author, journal source data) for the subject item. In lieu of the full content of the item, a user will see a notice indicating that, for legal reasons, the publisher has withdrawn permission to display the item in PMC, and that a copy of the item may be available from the journal publisher or from NLM, upon request, under certain conditions.

According to NLM representatives, this provision was included to induce publishers to deposit their articles, since PMC participation is voluntary and access is free. They have not encountered any problems, however.571

NLM does not have a posted retraction policy for PMC. Its standards for PubMed (its citations database, discussed below) recognize that articles may be retracted or withdrawn for a variety of reasons, including “honest error, scientific misconduct or plagiarism.”572 When it receives an appropriate retraction notice, NLM does not remove the citation for a retracted article, but updates its database to indicate the retraction. If they receive a retraction notice with respect to an article they have in full text in PMC (which “happens periodically”), they will not pull the article, but will include the
retraction notice. They have not encountered any problems with publishers requesting removal, though they did recall an instance in which one journal reprinted the article of another without authorization. It was ultimately resolved with a retraction notice filed by the second journal to accompany its article, but the article was not removed.\textsuperscript{573}

NLM reports an increasing number of citations (currently, 38) to withdrawn articles in their PubMed database. (They use the term “withdrawn” as we have been using the term “removed.”) PubMed is a freely accessible online database of biomedical journal citations and abstracts (as opposed to full text articles). Citations to “withdrawn” articles occur primarily with respect to “Ahead of Print” articles that are published on a journal’s website and subsequently removed for reasons such as plagiarism, copyright infringements, or duplicate publication in another journal. The citations to such articles are not removed from PubMed, but modified with a notice sent to PubMed by the publisher to indicate they were removed. The number of occurrences for AOP article removals likely reflects the fact that different publishers post articles at different stages of the editorial process, and in some cases that may be before peer review has been completed. Still, the number of citations to removed articles is only a very small fraction of the database.

\textit{LOCKSS/CLOCKSS}

LOCKSS stands for Lots of Copies Keep Stuff Safe. LOCKSS was designed to give libraries a simple and sustainable means to archive their electronic journals locally. Libraries that participate in the LOCKSS system configure a local computer with the LOCKSS software. They can then archive any journal title for which (a) the publisher has granted permission, (b) the publishing platform is supported by LOCKSS, and (c) a “critical mass of libraries” agree to archive the title.

The archiving is done through a regular web crawl of the publisher’s site. LOCKSS continuously checks the integrity of the archived content against that in LOCKSS archives (or “boxes”) maintained by other libraries – thus the need for a “critical mass of libraries” for a given title – and will resolve inconsistencies and restore damaged content in a participant’s box.

Users can access journal content stored in the LOCKSS box whenever the publisher’s site is unavailable (e.g., the subscription is cancelled or the publisher’s server is down). Libraries can configure the server to provide that access automatically, even when the publisher’s site is down temporarily, but the libraries with which we spoke had not done so.

\textit{LOCKSS Agreements}

There are two parts to a publisher’s agreement to allow its content to be archived through LOCKSS. First, participating publishers must signify their permission for the LOCKSS software to crawl their website and collect and copy data. This is done by means of a “publisher manifest” page on the publisher’s site that includes a permission
Second, publishers must authorize use of LOCKSS in their subscription agreements with libraries. Because LOCKSS does not merely archive, but also makes the archived material available to other LOCKSS participants, the permission must reflect that. LOCKSS suggests the following language:

Publisher acknowledges that Licensee participates in the LOCKSS system for archiving digitized publications. Licensee may perpetually use the LOCKSS system to archive and restore the Licensed Materials, so long as Licensee's use is otherwise consistent with this Agreement. Publisher further acknowledges and agrees that, for the purpose of repairing damage to or loss of another LOCKSS system's copy of Licensed Materials, Licensee's LOCKSS system may make Licensed Materials available to that other LOCKSS system provided that the other LOCKSS system had previously proven to Licensee's system that it had the same Licensed Materials.574

How LOCKSS deals with articles removed by the publisher.

Once something is copied into a LOCKSS box, we understand that it may not be removed, even if the publisher decides to leave the program. Thus, removed articles should be in the LOCKSS box. However, the inability to get a particular article from the publisher’s website does not appear to be an event that would automatically trigger user access to the LOCKSS archive (even if the library does opt to configure the system to kick in automatically whenever the publisher’s site is unavailable. Presumably the individual user would have to request access from a librarian. It’s unclear how information about the article in the archive would be displayed: LOCKSS says that “Content served from a LOCKSS appliance will look exactly the same as content served from the publisher” except that content such as ads which normally change when the user presses the browser reload button will remain static.575 But presumably it cannot look precisely the same if the LOCKSS archive contains material the publisher’s site has removed.

We were unable to discover exactly how LOCKSS would work in connection with removed articles, perhaps because removals are rare and, in fact, most libraries do not archive for the isolated removed article, but to ensure that they will not lose access to subscription content when the subscription is cancelled or the publisher goes under. But access to the LOCKSS box for removed articles raises another issue: one of the tenets of LOCKSS use is that “Users of content in the LOCKSS appliances are bound by the same legal agreements as the original subscription.”576 Assuming the agreement provides that the publisher can remove things from the Licensed Material, then the library no longer
CLOCKSS (‘‘Controlled LOCKSS’’) is an initiative that includes seven libraries and eleven publishers that are attempting to establish a large-scale closed repository for e-journals. CLOCKSS is a private LOCKSS network that collects materials and maintains them in a dark archive that will be available only if a publisher’s content remains unavailable online for six months after a trigger event. CLOCKSS will be in its development phase through 2007.\textsuperscript{577}

8.2 Structuring Archives To Avoid Removal of Documents

E-journal archiving is still in its infancy. We have provided some examples of e-journal archives, but we take no position on whether one approach is preferable to another. We consider below how various approaches to e-journal archives could address the issue of document removal.

Archives with no right to retain removed material. These archives must comply with depositors’ removal requests, pursuant to agreements with publishers that may be necessary to enlist their voluntary cooperation.

* Wherever possible, contracts with publishers should provide for (i) removal of material to a restricted archive, inaccessible to the general public, rather than complete removal from the archive, and (ii) periodic consultation with the publisher as to the continued necessity for maintaining the material in a restricted archive.

* The archives should implement systems for periodic review of material in the restricted archive to determine if the relevant circumstances have changed, and consult the publisher as necessary.

* Ingest procedures should identify removals so that they can be monitored and followed up if necessary, particularly if it becomes apparent that some publishers are removing with greater frequency. In some cases, publishers themselves may not be aware of these trends. Even though an archives may not be able to compel retention, it may have influence over a publisher’s practices.

Archives with a limited right to maintain and make available removed material. Publishers are reluctant to restrict their ability to avoid suits or minimize damages through takedown. However, the potential risk that an archives faces may be different from that of a publisher, and ideally the decision on whether to remove material from public access should be made independently. The Portico agreement demonstrates a useful approach to this conundrum.

* The agreement should limit the circumstances under which a publisher can request removal to legal claims, and require the publisher first to consult with counsel. It
should require the parties to consult on removals, but permit the archives to assess the legal threat and make a decision about takedown independent of the publisher.

As the Portico agreement demonstrates, the price of the right to resist removal may be an obligation to indemnify the publisher for liability from the archives’ further use. However, if the archives has independently assessed the threat of liability and concluded that it is small, the risk of having to indemnify the publisher is correspondingly small. Also, with time and experience with digital archives, publishers’ concerns over potential liability stemming from archives’ use could diminish.

* If the archives has an independent right to assess liability and retain the document, it has to know when the publisher takes things down. This notification might come from the publisher, but in order for removals not to fall through the cracks, ingest procedures should be structured to report a document that effects removal so that it can be followed up. No automatic process should be permitted to effect a removal.

* Wherever possible, contracts with publishers should provide for (i) removal of material to a restricted archive, inaccessible to the general public, rather than complete removal from the archive, and (ii) periodic consultation with the publisher as to the continued necessity for maintaining the material in a restricted archive.

* The archives should implement systems for periodic review of material in the restricted archive to determine if the relevant circumstances have changed, and consult the publisher as necessary.

* A risk analysis may change over time. For example, if a person who was defamed dies, it would likely be possible to make a defamatory article more widely available. In the unlikely situation where an archives has decided against placing offending material in a restricted area despite the publisher’s removal request, the archives should review its decision periodically in case the legal or factual circumstances change. An archive may have minimal risk when it’s providing minimal public access to the material, e.g., where it is designed to protect against a catastrophic event or business failure but allows no current use, or is subject to a “moving wall” approach to public access, but when access is expanded, the risk may expand as well.

Archives that automatically ingest material and without removing previously ingested content. This is how we understand LOCKSS to work, and if our understanding is accurate, any article that the publisher has removed would remain in the LOCKSS box. While we did not talk to anyone who had accessed a LOCKSS box to obtain a publisher-removed article, we assume for the sake of this discussion that technically, it could be done.

In general, keeping infringing articles in the LOCKSS archive appears to create little risk as long as the material remains dark. However, when the host library accesses a LOCKSS archive and provides public access to removed material, the risk increases and may depend on the nature of the material and the circumstances under which it is made
available. In general, providing more limited access (e.g., to scholars and researchers on site) is less likely to result in liability. It would be wise – assuming this is not an integral feature of LOCKSS – to configure the box to segregate removed material so that access is not automatic, and librarian intervention is required to obtain removed articles. That way, the library could evaluate the situation and determine whether and how it should make the material available.

The implications for the subscription agreement of going into the box specifically to copy and make removed material available for use are unclear. If LOCKSS allows use of the licensed content only to the extent permitted by the agreement, and under the terms of the agreement the removal notice effectively removes an article from the licensed content, then use of that material is not authorized by the agreement. It may be that the publisher had no right to authorize its use, or lost that right, which is why it was removed. This does not seem to be something that either publishers or libraries have given much attention to, perhaps because removed articles are rare, and this scenario is not the principal reason libraries use LOCKSS.

### 8.3 E-journal Archives and Mandatory Deposit

The digital archives discussed in this section involve voluntary participation by the right holders. However, national electronic archives based on legal or mandatory deposit laws are on the horizon. Germany recently passed a law instituting a legal deposit scheme and other countries are developing electronic repositories.

Right holders of works published in the United States are required by Section 407 of the Copyright Act to deposit two complete copies of the best edition for the Library of Congress, unless exempted from this requirement by regulation. So far, e-journals have been exempt. The Library is not required to preserve – or even retain – the materials it receives through mandatory deposit, but our understanding is that it will not institute mandatory deposit until it develops the necessary infrastructure to ingest, maintain and preserve e-journals. That process is under development, but will likely occur in the next few years.

A legal deposit e-journal archive could protect against the “vanishing articles” problem: the Library would not be subject to the subscription agreements that permit publishers to remove materials. But developing the e-journal archive will require ongoing cooperation from publishers for political and logistical reasons. On the political front, both the law and the regulations will likely have to be changed before this effort can be fully implemented. Section 407 was drafted before digital technology; it allows the Library to demand copies of published works but gives it no rights to put them on a network for public distribution, performance or display. Certainly the law should permit the Library to make reasonable use of the electronic materials it receives through mandatory deposit, but publishers are unlikely to acquiesce in changes to the law to permit access beyond the Library premises and it’s doubtful that the Library would expect to be able to do so, because of the potential adverse effects on the market. On the logistical front, after discussions concerning ingest procedures with representatives
from JSTOR, Portico, e-Depot and the Canada Institute for Scientific and Technical Information (CISTI), it is apparent that creating ingest procedures for an archive of this nature is a formidable task that will require cooperation from publishers and ongoing involvement from publishers when problems arise or formats change. Our focus in this report has been on ensuring that articles are not completely removed, but it is at least as important to ensure that ingest procedures respond to and link retraction notices with original articles, since retraction is the more common, and preferred, means of handling problems.

In short, if it’s going to work, it will require something more from depositors than just dropping two copies in the mail, so getting the archive off the ground will likely entail some give-and-take with publishers. It is not surprising that the e-journal archives developed to date, even those by national libraries, have developed through agreements with publishers.580

9.0 Other Challenges to the Integrity of the Scholarly Record

In the course of our inquiries, a number of librarians offered the view that document removal – particularly where the larger, established STM publishers are concerned – is not their major concern, and that the integrity of the scholarly record currently faces other significant challenges. Many of the people we spoke to raised issues in addition to document removal by publishers. Those issues are outside the scope of our report, but we describe briefly those most frequently mentioned.

(1) The ephemeral nature of links to web content (a phenomenon sometimes called “link rot”).581 Often the Internet address for material cited in a scholarly article is no longer valid. In some cases the cited article has merely been removed; in others, it has been taken down. Sometimes this happens so quickly that the cites are outdated even before formal publication. Someone searching for the cited material can occasionally find it through the Internet Archive’s “Wayback Machine,” but it is not always available there.

Some universities are attempting to address this problem by putting articles by university authors in university repositories with persistent identifiers. That will solve the problem with respect to citations to material by their authors, but not to citations by their authors to the works of others, until persistent identifiers are widely used or another solution is developed.

(2) The existence of numerous different versions of an article available on the Internet. It is increasingly common for a work to be available on the Internet in several versions. It may be available on a pre-print server, on a publisher’s site, on a free access site such as PubMed, on the author’s personal site and/or that of her institution. Sometimes the versions differ only in format, but on other occasions they can differ in substance, such as when changes occur between the prepublication version and the published version. The differences are not always readily apparent. Among the things that concern librarians and publishers are how to ensure that people are referring to the
same version of an article, and how to ensure that when an author updates a published, peer-reviewed article, it is apparent that the updated version contains material that was not subject to peer review. NISO has an ongoing effort to develop a policy on journal article version control. 582

This issue has implications for article retraction or removal as well. Whose responsibility is it to see that retraction notices are submitted to these various repositories when such notices are necessary? The publisher generally takes the responsibility for sites it has supplied, but the authors may have sent it to other repositories. Depending on the circumstances for the retraction, it may not be realistic to expect authors to provide those notices.

(3) The disappearance of documents from government websites. Increasingly, government material is made available exclusively online, and once it is taken down it is no longer available. Removal can sometimes occur for reasons of national security or politics. 583 But sometimes it is simply because of the misguided notion that only the latest material is of use. California Digital Library (CDL) representatives mentioned a recent proposal in California to require state agencies to keep their websites “up-to-date” because when people do web searches it “looks bad” if they find older information. But that “older information,” like last year’s state budget analysis, can be useful. Website preservation initiatives are being developed to address this issue, such as CDL’s project in conjunction with the Library of Congress’s National Digital Information Infrastructure and Preservation Program (NDIIPP) initiative to develop an archive of government and political web content.

(4) Digital preservation of datasets. The data underlying a scientific, technical or social science article can be valuable to other researchers in the same field, and some organizations are starting to require that the data underlying projects that they fund be made publicly available. The data is not typically part of the resulting journal article or made available by the publisher; in other words, it does not make its way into e-journal archives. Sometime the data resides on a PC in the researcher’s office; if the hard drive crashes or the researcher moves on, it is effectively lost. Universities and professional organizations are beginning to address the need to preserve data and make it available. A number of universities are developing or have recently developed institutional preservation repositories for the preservation of data, among other things.

10.0 Recommendations

The goal of this project was to try to find ways to preserve the scholarly record and avoid removal of documents from archives. There is no single answer to the problem of removal of documents from archives, but we believe that there are ways to reduce the risk that documents will be “digitally erased from the mind of man.”

(1) Encourage the development of not-for-profit third party archives. Publishers should and likely will maintain their own archives, and they have a critical role to play in ensuring comprehensive digital preservation. But publishers can sometimes be vulnerable
to risks that a third party archives does not face. Publishers are likely to be the first line of defense in a legal action, and removing the archives from publisher control will reduce the risk that an article can be permanently removed pursuant to a settlement agreement or a court order. Archives are generally not immune from suits based on claims that publications they are distributing violate third party rights, but the nature and extent of the risk they face differs from that of the publisher.

(2) Encourage the development of standard terminology and best practices for the treatment of corrections, retractions and removals. Use of the terms “replacement” and “correction” can be ambiguous; “removal” and “withdrawal” can be used interchangeably; and “retraction” – though usually used for an article that the publisher disavows but which remains available accompanied by a notice – sometimes refers to removed articles. Encourage practices to ensure that someone cannot access a retracted article without being made aware of the retraction, and that in those cases where removal is necessary, a listing for the item removed, with an appropriate designation, remains in the catalog.

(3) Publisher guidelines that address removals and retractions have been constructive, but ultimately the decision whether to remove a work from public access is a judgment call on publisher’s part. The guidelines should address appropriate internal controls, e.g., removal decisions should be made only by senior editorial staff, and only in consultation with counsel. Such an undertaking could encourage appropriate and consistent standards for removal, and publishers who implement such controls are better able to detect trends.

(4) Archives’ agreements with publishers should narrowly limit the circumstances in which publishers can request removal to those in which a publisher has determined, after consultation with counsel, that there is a genuine risk of liability.

(5) Archives’ agreements with publishers should allow the archives to determine independently whether or not to remove material upon request by the publisher. Even if the archives is obligated to indemnify the publisher if its continued use of the article causes harm to the publisher, the archives will be able to assess the risk when the situation arises. Such an undertaking further protects against the possibility that removal from an archives might be required – pursuant to a settlement or a court order – based on publisher control.

(6) Archives should create a restricted area, inaccessible to the public, in which to maintain any material it “removes” based on a publisher’s request or its own liability assessment. An archives should not agree to completely remove any material unless under direct court order to do so.

(7) Material removed from public access should remain listed in the archives catalog, with an appropriate notation.

(8) Material in the restricted area of an archives should be reviewed periodically, in cooperation with the publisher, to determine whether the circumstances warranting
removal have changed. For example, our Singapore consultants report that globalization and access to a wider range of content will lead to liberalization of the country’s censorship laws. There may be material that is currently off-limits that can be made publicly available in the foreseeable future.

(9) Archives and libraries should require publishers to provide notice to them when they remove articles. Minor corrections are commonly made, retractions very occasionally. But complete removal of material is – or should be – sufficiently rare that notice can be required. Archive ingest procedures should provide for an exception report when material is retracted or removed.

(10) Any pattern of removals that is detected should be brought to the attention of the publisher and the public. Concerns raised by librarians and scholars had an important role in the decision of Elsevier and other STM publishers to reexamine their practices and develop guidelines. As one publisher representative told us “We’re very careful about removal. We don’t want to find our name all over the Liblicense discussion group.”

(11) The scholarly community should monitor and, where appropriate, participate in litigation (by means of amicus curiae briefs) and administrative proceedings such as rulemakings that bear on issues relevant to libraries and archives.

(12) Concerns about the integrity of digital databases and archives beyond the STM community should be addressed. The STM community – scholars, libraries and publishers – is further along in developing third-party digital archives and addressing integrity issues than is the broader community. But there are many other types of publications – including popular media – that provide important source material for scholars and researchers, and need to be part of a comprehensive preservation initiative.

(13) Changes in the law should be made to facilitate digital archiving. Most e-journal archiving occurs pursuant to agreement, so limitations in the copyright law do not restrict their activities. However, digital preservation is still in its infancy, and this model may not be realistic for other types of content. The recommendations below are made with an eye to the deficiencies in the laws of the US and other countries that have not yet addressed digital preservation issues.

We recommend:

a. An exception to copyright law to allow libraries and archives qualified for digital preservation to copy and preserve publicly available web content. The migration of important content in the government and the private sector to the web, and the ephemeral nature of web content, suggest that it is imperative to preserve this material.

b. An amendment to copyright law to ensure that digital archives are not precluded from taking advantage of the exceptions generally applicable to libraries and archives – in other words, to recognize digital archives as archives. We have no “one
size fits all” definition for digital archives, since the definition of “archives” varies from country to country, but believe they should be described in functional terms.

c. An exception to copyright law to allow libraries and archives qualified for digital preservation to make digital preservation copies of at risk works and maintain them in a secure digital repository.

d. Explicit authority for libraries and archives to use outside contractors in the performance of their preservation activities. Among other things, this would enable joint preservation efforts among libraries and archives.

e. Elimination of meaningless limits on the number of copies that a library and archives can make in the context of digital preservation and replacement activities, such as the three-copy limit in US law.

(14) Other changes in the law may be necessary in the future, but it may be wiser to wait and see where genuine issues arise. We do not intend to suggest that there are no other changes to the laws that could benefit archives. But legislative change – particularly on controversial issues – sometimes leads to unintended and undesirable consequences and has to be approached with caution.
infringement and plagiarism in a single category as it is often not possible to determine from reported incidents whether one or the other or both are involved.


6 Id.

7 Id. See the discussion of Elsevier’s withdrawal policy in Section 6.0.

8 Jim Giles, Preprint server seeks way to halt plagiarist, 426 NATURE 7 (Nov. 6, 2003).


11 Id.


22 Id.


33. Can. Rep. at C-I-6. Appendices B-F represent the reports for Australia, Canada, France, the UK and Singapore. Each country’s reports have been numbered separately within the Section so that Can. Rep. C-I-6 refers to Appendix C, Document I (in this case, the Phase I report), page 6.

34. Can. Rep. at C-I-7, citing Jean E. Dryden, Chair of the Copyright Committee of the Bureau of Canadian Archivists, in *Unpublished Works in Archives*, COPYRIGHT & NEW MEDIA LAW NEWSLETTER, Summer 1998 (Vol. 2, Issue 2), ¶ 2. As discussed above, the term “archives” appears to be evolving, and the definitions in Canadian law do not limit “archives” to collections that are predominantly unpublished works.


36. Canadian laws dealing primarily with public archives (*e.g.*, National Archives of Canada Act), provide an indirect definition of archives by defining the “objects,” “functions” or “purposes” of specific archives (often these Acts define “archives” to identify the specific archive referred to by the Act). Can. Rep. at C-I-2-5. Frequently mentioned objects and functions include: “the preservation of documents of public importance (for social, political or cultural reasons), the facilitation of access to these documents, their management, and support for archival communities and their activities.” Canada’s Foreign Missions and International Organizations Act sets forth a more concrete and technical definition of “archives,” describing the specific types of documents and materials contained in “consular archives.” Can. Rep. at 5.

37. This understanding is based on interviews and conversations with traditional archivists conducted by Robert Burell and Allison Coleman while researching for their book *COPYRIGHT EXCEPTIONS: THE DIGITAL IMPACT* (Cambridge University Press, 2005). UK Rep. at E-I-5-6.

38. The American Bar Association’s Legal Technology Resource Center attempted to create a working definition for “digital library” as part of a study it conducted in February 2002 concerning digital libraries in law firms. The resulting definition of “digital library” is a library with an entirely electronic (Internet-based, CD and DVD, and software-accessible) collection and a physical location from which information professionals can provide services virtually and in person. Reach, et al., *Feasibility and Viability of the Digital Library in a Private Law Firm*, 95 LAW LIBR. J. 36 (Summer 2003).

39. While archives can be maintained by corporations or other profit-making institutions for internal business needs, our focus here is on collections maintained not-for-profit.

40. United States copyright law is contained in Title 17 of the United States Code. Statutory references to U.S. law in this report will be to Title 17, unless otherwise noted.

41. Although the current term of copyright protection is life of the author plus seventy years, certain works, such as works made for hire and works first published prior to January 1, 1978, have different terms of protection. §§ 302(c), 304.

42. The donor frequently does not own the rights and therefore cannot convey them. For example, the copyright in letters is owned by the writer, not the recipient, though the recipient owns the physical copies. Even when the donor owns the rights, they are transferred to the library or archives only if the gift includes a license or assignment.

43. §101.

44. §§106(6), 114.

45. §101.

47 §115. Technically, copies of sound recordings are referred to as “phonorecords” under the Copyright Act §101 but for simplicity we refer to copies and phonorecords collectively as “copies.” §109(a).

48 118 F.3d 199 (4th Cir. 1997).

49 §109(a).

50 §107. Fees for photocopying journal articles are properly considered as part of the “potential market” for the copyrighted work (rather than just sales of complete journal issues). See American Geophysical Union v. Texaco, Inc., 60 F.3d 913, 931 (2d Cir. 1994) (narrowly limiting libraries’ copying privileges in §108 suggests Congress viewed journal publishers as having the right to restrict photocopying).

51 The one exception is a “work made for hire.” Works made for hire are works created by employees in the course of their employment, in which case the employer is deemed by law to be the author, and certain types of commissioned works, provided that the parties agree in writing that the work will be a work made for hire owned by the commissioning party. §§ 101, 201(a), (b)

52 E.g., § 104A (restored copyrights in certain foreign works); § 203 (termination of transfers and licenses); § 304 (rights during renewal term).

53 Contributions by staff writers and artists are not at issue since their works are usually “works made for hire” in which the employer owns the copyright.


55 Section 201(c) of the Copyright Act provides: “Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.” 409 F.3d 26 (2d Cir. 2005).

56 An unpublished work must have been registered before the infringement begins; a published work, within three months of publication or before the infringement begins. § 412.

57 § 504 (c).

58 § 504 (c)(2).

59 § 502.


61 Association of American Medical Colleges v. Carey, 728 F.Supp. 873 (N.D.N.Y. 1990), rev’d, Association of American Medical Colleges v. Cuomo, 928 F.2d 519 (2d Cir.), cert. denied, 502 U.S. 862 (1991), involved New York’s Standardized Testing Act (“STA”), which required, among other things, copyrighted medical college admission tests be disclosed and placed in a state “archive” over the objection of the Association of American Medical Colleges (AAMC), the copyright owner. AAMC sued, alleging that federal copyright law preempted the STA. New York argued, inter alia, that the STA was consistent
with federal copyright law since it was amended to designate the State Education Department as an “archive” for retention and copying of standardized tests, and therefore its activities were permissible under § 108. The district court disagreed, concluding § 108 applied to unpublished works only if they were properly in possession of the archive in first place. The Court of Appeals reversed and remanded the case to the district court on other grounds. Apparently the ruling on §108 was not raised in the appeal.

§ 108(c)(2).

Recommendation of the Register of Copyrights in RM 2002-4; Rulemaking on Exemptions from the Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies (Oct. 27, 2003) at 63.

§ 108(c)(2).


§ 108(h). Prof. Laura Gasaway posits that as the library’s purpose for reproduction, distribution, performance or display is not limited to preservation, but also includes scholarship and research, this Section can “presumably . . . serve as a collection building Section” for works that meet its requirements. Laura N. Gasaway, America’s Cultural Record: A Thing of the Past?, 40 HOUS L. REV. 643, 661 (2003).

§§ 108 (d),(e). These exemptions encompass “isolated and unrelated reproduction and distribution of a single copy . . . of the same material on separate occasions.” However, they do not apply when a library or archives “is aware or has substantial reason to believe that it is engaging in the related or concerted reproduction or distribution of multiple copies” of the same material, whether at one time or over a period of time. Nor do they apply to a library or archives that “engages in the systematic reproduction or distribution of a single or multiple copies” of a work. Libraries and archives may participate in interlibrary arrangements as long as the practice is not intended to – and does not – substitute for a subscription to or purchase of the work. § 108 (g).

§ 108(i). Audiovisual news programs are treated separately, as discussed above.

§ 108(f)(4).

§ 117 (a)(2). This privilege applies only to computer programs, not to other works in digital form. In a recent report, the Copyright Office declined to recommend expanding the privilege to permit individual backup copies of other types of works in digital form. At the same time, the Office observed a “fundamental mismatch” between the archival exemption of §117 and the current practice of making periodic backup copies of a computer’s hard drive. U.S. Copyright Office, DMCA Section 104 Report 118 (August 2001), at 148-150, available at <http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf>.

However, the importation of such copies may not be part of an activity consisting of systematic reproduction or distribution in violation of the provisions of § 108(g)(2). § 602(a)(3).

§ 1201(a)(1)(A). Damage awards under the DMCA provision are not allowed where a nonprofit library, archives, educational institution, or public broadcasting entity proves that it was not aware and had no reason to believe that its acts constituted a violation.” § 1203 (5)(B) (ii).

§§ 1201(a)(2), (b).


§ 407. The “best edition” is the edition published in the United States that the Library deems most suitable for its purposes. § 101.

§ 407(d).

§ 407(e).

§ 101.

§ 704(b). The Library may also keep the deposit copies of unpublished works for its collections, or may transfer them to the National Archives or a federal records center. Unpublished works are not subject to mandatory deposit (except transmission programs, as noted above), but may be deposited with the Copyright Office as part of a registration application.

Appendix I of the Copyright Act, Transitional and Supplementary Provisions, § 113(a).

See DMCA Section 104 Report, supra note 78. Digital transmission involves making a copy, not merely transferring a copy. While theoretically the sender could delete her copy after she forwarded it to another, the Copyright Office was not persuaded that such an application of the first sale doctrine is either workable or appropriate, since “forward and delete” is not a feature generally available on software currently in use.
and is unlikely to be done on a systematic basis by users. Moreover, “forward and delete” is not entirely comparable to transferring a physical copy, as it is faster and more efficient and makes it possible for fewer copies to satisfy the same demand. Id. at 96-101.


91 44 U.S.C. §2111(2); see generally 44 U.S.C. §2101 et seq. U.S. law contains a limitation of liability for the National Archives and Records Administration with respect to certain copyrighted works, notably unpublished and unregistered copyrighted works: “When letters and other intellectual productions (exclusive of patented material, published works under copyright protection, and unpublished works for which copyright registration has been made) come into the custody or possession of the Archivist, the United States or its agents are not liable for infringement of copyright or analogous rights arising out of use of the materials for display, inspection, research, reproduction, or other purposes.” 44 U.S.C. §2117.

92 Aus. Rep. at B-I-16-17. Specifically, Section 10(1) of the Copyright Act 1968 (Cth) (Australia) defines “archives” as: (a) “archival material in the custody of” specific national archives and public records offices set forth in the definition (e.g., the Archives Office of New South Wales) or “(b) a collection of documents or other material to which this paragraph applies by virtue of subSection (4).” Section 10(4) provides that “Where: (a) a collection of documents or other material of historical significance or public interest that is in the custody of a body, whether incorporated or unincorporated, is being maintained by the body for the purpose of conserving and preserving those documents or other material; and (b) the body does not maintain and operate the collection for the purpose of deriving a profit; paragraph (b) of the definition of archives in subSection (1) applies to that collection. Example: Museums and galleries are examples of bodies that could have collections covered by paragraph (b) of the definition of archives.” Aus. Rep. at B-1-2.

93 Copyright Act (Cth) 1968 (Australia) §§ 49(9), 50(10). Australia’s Copyright Act was originally enacted in 1968 (Act No. 63 of 1968). In 2006 the original Act was amended under the Copyright Amendment Act 2006 (Act No. 158 of 2006). References to the “Copyright Act” denote the Copyright Act 1968 taking into account all amendments up to and including Act No. 158 of 2006.


95 Aus. Rep. at B-I-1 citing The Digital Agenda Review: Report and Recommendations (January 2004), ¶1.3 available at <www.ag.gov.au/DigitalAgendaReview/reportrecommendations>. In general, the foreign reports indicate that very little case law exists relevant to the definition of archives under copyright law. The UK report also noted that there were no cases concerning limits placed on or privileges accorded to archives with respect to acquisition of material, maintenance and updating material, and making it available to the public. UK Rep. at E-I-9.

96 Copyright Act 1968 (Cth) (Australia) § 51A(1)(b)-(c).

97 Section 10 of the Copyright Act 1968 (Cth) (Australia) defines “artistic work” as: “(a) a painting, sculpture, drawing, engraving or photograph, whether the work is of artistic quality or not; (b) a building or a model of a building, whether the building or model is of an artistic quality or not; or (c) a work of artistic craftsmanship to which neither of the last two preceding paragraphs applies . . . .”

98 Aus. Rep. at B-I-9-10, citing Copyright Act 1968 (Cth) (Australia) § 51A.

99 Id. at footnote 24.

100 Id. at B-I-10, citing Copyright Act 1968 (Cth) (Australia) § 110B.

101 SectionId. At B-I-36, citing §51A(2)

102 Reproduction of a work by libraries or archives for “administrative purposes” is permitted under the same Section of the Copyright Act 1968 (Cth) (Australia) as the preservation provision, § 51A(6). The “administrative purposes” provision was added by to the Copyright Act by the Digital Agenda Act. Neither the Digital Agenda Act nor its explanatory Memorandum defines that term. Aus. Rep. at 11.

103 Id. at B-I-10, referring to §51A.

104 Id. at B-I-7, citing §50. Section 50 also allows the library to make the reproduction to fulfill a written request made by a user of the other library, for purposes of research or study. For further discussion of Section 50 requirements and privileges, see Aus. Rep. at B-I-31.

105 Copyright Act 1968 (Cth) (Australia) § 50..

106 Copyright Act 1968 (Cth) (Australia) Section§ 51B
The Australian report identified legislation establishing and governing the operation of specific archives (e.g. the National Archives of Australia is established by the Archives Act 1983 (Cth) and the Public Records Office is established by the Public Records Act 1973 (Vic)), but did not identify legislation (other than the Copyright Act 1968 (Cth) (Australia) with a general definition of “archives.” Aus. Rep. at B-I-15-16.

Copyright Act 1968 (Cth) (Australia) § 49.

Id. § 49(5).

Id. § 49(7A).

Aus. Rep. at B-I-7-8 citing Copyright Act 1968 (Cth) (Australia) § 50. Declarations are required for reproductions made from a hard copy if all of a work (excluding an article) or an unreasonable portion of it is reproduced.

Aus. Rep. at B-I-8, discussing § 51(1).

Id. discussing § 51(2).

Id., discussing § 51(1). See also Copyright Act 1968 (Cth) (Australia) § 52 regarding publication of a new work containing all or part of unpublished works kept in libraries and archives.

Id. At B-I-18.

The Australian report cites the case of De Garis v. Neville Jeffress Pidler Pty Ltd (1990) 95 ALR 625, in which two journalists claimed that a press clippings company infringed their copyright by supplying its clients with copies of the journalists’ articles. The company’s attempt to rely on the fair dealing defense failed, as the relevant purpose in the fair dealing analysis was that of the alleged infringer, the press clippings company, rather than that of the end users. The company’s purpose was found to be purely commercial. Its actions were held not to constitute news reporting or to require evaluation or judging the merits of the identified articles. Aus. Rep. at B-I-18-19.


Section Copyright Act 1968 (Cth) (Australia) § 200AB(2).

Section Id. § 200AB(6).


Aus. Rep. at B-I-20, citing Explanatory Memorandum to the Copyright Amendment (Digital Agenda) Bill 1999, at 68 ff.

The legislative intent behind these conditions was to create a situation analogous to displaying a hard copy of a book in the library. Aus. Rep. at B-I-6.

Id. at B-I- 20.


Id. at B-I-14.

Most of these new rulings apply to individuals. For example, individuals may now transfer materials which they own into a different, even digital, format for private noncommercial use.

Libraries and archives are also redefined in this Act to include only those institutions whose collections are available to the general public. For-profit libraries are now included in this definition but for-profit archives are not; archives must still be operated as not-for-profits in order to be eligible for these benefits. Australian Copyright Council Information Sheet for the Copyright Amendment Act 2006, Document G096, at 3, available at http://www.copyright.org.au/publications/infosheets.htm..

Copyright Act 1968 (Cth) (Australia) § 200AB(1)-(4).

Id. § 200AB(1).


Id. §§ 132AC(7)(a), 132AT(2)(a), 116AN(8)(b)(i), 132APC(8)(a), 132APD(7)(a), 132APE(7)(a).

Id. §§ 50(7)(d), 51(a)(1)(b).

The types of materials that may be copied are specified in the Copyright Act 1968 (Cth) (Australia) §§ 51B, 110BA, 112AA.


The Australian Digital Alliance is comprised of museums, schools, cultural institutions and a variety of other groups who “are united by the common theme that intellectual property laws must strike a balance

138 Id. at B-II-26, citing Archives Act 1983 (Cth) (Australia) § 5(1).
139 Id. at B-II-27 citing § 5(2),
140 Id. citing § 28.
141 Id. citing §§ 24, 26...
142 Id. citing §§(7), 31(1).
144 Copyright Act 1968 (Cth) (Australia), Section§ 10(a).
145 See Fr. Rep. at D-I-1.
146 2004 SCC 13 (Can.)
147 Id. at ¶¶ 83-84.
148 Id.
150 Id., citing §. 30.1(1)(b).
151 Id. at C-I-14, citing § 30.1(1)(c) Section 30.1(1) also allows a library, archive or museum, for the maintenance or management of its permanent collection or that of another library, archive or museum to make a copy of a work or other subject matter in its collection: 1) for purposes of record-keeping or cataloguing; 2) for insurance purposes or police investigation; or 3) if necessary for restoration. Id. citing § 30.1(1)(d), (e), (f).
152 Id. at C-I-16, citing Copyright Act (R.S. 1985, c. C-42) (Canada) § 30.2(2)(b).
153 Id., citing § 30.2(3).
154 Id., citing § 30.2(4). Section 30.2(1) provides that a library, archive or museum does not infringe copyright if it engages in an act on behalf of an individual that would not constitute copyright infringement if the individual were to perform the act himself or herself. The Canadian report states that 30.2(1) seems to apply to unpublished works, but notes ambiguities in its drafting. Can. Rep. at C-I-16,Section
155 Id., citing § 30.2(5).
156 As discussed above, the CCH court found that the Great Library, controlled by the Law Society, indirectly controlled by lawyers who practice law for profit, did not need to rely on the library exemption but would be entitled to do so, as the Law Society lawyers were not acting as a body established or conducted for profit in connection with the administration of the Great Library.
157 Can. Rep. at C-I-18, referencing David Vaver, Chapter 7 (B)(12)(c) of COPYRIGHT LAW. Canada’s Copyright Act also provides that an educational institution or a library, archive, or museum does not infringe copyright where a copy of a work is made using “a machine for the making, by reprographic reproduction, copies of works in printed form;” the machine is installed on the premises of the educational institution, library, archive, or museum (with its approval) for use by students, instructors or staff at the educational institution or by people using the library archive or museum; and the prescribed notice of copyright infringement is affixed in the prescribed location. Can. Rep. at C-I-17, citing §30(3).
158 Id., at C-I-12, citing CCH Canadian Ltd. v. Law Society of Upper Canada, 2004 SCC 13 (Can.).
159 Id. at para. 76. The court also held that the Law Society does not authorize copyright infringement by maintaining self-service copiers in the library, with a copyright warning.
160 Id. at para. 48 ff. Copyright Act (R.S. 1985, c. C-42) (Canada) § 29 provides: “Fair dealing for the purpose of research or private study does not infringe copyright.”
162 Id.
163 [1943] 2 D.L.R. 257 (Can.).
164 For example, it is unclear whether the fact that the papers were not to be sold was important because the court thought that this meant the public would not have the ability to see the papers or whether the court thought this was important because it meant the papers would not be widely disseminated.
166 Id.
167 Id., citing Robertson v. The Thompson Corporation et. al., [2006] 2 S.C.R. 363 (Can.).
168 Id.
169 Id.
170 Id. at C-I-10, citing Dryden supra at para. 2-3.
171 Id. at C-I-14, citing BMG Canada Inc. v. John Does, 2004 FC 488 (Can.).
172 Id. at C-I-15, citing CCH Canadian Ltd. v. Law Society of Upper Canada, 2004 SCC 13 (Can.), at para. 78.
173 R.S., 1985, c.1 (3rd Supp). Section 4(1) (Can.)
175 Id. at C-I-6, citing Archives and Recordkeeping Act, C.C.S.M. c.A132 (Can.)
176 Id. at C-I-5, citing Public Archives Act, S.N.S. 1998, c. 24. Section 5 (Can.)
177 The law of January 3, 1979 on archives (now codified in Art. L211-1 and subsequent provisions of the Code of Patrimony). This law sets forth the rules of communication of public archives and contains a general definition (see below). Art. L211-2 of the Code of Patrimony states: “[T]he conservation of archives is organized in the public interest as much for the needs of management and of justification of rights of persons or entities, public or private, as for the historical documentation of research.” The French law of archives contains two other definitions related to archives: a definition of public archives/public records (public records/archives are “the documents that come from the State, the local communities, the public establishments and public companies; 2. The documents which come from the activity of the organizations of private law in charge of the management of public services or a mission of public utility; 3. The minutes and catalogues/notes of the public or ministerial officers”) and an indirect definition of private archives/private records (all documents which are not public records/archives are private records/archives). Art L211-4 and Art L211-5. Fr. Rep. at D-I-3.
178 Fr. Rep. at D-I-3, citing Art. L 211-1 of the Code of Patrimony. The Canadian report identifies provisions of the National Archives of Canada Act, the Ontario Archives Act, Quebec’s Archives Act, Manitoba’s Archives and Recordkeeping Act, Nova Scotia’s Public Archives Act, which contain similar objects and functions. Quebec’s Archives Act’s definition of archives is similar to that contained in the French law on archives. Can. Rep. at C-I-3-5.
181 “infringement is characterized by the reproduction, the representation or the exploitation of a work in violation of the intellectual property rights attached to it independent of all fault or bad faith,” (Cass. Civ. 1ère, 29 mai 2001, Propriétés intellectuelles, oct. 2001, p. 71, obs. P. Sirinelli, dans le même sense, on peut encore citer, Cass. Civ. 1ère, 16 février 1999, RIDA juill. 1999 p. 103); Our correspondents believe that public records in government archives have a greater protection than a private archive because of the public interest that they serve. Fr. Rep. D-I-1-3.
183 “This is not elaborated on further in the report and no cases are cited. Fr. Rep. D-I-2.
184 Id.
185 Id.
186 Id.
188 Id.; The distinction here is that archives – whether run by the government or not – have no duty to give patrons access to private materials. Private materials are those materials not considered government documents: items donated by private individuals, for example.
190 Id.
191 Fr. Rep. D-II-4
192 Id.
193 Id. at D-I-7.
194 Id. at D-I-8.
195 Id. at D-I-8.
196 Id. at D-I-9. For a discussion of these penalties, see D-II-8.
197 Id. at D-II-14
198 Id. at D-I-7.
199 The French word “archives” can mean “records” or “archives.”
201 Id. at D-I-8.
102

202  Id. at D-I-9, citing The Code of Patrimony, Art. L212-29. A similar provision of the UK’s copyright law, CDPA § 44, provides that it is not an infringement of copyright to condition the export from the UK of an article of cultural or historical interest or importance on making a copy and depositing it in an appropriate library or archives.

203  Id. at D-I-10, citing Art. R1421-1 of the General Code of Local Communities.

204  Id. at D-I-11.

205  Id.

206  Art. R1422-9 of the General Code of Local Communities provides that the State insure the security of the materials, the quality of the collection, their renewal, the accessibility of services for the public, the technical quality of the libraries and the preservation of the collections. Fr. Rep. at D-I-12.


208  Id. at D-I-4, citing Art. L 131-1 of the Code of Patrimony. The French report notes that the law of legal deposit is very old (the first text dates back to François I), and has, dating back to its origin, both a cultural and patrimonial purpose, and a function of controlling publications (a function which today “fades into the background”).


210  Id.

211  Id.

212  Administrative documents make up a specific category of public archives addressed in the French law that provides: “the right of all persons to information is specified and guaranteed by this title in that which concerns the freedom of access to administrative documents.” Law number 78-753 of July 17, 1978 (hereafter “the law of 1978”) Art. 1. Fr. Rep. at D-I-13.


214  Id.

215  The law of 1978, Art. 4, modified by law 2000-321 2000-04-12 art. 7 JORF April 13, 2000 allows for the access to administrative documents: “(a) by free consultation on the premises unless the preservation of the document does not allow it; (b) provided that the reproduction does not harm the preservation of the document, by the delivery of an easily understandable copy on a medium identical to that used by the administration or on paper, at the discretion of the requester/applicant within the limit of the technical possibilities of the administration and at the expenses of the administration, without the expenses being able to exceed the cost of the reproduction, under conditions provided by decree.” Fr. Rep. at D-I-14.

216  “[T]he right to communicate the documents only applies to completed documents (it does not concern documents preparatory to an administrative decision as long as it is under development); it does not apply once documents are publicly disseminated (once the documents are communicated to the public, it is no longer necessary to limit the right of access to them); and “it does not apply to documents carried out within the framework of a contract of provision of services carried out for the account of one or several specified people.” Fr. Rep. at D-I-14.


219  Art. L132-4 provides that “The consultation of the documents deposited as provided in Article L. 131-1, is done in the dual respect of the principles defined by the code of intellectual property and those inherent in the right for the researcher, to access on a purely individual basis, within the framework/confines of his research and inside the walls of the depository body, to the conserved documents” as cited in Fr. Rep. at D-I-20.

220  Under provisions of the proposed law of implementation, “the author may not prohibit depository organizations for purposes of this law from: (1) allowing the work to be consulted by researchers, duly accredited by each depository organization (body/entity), on the premises, on individual stations of consultation of the use of which is exclusively reserved to them” or “(2 ) reproducing onto any medium and by all processes/means of a work necessary for the collection, conservation and the consultation on the premises in the conditions provided for in (1).” Art. 6-1. Fr. Rep. at D-I-20. In addition, the French bill of implementation provides that “the artist-performer, the producer of a sound recording (phonogram) or audiovisual work (videogram), and the audiovisual communication firm may not prohibit the reproduction and the communication to the public of documents mentioned in the 1st article of this law in the conditions provided for in the preceding article.” Art. 6-2. Similarly, Art. 6-3 provides that the producer of a database
cannot prohibit the extraction and re-use by making available all or a part of the database under the conditions provided by Art. 6-1. Fr. Rep. at D-I-21.


Copyright Act of 1987 (Singapore) § 7(4)(b).

Id. at § 7(4)(a).


Copyright Act of 1987 (Singapore) § 48(1).

Id. at § 48(3).

Id. at § 113

Id. at § 48(4).

Id. at § 48(2).


Copyright Act of 1987 (Singapore) § 261D; Sing. Rep. F-I-4-5.

Id. at § 261C(9) ..


Copyright Act of 1987 (Singapore) § 46.

Id. at § 50.

Id. at § 45(5).

Id. at §§ 47, 112.

Id. at § 45(1)(b).

Id.

Id. at § 45(3).

Id. at § 45(9).

Id. at § 45(7A).

Id. at § 47(2).

Id. at § 39(1).

Id. at §§ 35-37.

Id. at § 35(1).

Id. at § 35(2).


Id.

Id.

See <http://www.elibraryhub.com/heritage/heritageCollection.asp>.


Some of the UK library and archives provisions apply to both libraries and archives, some only to libraries, but none applies only to archives.

Section 40A, 42 and 43 of the CDPA apply to “prescribed archives.” Section 44 (which provides that it is not an infringement to make a copy of an article of cultural or historical importance or interest, whose export from the UK is conditioned on making a copy of it and depositing it in an appropriate library or archive) applies to any archive. UK Rep. at E-I-2.

The Copyright (Librarians and Archivists) (Copying of Copyright Material) Regulations, SI 1989 No. 1212 (the “Library Regulations”), Reg 3(4). UK Rep. at E-1-2. The CDPA provides some further guidance regarding the permissible scope of the regulations. See CDPA 1988, § .37.

UK Rep. at E-I-3.

Id.

UK Rep. at E-I-12. citing CDPA s. 42.

Id. citing CDPA s. 42(2).

The UK report notes that if the users of the intranet count as “the public,” however, this could constitute an infringing communication to the public. UK Rep. E-I-4 at note 8.

UK Rep. at E-I-4, citing ¶ 6 of the Regulations. Also see UK Rep. at E-I-4 at note 9, stating it is unlikely the concept of “premises” could be interpreted “other than as referring to physical premises.”

National Library of Scotland, the National Library of Wales, the Bodleian Library, Oxford, the University Library, Cambridge, and the Library of Trinity College London. Section 6(2) of the 2003 Act empowers the Secretary of State to make regulations with regard to the circumstances under and means by which a deposit library is entitled to delivery of a non-print publication or a key or program required to access a work. As of May, 2007, no regulations have yet been issued and our correspondents do not believe any will be released before next spring.

This provision only applies to libraries. The UK report notes, however, that this provision and others specifically applying to libraries could also benefit archives to the extent the archives are regarded as a library. UK Rep. at E-I-8.

CDPA, § 41. UK Rep. at E-I-12. See also CDPA, § 40A, which allows for the lending of books by libraries and archives.

Id. at §§ 38-9. The researcher is required to make a signed declaration to that effect.


UK Rep. at E-I-5.

CDPA § 28A.

Copyright Act 1956 (the "1956 Act") § 7(6). Although the 1956 Act was repealed in 1988, this Section was preserved by transitional provisions.

Id. UK Rep. at E-I-6-7.


Nevertheless, the UK report cites Padfield, who in his guide to copyright for archivists warns that archivists should be "very wary of providing copies of artistic works (including most maps, drawings and photographs) in their collections." Padfield, COPYRIGHT FOR ARCHIVISTS AND USERS OF ARCHIVES (London: PRO, 2001).


Id. at E-I-8.

Id. at E-I-6.

Id.

Id. citing CDPA § 44A.

Id.

§106A(a).

§101.

§106A(c)(3).

§1202(c).

§1202(a).

§1202(b).

§1203(b).


Id. at B-II-11.

Id. at B-II-10.

Id. at B-II-11.

Id. at B-II-11-12.

These rights are enumerated in the Copyright Act (R.S.C. 1985, c. C-42), cited in Can. Rep. at C-II-4.

In the previously discussed Robertson case, the court specifically noted that moral rights infringement was not the subject of the appeal and was not addressed in the opinion but our correspondents note that this is an area of law ripe for discussion. Can. Rep. at C-II-7.

Copyright Act (R.S.C. 1985, c. 42) § 14.1(1), cited in Can. Rep. C-II-5. The right of integrity is further defined in Section§§ 28.2(1), (2) and (3). Note that there are exceptions to moral rights under Section§ 64 of the Act which apply to industrial designs and topographies. See Can. Rep. at C-II76. Also, Section§ 64.2 provides that certain activities relating to computer programs constitute infringement of copyright and moral rights. Id.


Id. citing § 14.1(2).

Id. citing § 14.1(4).

Id. citing § 28.1.
301 Can. Rep. at C-II-6. citing §34(1).
302 Fr. Rep. at D-II-5.
303 Our correspondents report that an author can repudiate an agreement if the other party attempts to
digitize the work. Fr. Rep. at D-II-6.
304 Fr. Rep. at D-II-5.
305 Since state-generated documents do not get included in public archives until thirty years after their
creation, this entire scenario might not arise very frequently. Id.
306 Article L121-7-1, cited in Fr. Rep. at D-II-7.
307 Id.
308 Fr. Rep. at D-II-7.
310 Fr. Rep. at D-II-7-8.
312 Copyright Act of 1987 (Singapore) § 190 cited in Sing. Rep. F-IV-4Section.
313 Sing. Rep. at F-I-8..
314 UK Rep. at E-II-1. These rights can be waived and are of limited duration. The right of attribution is
only enforceable in cases where the author has taken positive steps to assert his rights.
315 It is important to note that the archive and library exceptions to infringements discussed previously in
this Report do not provide protection against allegations of infringements of moral rights. See UK Rep. at
E-II-1-2.
316 Under Section§ 20 of the CPDA, “communication” is defined as ‘making available to the public of the
work by electronic transmission in such a way that members of the public may access it from a place and at
a time individually chosen by them.” Therefore, it would appear that any time material is either posted on a
website or sent via an e-mail, there is communication, and, thus, the libraries open themselves up to
liability quite frequently.
317 UK Rep. at E-III-1
318 Id.
319 43A N.Y. Jur. 2d Defamation and Privacy § 1.
and John Taylor Williams, PERLE AND WILLIAMS ON PUBLISHING LAW §505 (Aspen 2006).
321 Bruce W. Sanford, LIBEL AND PRIVACY §6.3.2 (2nd ed. 2007).
322 43A N.Y. Jur. 2d Defamation and Privacy § 201.
323 Fischer, Perle and Williams, PERLE AND WILLIAMS ON PUBLISHING LAW, supra note 319 at 532.
325 E.g., N.Y. C.P.L.R. § 215(3).
326 44 N.Y. Jur. 2d Defamation and Privacy § 239.
327 43A N.Y. Jur. 2d Defamation and Privacy § 77.
328 44 N.Y. Jur. 2d Defamation and Privacy § 240. Under New York law, the statute of limitations runs
from publication of the alleged defamatory material and not from the time that plaintiff discovers it.
of San Francisco v. Goldman, 28 Cal. Rptr. 3d 515, 525 (Cal. Ct. App. 2005) (applying California’s “rule
of discovery” to extend the statute of limitations in defamation action because oral history housed at library
was “inherently undiscoverable”), review granted and opinion superseded by 118 P.3d 1017 (Cal. 2005).
329 See generally Sanford, LIBEL AND PRIVACY, supra note 320, §12.3.4 and App. B (2nd ed. 2007).
331 44 N.Y. Jur. 2d Defamation and Privacy § 240.
332 Id.
335 See id. at 369-70.
336 Firth v. New York, 306 A.D.2d 666 (3rd Dept. 2003). The court ultimately held that the state was not
liable because the author of the report, the Office of the State Inspector General, had complete immunity in
the matter. 12 A.D.3d 907 (3rd Dept. 2004).
This second purpose is accomplished by § 230(c)(2), which overrules the New York case that found an online service provider liable as a publisher for the defamatory statements of its users because the service provider exercised editorial control over the content of its bulletin boards. See Zeran v. America Online, Inc., 129 F.3d 327 (4th Cir. 1997) at 330-331 (noting the purposes of the CDA and its overruling of Stratton Oakmont, Inc. v. Prodigy Services Co., 1995 WL 323710 (N.Y. Sup. Ct. 1995)).

47 U.S.C. § 230(f)(2) (emphasis added). “The term “access software provider” means a provider of software (including client or server software), or enabling tools that do any one or more of the following: (A) filter, screen, allow, or disallow content; (B) pick, choose, analyze, or digest content; or (C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.” § 230(f)(4).

§ 230(f)(3).
§ 230(c)(1) (emphasis added).
129 F.3d 327, 332-334 (4th Cir. 1997).
Id. at 332.
40 Cal.4th 33 (2006).
Id. at 60, note 19.
§ 230(e)(1).
“Civil libel law in the United Kingdom is an American reporter’s, or publisher’s, worst nightmare.” Sanford, LIBEL AND PRIVACY, supra note 320, §2.2.2 at 2-9.
Id. §2.2.2 (comparing U.S. and U.K. defamation law); see also Fischer, Perle and Williams, PERLE AND WILLIAMS ON PUBLISHING LAW, supra note 319 §5.13 (concerning damages in U.S. libel suits).
Note that damages may be mitigated if used for purely scholarly purposes.
For the purposes of this discussion, “publication” has as a dual meaning. Not only does it mean the printing of the material by the original source but also allowing access to the public to view the material.
“An archive is said to have ‘published’ defamatory material if it includes such material in its publicly-accessible collection.” Aus. Rep. at B-II-19.
According to the Canadian Report, the act of including defamatory material in an archive or library is unlikely to result in institutional liability given their subordinate role in the dissemination of the material. Can. Rep. at C-II-10.
Fr. Rep. at D-II-22.
Electronic means is defined as “any distribution to the public or to categories of the public by an electronic communication process, by signs, by signals, by written materials, by images, by sounds, or messages of any nature which are not private correspondence.” It is unclear whether a private e-mail would fall under this category as there was no definition of ‘private correspondence’ provided. (For example, would an email between two people be considered private correspondence but an email to more than ten people, for instance, not be? Is posting on a blog with limited access ‘private correspondence?’) Fr. Rep. at D-II-22.
The statute of limitations begins anew when the material is posted on the website. Fr. Rep. at D-II-24.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.
Id. at 267. Indeed, other relevant aspects of the case illustrate its unique nature, and how unlikely it is that a library or archives would ever be liable. The publisher had stipulated that it specifically targeted the market of murderers and would-be murderers for sale of its murder manual; that it knew and intended that the book would be used by criminals in planning and committing murder; and that in publishing and selling the book, it "assisted" Perry in committing the brutal triple murder.


Article 1383 states, “Every individual is responsible for the damages that he causes not only by his own actions but also due to his negligence or imprudence.” It is unclear whether an archive or library that simply carried the book in its collection would also be liable under this law. Fr. Rep. at D-II-12.

Also, our correspondents note that many books carry a note disclaiming responsibility on the part of the author and publisher for the accuracy of the work, but our correspondents do not believe these clauses would hold up to scrutiny under French tort law. Fr. Rep. at D-II-12-13.


The examples given include a book capable of causing a dermatological reaction or a cookbook containing incorrect instructions (though it is likely the publisher would be liable in these instances, not the library).

See generally Bruce Sanford, Libel and Privacy, supra note 320, §11.1; Restatement (Second) of Torts (1977) §652A.


See Restatement (Second) of Torts, supra note 420 at §652E and comment b.

Restatement (Second) of Torts, supra note 420 at §652C, comment b; Sanford, supra note 320 §11.5.

Restatement (Second) of Torts, supra note 420 at §652H.


Acara v. Banks, 470 F.3d 569, 570-71 (5th Cir. 2006).


Id.


Id. at C-IV-4-5.


In fact, there is no record of any such case in our correspondents’ report. Cases appear to be settled by the Privacy Commissioner.


Fr. Rep. at D-II-11.
Law No. 2004-801 of August 6, 2004 on the protection of individuals with respect to the processing of personal information and amending law No. 78-17 of January 6, 1978 on data processing, files and freedoms, cited in Fr. Rep. at D-II-16.


CDPA § 85, cited in UK Rep. at E-II-5.

See, e.g., 18 U.S.C. §842 (p) (making it a criminal act to teach or demonstrate the making or use of explosives, destructive devices or weapons of mass destruction knowing that the recipient intends to use the information for criminal purposes).

E.g., Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)


See, e.g., http://www.ala.org/ala/oif/bannedbooksweek/bbwlinks/100mostfrequently.htm (American Library Association webpage dealing with “most frequently challenged books” and ways to respond to such challenges).

Moreover, a library or archives might be protected under Section 230 of the CDA, discussed in the Section on defamation. See Kathleen R. v. City of Livermore, 104 Cal. Rptr. 2d 772 (Cal. Ct. App. 2001) (CDA preempted claims brought by a parent whose child had accessed pornography through a library internet connection). See also Barrett v. Rosenthal, 40 Cal. 4th 33, 53 (Cal. 2006) holding that Section 230 promotes “active screening by service providers of online content provided by others” but that it “broadly shield[s] all providers from liability for ‘publishing’ information received from third parties.

There have been reports that government officials have urged private website operators to remove certain materials from their sites in the wake of 9/11 (see, e.g., http://www.eff.org/Censorship/Terrorism_militias/antiterrorism_chill.html), but none of the individuals we spoke to in connection with this project had any first-hand knowledge of such requests.

It is unclear whether the issue was that they would come across the offensive material while doing searches in the course of their work or if the patrons might view offensive materials potentially exposing the workers to them. Can. Rep, at C-III-6.

It should be noted that Cosmopolitan is now available in Singapore. It is sold, shrink-wrapped in cellophane and marked as unsuitable for children, as an adult-themed publication. Id.

The Public Entertainment and Meetings Act is relevant to authors because it regulates the in-person promotion of literary works. Sing. Rep. at F-III-6.
It is important to note that removed materials are not listed in the library’s public online catalogue. *Id.*

www.elibraryhub.com/heritage/heritageCollection.asp

Section 22(1) of the National Library Board Act; *Id.*

*See, e.g.,* EU Directive 2000/31/EC (Directive on electronic commerce), OJ L178 (8 June 2000). For Australia, see the Copyright Amendment Act of 2000, US Free Trade Agreement Implementation Act 2004 (“USFTAIA”) and the Copyright Legislation Amendment Act 2004. For Singapore, see Section 10 of Singapore’s Electronic Transactions Act (as amended by 2004’s Electronic Transmissions Amendment) and Sections 193A-193F of The Copyright Act, Part IXA. Canada currently does not have any laws that directly address internet service provider liability for infringement. In 2005, Canada’s Parliament introduced Bill C-60, to amend the Copyright Act but it was never passed. In principle, ISPs are not liable so long as they merely act as conduits for content and not as content-providers. *Tariff 22 decision: FC, FCA and SCC* according to an e-mail from David Lametti to Philippa Loengard on May 24, 2007.

The limiting principle is found in article 9(2) of the Berne Convention, which provides that countries may allow exceptions in “certain special cases” provided that the permitted use “does not conflict with a normal exploitation of the work” or “unreasonably prejudice the legitimate interests of the author.”

*Aus. Rep. at B-II-33*  
*Id.*  
*Aus. Rep. at B-II-30.*  
*Id.*  
*[2004] B.C.J. No. 2534 (B.C. Sup. Crt.);* It is unclear if the archive would have been able to grant access to the report had they wanted to as in this case the archive in question did not wish to grant access. It is unclear why that was the case. *Can. Rep. at C-IV-2.*  
*Fr. Rep. at D-II-33.*  
*Fr. Rep. at D-II-26.*  

*Fr. Rep. at D-II-28.*  
*Id.*  
*Fr. Rep. at D-II-28.*  
*In France, the archivists determine whether a document is sensitive.* *Fr. Rep. at D-II-28.*  
*Fr. Rep. at D-II-28.*  

*UK Rep. at E-II-20-21.*  
*UK Rep. at E-II-20.*  
*Id.*  
*See, in general,* *Sing. Rep. F-II.*  
*Sing. Rep. at F-II-3.*  
*Id.*  
*The Koninklijke Bibliotheek, or National Library of the Netherlands, was founded in 1798 to provide resources “for research, study and cultural enrichment.” It is a deposit library for Dutch printed and electronic publications (performing in the Netherlands a role similar to that of the Library of Congress in

520 Id. For a discussion of online corrections sites maintained by news media organizations, see Cynthia Cotts, Department of Corrections, VILLAGE VOICE (Jan. 28-Feb. 3, 2004), available at <http://www.villagevoice.com/print/issues/0404/cotts.php>.


522 Id.


528 Libraries that are members of LOCKSS create their own archive to ensure post-subscription access without the necessity of a continuing payment for online access, and their contracts with publishers expressly permit this (at least with respect to those journals for which the publisher allows LOCKSS use). LOCKSS is discussed further below.


532 Id.


536 http://www.caslconsortium.org; Aus. Rep. at B-II-34


539 Can. Rep. at C-II-16.


541 Fr. Rep. at D-II-33.

542 Id.

543 Sing. Rep. at F-II-2. The Report later adds, however, that contracts between publishers and authors include provisions governing the digital exploitation of the author’s work. Sing. Rep. at F-II-2. The Report does not mention whether these contractual provisions constrict the use of works by archives.

544 The Report mentions that Marshall Cavendish, a major international publisher based out of Singapore, conducts extensive fact-checking into its non-fiction works. Sing. Rep. at F-II-10. This finding might imply that Singaporean publishers weed out offending materials more rigorously than their counterparts and thereby have less need for the contractual provisions covered in this Section.

545 Sing. Rep. at F-II_2.

546 Sing Rep. at F-II-3.

547 Id.


550 Id.
Id.

Id.

Id.

UK Rep. at E-II-23.

JISC Model License Clause 11.4, cited in UK Rep. at E-II-23.


See http://www.nesli2.ac.uk/model.htm.

JISC Model License Clause 11.4, cited in UK Rep. at E-II-23.


See http://www.nesli2.ac.uk/model.htm.


E-mail message from Els van Eijck van Heslinga, International Program Development Manager, e-Depot, to June Besek, May 25, 2007.


Portico’s current list of libraries and publishers is on its website, <http://www.portico.org>.


Telephone conversation between June Besek and Eileen Fenton, May 18, 2007.


See Agreement for Full Participation in NIH PubMed Central Archive and Agreement for Selective Deposit in NIH PubMed Central Archive, both available at <http://www.pubmedcentral.nih.gov/about/pubinfo.html#pmcagree>.

Telephone conversation between June Besek, Martha Fishel, Chief of the Public Services Division, National Library of Medicine, and David Gillikin, Chief, Bibliographic Services Division, NLM on May 9, 2007.


Telephone conversation between June Besek, Martha Fishel, Chief of the Public Services Division, National Library of Medicine, and David Gillikin, Chief, Bibliographic Services Division, NLM on May 9, 2007.


See Anne R. Kennedy, Richard Entlich, Peter B.Hirtle, Nancy Y. Mcgivern and Ellie L. Buckley, E-Journal Archiving Metes and Bounds: A Survey of the Landscape 21 (CLIR, Sept. 2006) [hereinafter, Metes and Bounds]. The National Library of Germany, Die Deutsche Bibliothek instituted an e-journal archive called “kopal” in 2004. See id. at 105. That archive was developed on the basis of voluntary agreements with publishers, and it is unclear to what extent the new law will change its operations.

One could envision an amendment that allows distribution to the offices of Members of Congress.
It is not inconceivable that publishers might want legal protection from any liability that might accrue to them as the result of the Library’s distribution of removed material.


APPENDICES

1. Appendix A          A-1

2. Appendix B - Australia
   a) Phase I Report          B-I-1
   b) Phase II Report         B-II-1
   c) Responses to Additional Questions, May 2006      B-III-1
   d) Further Comments, February 2007        B-IV-1

3. Appendix C - Canada
   a) Phase I Report          C-I-1
   b) Phase II Report         C-II-1
   c) Responses to Additional Questions, December 2006    C-III-1
   d) Response to Additional Questions, May 2007       C-IV-1

4. Appendix D - France
   a) Phase I Report          D-I-1
   b) Phase II Report – English Translation   D-II-1
   c) Phase II Report          D-III-1
   d) Responses to Additional Questions, July 2006 – English Translation D-IV-1
   e) Responses to Additional Questions, July 2006        D-V-1
   f) Mise à Jour Mellon I, September 2006 – English Translation D-VI-1
   g) Mise à Jour Mellon I, September 2006     D-VII-1
   h) Responses to Additional Questions, May 2007 – English Translation D-VIII-1
   i) Responses to Additional Questions, May 2007       D-IX-1

5. Appendix E - UK
   a) Phase I Report          E-I-1
   b) Phase II Report         E-II-1
   c) Responses to Additional Questions, May 2007       E-III-1

6. Appendix F - Singapore
   a) Phase I Report          F-I-1
   b) The Legal Treatment of Archives Under Contract Law   F-II-1
   c) The Legal Treatment of Archives – Other Substantive Areas F-III-1
   d) Memorandum, April 2006       F-IV-1
   e) Responses to Additional Questions, May 2007       F-V-1
Appendix A

The following table summarizes some of the basic provisions related to archives in the copyright laws of the United States, Australia, Canada, and the United Kingdom (as described in the foreign reports). The table is a ready reference tool but is not a substitute for the complete text of the reports and the discussion of these provisions in the Phase I Report. The French report refers to separate provisions of law (rather than copyright law). These provisions are not included in this chart but are discussed in the Phase I Report. Please refer to the Phase I Report and its Appendices (including the foreign reports) for a more comprehensive explanation.

<table>
<thead>
<tr>
<th>Specific provisions in copyright law related to archives?</th>
<th>United States</th>
<th>Australia</th>
<th>Canada</th>
<th>United Kingdom</th>
<th>Singapore</th>
</tr>
</thead>
<tbody>
<tr>
<td>Provisions permitting certain reproductions made for distribution to library patrons upon request apply to:</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Literary and dramatic works, pantomimes, choregraphic works and sound recordings that do not contain musical works. Illustrations, diagrams, or similar “adjuncts” to works permitted to be reproduced and distributed to patrons, may also be copied. These provisions (regarding distribution to patrons) do not apply to musical works, pictorial, graphic or sculptural works, motion pictures or other audiovisual works.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Provisions related to copying for preservation or deposit in a library’s collection, but not for distribution to a library’s patron, apply to all forms of works.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Audiovisual news programs are a separate category. Libraries or archives are permitted to reproduce and distribute by lending a limited number audiovisual news programs.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

To what types of works do these provisions apply?

- Some provisions (e.g. provisions related to certain unpublished works in libraries or archives) relate to the reproduction and communication of: Original literary, dramatic, musical and artistic works.
- Other provisions (e.g. those related to reproducing and communicating works to requesting users) specifically apply to an article contained in a periodical publication, or to a published work other than an article contained in a periodical publication, or a published work held in the library or archives’ collection. References to an article in a periodical include anything contained in that article other than artistic works (unless the artistic works accompany and explain or illustrate the article).
- An “artistic work” is defined as: “(a) a painting, sculpture, drawing, engraving or photograph, whether the work is of artistic quality or not; (b) a building or a model of a building, whether the
- Provision applicable to articles published in a newspaper or periodical (other than a scholarly, scientific or technical periodical), does not apply to works of fiction, poetry, drama or music. Because the provision is limited to “reprographic reproduction,” this by its nature excludes audiovisual works (an audiovisual work cannot be photocopied). This provision and others only apply to “works.” Works of authorship do not include sound recordings or broadcasts.
- Articles in periodicals (not including artistic works); artistic works included for explanatory or illustrative purposes in an article, thesis, or literary, dramatic, or musical work; published literary, dramatic and musical works; old unpublished literary, dramatic and musical works (including incorporated explanatory or illustrative artistic work); photographs, engravings, old unpublished sound recordings and cinematographic films within collections that are open to public inspection.
- Provisions related to making copies for patrons who request them for their own research or study apply to:
- A literary, dramatic or musical work (and any accompanying illustrations or typographical arrangement).
- Recording or copy of certain folk songs, broadcasts and cable programs of a designated class may be made for purposes of being placed in an archive maintained by a designated body.
<table>
<thead>
<tr>
<th>United States</th>
<th>Australia</th>
<th>Canada</th>
<th>United Kingdom</th>
<th>Singapore</th>
</tr>
</thead>
<tbody>
<tr>
<td>building or model is of an artistic quality or not; or (c) a work of artistic craftsmanship whether or not mentioned in paragraph (a) or (b).” Copyright Act 1968 (Cth) (Australia), section 10</td>
<td>Some provisions relate to reproduction and communication of “subject matter other than works”, e.g., provisions regarding: copying and communicating unpublished sound recordings and “cinematograph films” in libraries or archives; and copying and communicating sound recordings and “cinematograph films” for preservation and other purposes.</td>
<td>“Reprographic reproduction” (of scholarly periodical article or certain newspaper or periodical articles) given to patron must not be in digital form. Communication via hard copy permitted—any intermediate copies must be destroyed. Reproduction provision for patron does not apply to downloading a work from an electronic database or the Internet. Despite absence of digital exception to right of reproduction for patrons: No express restriction on type of medium on which copy may beon on type of medium on which copy can be made but “single copy” limitation may preclude supplying a copy electronically.</td>
<td>Reproduction for patrons: only available for research and study if not available commercially in a reasonable time frame may communicate work electronically (directly to patron only). Reproduction for Other Libraries: may copy material for another library's collection as long as not substitute for independent subscription or purchase. May replace another's copy as long as receiving library states reason for need (loss, damage, theft, etc.) Unpublished Works - 50 years after death of author and 75 years after creation, able to make copies for research and study. Sound Recordings and Films: 50 years after creation, copying for research and study allowed.</td>
<td></td>
</tr>
<tr>
<td>Reproduction: hard copies; up to 3 copies for preservation purposes may be in digital format, but may not be made available in that format outside library premises. Distribution of hard copies only. One provision allows the reproduction, distribution, performance or display in hard copy or digital form of a published work during the last 20 years of its term under certain circumstances.</td>
<td>Reproduction for patrons or other library/archives may be provided in hard copy or digital form. Communication via hard copy or electronic transmission permitted to patron, if not available commercially in a timely manner and for a reasonable price—but the supplying library/archives must destroy its digital copy once communicated. Preservation reproduction of original artistic work may be made available online to be accessed through use of a computer terminal installed within the library's premises, from which the user cannot make an electronic or hard copy or communicate the reproduction.</td>
<td>Reproduction for Other Libraries: may copy material for another library's collection as long as not substitute for independent subscription or purchase. May replace another's copy as long as receiving library states reason for need (loss, damage, theft, etc.) Unpublished Works - 50 years after death of author and 75 years after creation, able to make copies for research and study. Sound Recordings and Films: 50 years after creation, copying for research and study allowed.</td>
<td>Section 45 Reproduction for patrons: only available for research and study if not available commercially in a reasonable time frame may communicate work electronically (directly to patron only). Reproduction for Other Libraries: may copy material for another library's collection as long as not substitute for independent subscription or purchase. May replace another's copy as long as receiving library states reason for need (loss, damage, theft, etc.) Unpublished Works - 50 years after death of author and 75 years after creation, able to make copies for research and study. Sound Recordings and Films: 50 years after creation, copying for research and study allowed.</td>
<td></td>
</tr>
<tr>
<td>United States</td>
<td>Australia</td>
<td>Canada</td>
<td>United Kingdom</td>
<td>Singapore</td>
</tr>
<tr>
<td>---------------</td>
<td>-----------</td>
<td>--------</td>
<td>----------------</td>
<td>-----------</td>
</tr>
<tr>
<td>Reproduction and communication of works for administrative purposes—may be communicated to officers of the library or archives by making it available online to be accessed using a computer terminal installed on the library or archive’s premises.</td>
<td>single individual does not constitute communication to the public. As currently interpreted (albeit by a lower court), “making available” to individuals on-demand via digital transmission is not a “communication to the public” and thus falls outside the copyright owner’s rights. Preservation reproduction of a work or other subject matter may be made in hard copy or in alternative format if original is in an obsolete format or the technology required to use the original is unavailable. While silent on the types of formats that may be reproduced, provisions state any intermediate copy must be destroyed.</td>
<td>Definition of “archives” in copyright law?  No definition of “archives” in U.S. Copyright Act. Nevertheless, in order to take advantage of section 108 provisions:  • the library or archives must be open to the public, or at least to researchers in a specialized field;  • the reproduction and distribution may not be for commercial advantage; and  • the library or archives must include a copyright notice</td>
<td>“Archives” means a nonprofit institution that maintains a collection of documents or material of public interest or historical significance in order to conserve and preserve those documents or material. Specific provisions only available to libraries and archives all or part of whose collection is accessible to members of the public directly through interlibrary loan and parliamentary archives. See Australian Report for “Library, archive or museum” defined as: “(a) an institution, whether or not incorporated, that is not established or conducted for profit or that does not form a part of, or is not administered or directly or indirectly controlled by, a body that is established or conducted for profit, in which is held and maintained a collection of documents or other materials that is open to the public or to researchers, or (b) any other non-profit institution</td>
<td>No definition of archives in the Copyright, Designs and Patents Act of 1988 (“CDPA”). A non-profit collection of documents or other material of historical significance or public interest that is in the custody of a body, whether corporate or unincorporated, is being maintained by the body for the purpose of concerning and preserving those documents or other material. (Section 7(1) and 7(4) Copyright Act.</td>
</tr>
<tr>
<td>United States</td>
<td>Australia</td>
<td>Canada</td>
<td>United Kingdom</td>
<td>Singapore</td>
</tr>
<tr>
<td>---------------</td>
<td>-----------</td>
<td>--------</td>
<td>---------------</td>
<td>-----------</td>
</tr>
<tr>
<td>(108 (c)) Copies in digital format may not be made available to the public in that format outside library premises.</td>
<td>Library or archives may reproduce a work held in its collection for “administrative purposes.” Administrative purposes defined as “purposes directly related to the care or control of the collection.”</td>
<td>original cannot be viewed, handled or listened to due to its condition or the “atmospheric conditions in which it must be kept.” Copying in an alternative format is permitted if the original is obsolete.</td>
<td>The provision does not include “communication to the public.”</td>
<td></td>
</tr>
</tbody>
</table>

**Provisions related to copying for patrons:**

**In response to user’s request for a copy for research or private study purposes**

A library or archives may reproduce and distribute, in response to a user’s request, “no more than one article or other contribution to a copyrighted collection or periodical issue,” or “a small part” of any other copyrighted work from its collection or that of another archives, if:

- the library/archives has had “no notice that the copy would be used for purposes

Libraries or archives may reproduce or communicate all or part of an article or published work held in the library’s collection, in response to a user’s request for a copy for the purpose of research or study.

Most requests must be in writing. If the user requests all or more than a reasonable portion (other than an article or periodical) an authorized officer of the institution must make a

An archive, library or museum may make a copy of a “a work that is or is contained in an article published in (a) a scholarly, scientific or technical periodical, or (b) a newspaper or periodical, other than a scholarly, scientific or technical periodical, if the newspaper or periodical was published more than one year before the copy was made” for a person requesting to use the copy

The librarian of a prescribed library may make and supply a single copy of an article in a periodical, or part of a published work, for users who satisfy the librarian that the copy is required for non-commercial research or private study. The “single copy” requirement could preclude supplying a copy electronically.

An archive may “make and supply a copy of an unpublished literary, dramatic, or musical work (and any accompanying illustrations or typographical arrangement) to a person who requires the copy for the purposes of private study or non-commercial research.” The researcher must provide a written, signed

A patron may request an officer-in-charge materials for the purpose of research and study only. Officer may make and supply a copy of any published work or article in a periodical work, a literary, dramatic or musical work. Request may not be for more than two articles in the same periodical unless they are about the same topic.

Requested works may be supplied in electronic form provided the patron is notified that the electronic copy was made pursuant to the Copyright Act and provided the library supplying the work destroys the electronic copy made for the purpose.

Articles or other published works held by the library or archive in electronic form may be supplied to patrons online provided the material is only available on the premises and in such a manner that users cannot make an electronic copy of the work or transmit the work.
A library/archives or nonprofit educational institution may reproduce, distribute, perform or display in facsimile or digital form a copy of a published work during the last 20 years of its term, for purposes of preservation, scholarship or research if the work is not subject to normal exploitation and cannot be obtained at a reasonable price. The institution must make a reasonable investigation to determine the work meets these criteria and that the copyright owner has not filed a notice to the contrary with the Copyright Office.

### Commercial Availability Declaration

The library may communicate an electronic reproduction to the user under this provision, but if so, must provide copyright notification to the user prior to the communication and must destroy the reproduction once it is communicated.

A library or archives may provide a reproduction of all or part of an article or published work from its collection at the request of another library or archives for that institution’s collection or to fulfill a written request made by a user of the other library for a copy of the article or published work for research or study. The library or archives may supply the reproduction in hard copy or electronic form. If it supplies the reproduction electronically, the supplying library or archives, must destroy its reproduction once it has been communicated. The library or archive must not charge the user more than the cost to make and supply the reproduction.

### Fair Dealing

**United States**
- Fair Use -- Teaching, scholarship and research are favored by the fair use doctrine though they are not automatically deemed fair. The fair use analysis depends on the specific facts and requires that the use be evaluated according to the four factor test: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the reproduction; and (4) the effect of the use on the potential market for the copyrighted work.
- Fair Dealing -- More limited in scope than the fair use doctrine in U.S. law. Fair dealing applies to dealings undertaken for purposes of: research and study, criticism and review, reporting the news, or the giving of professional advice by a patent attorney or legal practitioner, parody or satire, and news commentary.
- **Patron’s property**: Where the copy becomes the requesting user’s property; and
- **Library/Archives displays a copyright warning**: Where the library or archives displays a copyright warning where it accepts orders. (Section 108 (d), (e))

**Canada**
- For purposes of research or private study. This provision does not apply to works of fiction, poetry, drama or music. The library, archive, or museum may only make a copy under the above-mentioned section if: the person requesting the copy satisfies the library, archive or museum that he/she will use the copy only for purposes of research or private study; and once satisfied, the library, archive or museum may provide the user with a single copy of the work.

**United Kingdom**
- declaration that the work will be used for such purposes. No express restriction on the type of medium on which the copy may be made, but the requirement of “a copy” may preclude supplying the copy electronically (particularly if original unpublished work is in hard copy form). (CDPA s.43)
- Where an unpublished literary, dramatic or musical work is over one hundred years old and has been open to public inspection in any institution in the UK, it may be copied by any person without infringing copyright as long as the author has been dead for at least fifty years, and the copy is made for purposes of private study or research or “with a view to publication.” If all or part of the old work is published, it is not a copyright infringement to broadcast or transmit the work to “subscribers to a diffusion service.”

**Singapore**
- Copying on behalf of other libraries: The librarian of a prescribed library may make and supply a copy of an article in a periodical or all or part of a published edition of a literary, dramatic or musical work to another prescribed library broadens the collection of the receiving library. The provision does not apply if, when the copy is made, the librarian knows or could ascertain by reasonable inquiry, the name and address of a person entitled to authorize the making of the copy. (CDPA, s. 41)

### General Provisions in Copyright Law Related to Archives

- **Fair Dealing** -- The UK copyright law provides that copying by a librarian is not fair dealing if the librarian does anything that regulations under section 40 (which restricts production of multiple copies of the same material) would not permit to be done under section 38 and 39 (which deal with libraries making single copies of articles in periodicals or parts of published works for users who require them for private study or research). Although this limitation would not prevent an archivist from making an electronic back-up (for use in case the original is no longer available) of computer software by or on behalf of the software owner, it is not a copyright infringement.

**Fair Dealing** -- The Singapore fair dealing defense is similar to the US fair use exception as it is not limited to a specific purpose of research or private study; rather, that is just one possible purpose that may constitute fair dealing under Section 35. In determining fair dealing, factors to consider are the purpose and character of the dealing, the nature of the work, the amount and substantiality of the part copied, the effect on the market for and value of the work, and the ability to obtain the work at a reasonable commercial price. If the work is to be used for...
<table>
<thead>
<tr>
<th>United States</th>
<th>Australia</th>
<th>Canada</th>
<th>United Kingdom</th>
<th>Singapore</th>
</tr>
</thead>
<tbody>
<tr>
<td>Libraries and archives may make up to 3 copies of an unpublished copyrighted work in the collection for the sole purpose of preservation and security or for deposit for research use in another library or archives. (Section 108 (b)) Libraries and archives may make up to 3 copies of a published work to replace a work in the collection that is damaged, deteriorating, lost or stolen or whose format has become obsolete, if library determines an unused replacement cannot be obtained at a fair price.</td>
<td>A library or archives may reproduce or communicate a work that forms or previously formed part of its collection in order to replace works that have deteriorated, been damaged, lost or stolen under certain circumstances. Libraries and Archives may reproduce specific editions of work if needed due to damage, loss, theft or determination, even if other editions are commercially available.</td>
<td>Libraries, archives may, under certain circumstances, make a copy of a literary, dramatic, or musical work (and any accompanying illustrations or the typographical arrangement) in the permanent collection of the library or archives (1) “to preserve or replace the item by placing the copy in its permanent collection in addition to or in place of it;” or (2) to replace a copy at another library or archive, that has been lost, destroyed or damaged. It must not be reasonably practicable for the library or archives to purchase a copy of the item in question. This provision does not restrict the medium on which a copy may be made but only allows the making of a copy.</td>
<td>A prescribed library or archive may, under certain circumstances, make a copy of a literary, dramatic, or musical work (and any accompanying illustrations or the typographical arrangement) in the permanent collection of the library or archives (1) “to preserve or replace the item by placing the copy in its permanent collection in addition to or in place of it;” or (2) to replace a copy at another library or archive, that has been lost, destroyed or damaged. It must not be reasonably practicable for the library or archives to purchase a copy of the item in question. This provision does not restrict the medium on which a copy may be made but only allows the making of a copy.</td>
<td>Section 48, Copies may be made of original works against loss, deterioration, or research. Published items that are part of collection may be copied for replacement if original damaged, deteriorated, lost or stolen as long as new copy not obtainable at reasonable price in a reasonable amount of time. Sound Recordings and Films – Section 113 – Copies can be made to preserve against loss and deterioration or research to be carried out by the archive as long as not available for a reasonable price and obtainable in a reasonable amount of time.</td>
</tr>
</tbody>
</table>
portion used; and (4) the effect on the potential market for or value of the copyrighted work. Many uses of copyrighted works for research and scholarship are considered fair. satire. Copying by a library or archives for preservation purposes would not constitute fair dealing. Fair dealing, under the current interpretation of Australian law, generally does not assist an institution performing an act on behalf of its user. Libraries and archives currently need to rely on specific exceptions in the copyright law rather than on fair dealing.

Flexible Dealing – Uses made (a) by or on behalf of the body administering a L or A (b) made for the purpose of maintaining or operating the library or archives and (c) not made for commercial advantage or profit. Can only be used in a special case which does not “conflict with a normal exploitation” of the copyrighted work meets aforementioned criteria; and does not “unreasonably prejudice the legitimate interests of the owner of the copyright.” §200 AB(1)

Flexible Dealing – Uses made (a) by or on behalf of the body administering a L or A (b) made for the purpose of maintaining or operating the library or archives and (c) not made for commercial advantage or profit. Can only be used in a special case which does not “conflict with a normal exploitation” of the copyrighted work meets aforementioned criteria; and does not “unreasonably prejudice the legitimate interests of the owner of the copyright.” §200 AB(1)

Does not apply to activities of patrons. Due to the newness of the provision and uncertainty surrounding it, libraries tend not to rely on it.

The fair use dealing defense in Section 35 is in addition to the provisions (Sections 45-49) specifically related to archives. There is no express statement in the 2005 amendments to the Copyright Act that archives should benefit from the revised Section 35 fair dealing defense as well as Sections 45-49. It is noteworthy that there is such an express statement with regards to software reverse engineering.
Appendix B

AUSTRALIA: PHASE I REPORT

This document contains responses to various questions posed by the Columbia University research team and, in the appendix, the most relevant provisions from the *Copyright Act 1968* (Cth) (‘*Copyright Act*’). We would be happy to discuss any of the matters set out below. In general, you will see that there is very little relevant case law, and the issues you are considering would benefit greatly from empirical research.\(^1\) Little more is possible than to describe the complex set of statutory provisions that apply to archives\(^2\) under the *Copyright Act*. The current state of knowledge about industry practices may well be frustrating, but it does suggest an important gap in the copyright policy process in Australia. As a recent Australian report emphasised:

> There is a clear need for further empirical data to be collected, at least in relation to the impact and effect of the library copying provisions and the educational statutory licence.\(^3\)

Emily Hudson\(^*\) and Andrew T Kenyon\(^**\)

---

By way of introduction, we briefly mention a few matters about Australian copyright law, which has broad similarities with other common law jurisdictions. Under the *Copyright Act*, copyright subsists in original literary, dramatic, musical and artistic works, as well as sound recordings, cinematograph films, sound and television broadcasts and published editions (ss 32, 89-92). The author or maker of copyright material or their employer is generally deemed to be the owner of

---

\(^1\) Eg, when the national law firm Phillips Fox recently prepared a report for the Commonwealth Attorney-General’s Department, it received very few submissions that were based on any detailed consideration of how the Australian provisions for digital copyright operate in practice: *Digital Agenda Review: Report and Recommendations* (January 2004) ¶ 1.3; available at [www.ag.gov.au/DigitalAgendaReview/reportrecommendations](http://www.ag.gov.au/DigitalAgendaReview/reportrecommendations).

\(^2\) In this document, we use the Australian statutory terminology of ‘archives’ rather than ‘archive’.

\(^3\) *Digital Agenda Review: Report and Recommendations* (January 2004) ¶ 1.4.

* Research Fellow, CMCL – Centre for Media and Communications Law, and IPRIA – Intellectual Property Research Institute of Australia, University of Melbourne; e.hudson@unimelb.edu.au.

** Director, CMCL – Centre for Media and Communications Law, University of Melbourne; a.kenyon@unimelb.edu.au.
copyright. But this principle can be modified by agreement, such that publishers and other investors who promote works will frequently be the owners of copyright (ss 35, 97-100, 196). The exclusive rights of copyright owners include the right to reproduce copyright material, to publish it, and to communicate it to the public by making it available online or electronically transmitting it (ss 31, 85-88).

Question 1a: Do the domestic copyright laws of Australia contain provisions specifically addressed to archives? Do they define the term ‘archive’?

The Copyright Act contains a number of provisions specifically directed to libraries and archives, which are commonly called the ‘library and archives provisions’. The term ‘archives’ is defined in section 10(1) of the Copyright Act to mean:

(a) archival material in the custody of:
   (i) the Australian Archives;
   (ii) the Archives Office of New South Wales established by the Archives Act 1960 of the State of New South Wales;
   (iii) the Public Record Office established by the Public Records Act 1973 of the State of Victoria; or
   (iv) the Archives Office of Tasmania established by the Archives Act 1965 of the State of Tasmania; or
(b) a collection of documents or other material to which this paragraph applies by virtue of subsection (4).

Section 10(4) provides:

Where:
(a) a collection of documents or other material of historical significance or public interest that is in the custody of a body, whether incorporated or unincorporated, is being maintained by the body for the purpose of conserving and preserving those documents or other material; and
(b) the body does not maintain and operate the collection for the purpose of deriving a profit; paragraph (b) of the definition of archives in subsection (1) applies to that collection.

Example: Museums and galleries are examples of bodies that could have collections covered by paragraph (b) of the definition of archives.
Through this definition, the term ‘archives’ includes a wide range of cultural institutions, but not entities such as commercial art dealers.\(^4\) There has been no case law considering the ambit of this definition. The term ‘library’ is not defined in the *Copyright Act*.

Australian library and archives provisions were first introduced in 1968. While further comments are made below in response to question 2, it is useful to outline the relevant timeline here:\(^5\)

1968: Provisions in relation to libraries (but not archives) were introduced in the *Copyright Act 1968* as a result of recommendations from the Spicer Committee, which based its recommendations on similar provisions in the *Copyright Act 1956 (UK)* and submissions from the Australian Library Association. Institutions that were conducted on a not-for-profit basis could make one copy of an article (or part of a published work) for a person who required the copy for research or private study.

1976: The Copyright Law Committee on Reprographic Reproduction (known as the Franki Committee) reported to government. Submissions suggested that libraries were concerned about the day-to-day operation of the library provisions, while copyright owners were concerned that copying was relatively unrestricted under the provisions. The Committee’s conclusions were motivated by a concern about the unavailability of works in Australia because of geographical isolation, and difficulties in disseminating information within Australia because of remoteness. The Franki Report noted:

> There is, we believe, particularly in Australia, a very considerable public interest in ensuring a free flow of information in education and research, and the interests of individual copyright

---

\(^4\) The *Digital Agenda Review: Report and Recommendations* (January 2004) received no submissions that argued the intention to exclude commercial galleries had not been achieved: ¶ 14.15.

owners must be balanced against this element of public interest.\(^6\)

Its recommendations reflected these concerns (for example, in recommending that entire works be able to be copied in certain circumstances). The Franki Report also recommended that the library be extended to include archives. The Franki Report did not suggest a definition for archives. Rather, it concluded the term should be ‘suitably defined’.

1980: The *Copyright Amendment Act 1980 (Cth)* introduced amendments based on the report of Franki Committee. The definition of ‘archives’ introduced in sections 10(1) and 10(4) remains the same in the current version of the *Copyright Act*, but for the addition of the example at the end of section 10(4), which was introduced in 2000 to clarify the type of bodies to which the library and archives provisions apply.

1986: The *Copyright Amendment Act 1986 (Cth)* introduced provisions for copying of sound recordings and cinematograph films.

2000: The *Copyright Amendment (Digital Agenda) Act 2000 (Cth)* (‘Digital Agenda Act’) extended the library and archives provisions to digital environment. The aims and provisions of the *Digital Agenda Act* will be discussed more fully during the course of this paper.

The library and archives provisions can be divided into four groups.
1. provisions relating to reproduction and communication of original literary, dramatic, musical and artistic works;
2. provisions relating to reproduction and communication of subject-matter other than works;
3. provisions relating to administration of records and declarations; and
4. miscellaneous other provisions.

\(^6\) Copyright Law Committee on Reprographic Reproduction (Franki Committee), *Report of the Copyright Law Committee on Reprographic Reproduction* (1976) 9.
We will consider each of these groups in turn.

1. **Provisions relating to reproduction and communication of original literary, dramatic, musical and artistic works.**

These are contained in Division 5 of Part III of the *Copyright Act*. The more important provisions are ss 49, 50 and 51A.

**Section 48 – Interpretation**

References to an article in a periodical include anything contained in the article *apart from artistic works*. Note, however, s 53 (below) which extends Division 5’s reproduction and communication provisions to illustrations that accompany articles, theses, literary, musical or dramatic works.

**Section 48A – Copying by parliamentary libraries for members of parliament**

This provision allows parliamentary libraries to perform otherwise infringing activities for the sole purpose of assisting members of parliament.

**Section 49 – Reproducing and communicating works by libraries and archives for users**

This provision allows a library or archives to respond, without infringing copyright, to user requests to be provided with copies of articles or published works held in the institution’s collection. Some points of note:

(i) **User’s can request reproductions for research or study:** The user can request a reproduction of the whole or part of an article or published work.\(^7\) However, the user’s purpose must be research or study.\(^8\)

(ii) **Most requests must be in writing:** The user’s request must be in writing and accompanied by a signed declaration, although the requirement for writing is dispensed with for remote persons.\(^9\)

---

\(^7\) *Copyright Act* s 49(1).

\(^8\) *Copyright Act* s 49(1)(b)(i).

\(^9\)
(iii) Requests for more than a reasonable portion require a commercial availability declaration: Where the request relates to the whole or more than a reasonable portion of a published work (other than an article in a periodical), a declaration must be made by an authorised officer of the institution that, following reasonable investigation, he or she is satisfied that a reproduction (not a second-hand reproduction) of the work cannot be obtained within a reasonable time at an ordinary commercial price (‘commercial availability declaration’).

(iv) Electronic reproductions can be communicated: The reproduction may be provided to the user in hard copy or electronic form. Before an electronic reproduction is communicated, the requester must receive a copyright notification; after the communication is made, the library or archives must destroy the reproduction (which prevents institutions building up collections of electronic reproductions).

(v) Charges are limited: Any charge to the user must not exceed the cost of making and supplying the reproduction.

(vi) Records must be kept: see below.

Section 49 also allows articles and published works that have been acquired in electronic form to be made available online within the premises of the library or archives on terminals that do not allow the making of an electronic reproduction or communication of the article or work. The explanatory memorandum for the Digital Agenda legislation notes this aims to allow the equivalent practice to displaying hard copy books within a library.

---

9 Copyright Act s 49(2A).
10 Copyright Act s 10(2) provides that 10% of the pages, or one chapter, from a published literary, dramatic or musical work will be taken to be reasonable portion; and s 10(2A) seeks to make an equivalent provision for electronically published literary or dramatic works (excluding computer programs and databases) of 10% of the words from the work.
11 Copyright Act s 49(5).
12 Copyright Act s 49(7A).
13 Copyright Act s 49(3).
14 Copyright Act s 49(5A).
15 Explanatory Memorandum to Copyright Amendment (Digital Agenda) Bill 1999 ¶ 75-77.
Section 50 – Reproducing and communicating works by libraries or archives for other libraries or archives

This provision allows a library or archives to respond, without infringing copyright, to a request by another library or archives to be supplied with a reproduction of the whole or part of an article or published work from the supplying library or archives’ collection:

- for inclusion in the collection of the requesting library or archives; or
- to fulfil a section 49 request.

As some commentators have noted, s 50 has ‘long been subject to the criticism that it permits the establishment of systematic inter-library photocopying networks, to the detriment of journal subscriptions.’ The recent Digital Agenda Review report differs from this view by emphasising the lack of empirical information about the operation of the inter-library loan system, and by largely endorsing the submission from the National Library of Australia (see below).

Some points of note:

(i) **Digital reproductions must be destroyed after communication:** The reproduction can be supplied in electronic or hard copy form. Where supply is in electronic format, the reproduction held by the supplying institution library must be destroyed after it has been communicated to the requesting institution (which prevents institutions building up collections of electronic reproductions).

(ii) **Charges are limited:** Any charge must not exceed the cost of making and supplying the reproduction.

(iii) **The requirement for a commercial availability declaration differs depending on whether a reproduction is made from a work that was obtained in hard copy or electronic form:**

---

18 Copyright Act s 50(7C).
19 Copyright Act s 50(6).
• where the work from which the reproduction is made was obtained in *hard copy form*, and

• a reproduction is made of the *whole* of a work (*excluding an article*) or *more than a reasonable portion* of such a work, then

• the library or archives must make a commercial availability declaration.\(^20\)

Or:

• where the work from which the reproduction is made was obtained in *electronic form*, and

• a reproduction is made of the *whole* of a work (*including an article*) or *any part of such a work*, then

• the library or archives must make a commercial availability declaration.\(^21\)

Thus, commercial availability declarations are required for all s 50 reproductions from works in electronic form, but only for some reproductions from works in hard copy form.

### Section 51 – Reproducing and communicating unpublished works in libraries or archives

Section 51(1) allows the making or communicating of a reproduction of unpublished works by a user, or an officer of a library or archives for supply to a user, for the purpose of research or study or with a view to publication. The section only applies:

- in relation to unpublished literary, dramatic and musical works and unpublished photographs and engravings;
- where copyright subsists in the work;
- where the work or a reproduction of it is open to public inspection at the library or archives; and
- at least fifty years has expired since the death of the author.

Section 51(2) allows the reproduction of an unpublished thesis or other similar literary works held in university libraries, or in archives, by an authorised officer on behalf of a person who requires the reproduction for the purpose of research or study.

\(^{20}\) *Copyright Act* s 50(7A).

\(^{21}\) *Copyright Act* s 50(7B).
Ricketson notes that old, unpublished works present a special problem for cultural institutions, as the copyright may subsist indefinitely. While the cultural institution may be the owner of the tangible item in which copyright is embodied, the copyright may be owned by another person. Section 51 was introduced to ensure that unpublished works could be used by researchers, without risk of copyright infringement.\(^{22}\)

**Section 51AA – Reproducing and communicating works in Australian Archives**

This section allows the making or communication of various reproductions of works held in the collection of the Australian Archives:\(^{23}\)

- a single working copy;
- a single reference copy for supply to the Archives’ central office;
- a single reference copy for supply to a regional office of the Archives, on written request, where a copy has not been supplied previously; or
- a single replacement copy for supply to the Archives’ central office or supply to a regional office, on written request.

A working copy is defined as a reproduction the archives retains and uses to make reference and replacement copies; a reference copy is a copy used to provide members of the public with access to the work; and a replacement copy is one that replaces a reference copy that is lost, damaged or destroyed.

**Section 51A – Reproducing and communicating works for preservation and other purposes**

Section 51A(1) allows the reproduction or communication of a work that forms, or previously formed, part of the collection of a library or archives, for these purposes:

- for original artistic works and works held in manuscript form – preserving the work against loss or deterioration, or for the purpose of research at the library and archives, or at another library or archives;\(^ {24}\) or


\(^{23}\) In relation to these archives, see below: response to question 1b.

\(^{24}\) *Copyright Act s 51(1A)(a).* This appears to cover both internal research, as well as research by a user. However, the use of the word ‘at’ may require that the library or archives retain any reproduction made. If a user wanted their
• for works that have been damaged, deteriorated, lost or stolen – replacing the work.  

Where the work in question is a published work, the provision only applies where an authorised officer makes a commercial availability declaration. Similar provisions apply to sound recordings and cinematograph films in s 110B.

Section 51A also allows a library or archives to:
• make a reproduction of a work for administrative purposes;
• make a communication of a work to officers of the library or archives by making it available online at a computer terminal within the premises of the library or archives; and
• make a preservation reproduction of an original artistic work available to users online, on terminals installed within the institution’s premises from which a person cannot make an electronic copy or hardcopy or communicate the reproduction, but only where the original work has been lost or deteriorated since the preservation reproduction was made, or where the work is so unstable that it cannot be displayed without risk of significant deterioration.

Some points of note:
(i) There were no provisions related to preservation or replacement before 1980.
(ii) The Franki Committee recommended preservation provisions, in light of the practical difficulties in locating the copyright owner, and the deterioration of the paper on which

---

25 Copyright Act s 51(1A)(b), (c).
26 Copyright Act s 51A(4).
27 Copyright Act s 51A(2).
28 Copyright Act s 51A(3).
29 Copyright Act s 51A(3A), (3B).

---

own copy for research purposes, they would need to rely on another provision of the Copyright Act, such as s 49.

much material was written.\textsuperscript{30} It also recommended introducing the replacement provisions, but did not articulate reasons for this.

(iii) The \textit{Digital Agenda Act} introduced the provision allowing copying for ‘administrative purposes’, but there is no explanation in the Explanatory Memorandum or Second Reading Speech as to the meaning of this phrase, and it is not defined in the Act.

(iv) There is no provision expressly allowing copyright material to be copied into a new format, where the existing format or technology has become obsolete or has been upgraded.\textsuperscript{31} It is possible that such activity could be subsumed within the undefined ‘administrative purposes’.

(v) There has been criticism of the provision allowing communications to officers of institutions. This excludes \textit{volunteers} who play ‘an important role in many cultural institutions’ and ‘provide expert guidance and assistance to members of the public and assist in the institution’s charter of disseminating information to the community’.\textsuperscript{32}

(vi) The provisions have been criticised for their lack of clarity in relation to whether reproductions can be made of earlier editions of published works. Earlier editions may have research importance, even when newer editions are commercially available. The \textit{Digital Agenda Review} recommends that copyright owners (through the most relevant collecting societies),\textsuperscript{33} libraries and cultural institutions be given the opportunity to negotiate a code of practice for this and related matters. Among other things, a code could help clarify the application of the commercial availability test, and deal with issues concerning preservation copies.\textsuperscript{34}

(vii) It has been recommended that the provisions for making preservation copies of artistic works available to users online (and related provisions for artistic works) be amended to allow artistic works to be reproduced and communicated at low resolution generally

\textsuperscript{30} Franki Report, ¶ 5.01, 5.03.

\textsuperscript{31} Cf, United States Copyright Act, §108(c).


\textsuperscript{33} CAL (Copyright Agency Limited) and Viscopy (Australia’s Visual Arts Collecting Society).

within institutions, and in response to requests from users for the purposes of users’ research or study.\footnote{Digital Agenda Review: Report and Recommendations (January 2004) ¶ 14.51-14.57 and recommendation 7, 70.}

Section 52 – Publication of unpublished works kept in libraries or archives
Section 52 sets out provisions relating to the publication of a new work containing the whole or part of a work dealt with under Section 51(1), which concerns reproducing and communicating unpublished works in libraries and archives.

Section 53 – Application of Division to illustrations accompanying articles and other works
The section means this Division’s provisions, which allow reproduction and communication, also apply to illustrations which explain or illustrate the article, thesis, literary, musical or dramatic work they accompany.

2. Provisions relating to reproduction and communication of subject-matter other than works.

These provisions are far less numerous than those for works, and are contained in Division 6 of Part IV. The relevant provisions are:

- Section 110A – Copying and communicating unpublished sound recordings and cinematograph films in libraries or archives; and
- Section 110B – Copying and communicating sound recordings and cinematograph films for preservation and other purposes.

These provisions mirror the equivalent provisions in relation to works. They allow the conversion into or from digital form for equivalent, limited purposes.


At numerous places, the library and archives provisions require institutions to complete and/or retain records and declarations in relation to their activities. Part X of the Copyright Act contains...
a series of provisions relating to the retention and inspection of those records, and setting out offences for failure to comply. The relevant provisions are:

- Section 203A – Retention of declarations in relation to copies made by libraries, archives or institutions;
- Section 203D – Arrangement of declarations and records;
- Section 203E – Inspection of records and declarations retained by libraries, archives or institutions;
- Section 203F – Additional offences in relation to the making and retention of records and declarations;
- Section 203G – Additional offences relating to declarations under subsections 116A(3) and 132(5F); and
- Section 203H – Notation of certain copies etc.

By way of background, the declarations system was intended to help prevent excessive copying by requiring records to be made and kept and by allowing copyright owners to inspect those records. Current evidence suggests copyright owners rarely avail themselves of this opportunity. Furthermore, it appears improbable that the declarations system deters or prevents serial infringement, as such activities are unlikely to be the subject-matter of a declaration. In its 1998 report, the Copyright Law Review Committee recommended abolishing the declarations system.36 This recommendation has not been implemented.

4. Miscellaneous other provisions.

Section 39A, 104B – Infringing copies made on machines installed in libraries and archives

In University of New South Wales v Moorhouse, the High Court held a library could be liable for authorising copyright infringement through the mere supply of self-service photocopiers on its premises.37

37 University of New South Wales v Moorhouse (1975) 133 CLR 1.
As a result of the *Moorhouse* case, section 39A was introduced into the Copyright Act. It provides that a library or archives will not be taken to have authorised an infringing copy to have been made by reason only that the copy was made on a machine, including a computer, installed on its premises, so long as a prescribed notice (a ‘Section 39A Notice’) is affixed in close proximity to the machine. Section 104B contains a similar provision in relation to audio-visual items and published editions.  

Section 116A(3), 8(b) – Limited exception for libraries and archives in relation to provisions prohibiting the supply of circumvention devices.

Section 116A sets out an enforcement regime against those who commercially deal with circumvention devices. However, it provides exceptions for the supply of circumvention devices to ‘qualified persons’. This includes ‘a person who is an authorized officer for the purposes of section 48A, 49, 50 or 51A’.

38 The content of the notice for section 39A and 104B is set out in Schedule 3 to the Copyright Regulations 1969 (Cth), and is as follows:

**WARNING**

Copyright owners are entitled to take legal action against persons who infringe their copyright. A reproduction of material that is protected by copyright may be a copyright infringement. Certain dealings with copyright will not constitute an infringement, including:

* A reproduction that is a fair dealing under the Copyright Act 1968 (the Act), including a fair dealing for the purposes of research or study; or

* A reproduction that is authorised by the copyright owner.

It is a fair dealing to make a reproduction for the purposes of research or study, of one or more articles on the same subject in a periodical publication, or, in the case of any other work, of a reasonable portion of a work.

In the case of a published work in hardcopy form that is not less than 10 pages and is not an artistic work, 10% of the number of pages, or one chapter, is a reasonable portion.

In the case of a published work in electronic form only, a reasonable portion is not more than, in the aggregate, 10% of the number of words in the work.

More extensive reproduction may constitute fair dealing. To determine whether it does, it is necessary to have regard to the criteria set out in subsection 40 (2) of the Act.

A court may impose penalties and award damages in relation to offences and infringements relating to copyright material.

Higher penalties may apply, and higher damages may be awarded, for offences and infringements involving the conversion of material into digital or electronic form.
Question 1b: Do any other provisions of Australian law define the term ‘archive’?

We have not located any other piece of legislation that contains a general definition of the term ‘archive’ (or in the Australian usage, ‘archives’). There are several pieces of legislation that establish and govern the operation of specific archives. For instance, the Archives Act 1983 (Cth) establishes the National Archives of Australia, and the Public Records Act 1973 (Vic) establishes the Public Records Office. These entities have powers in a relatively limited field, especially compared with the library and archives provisions discussed above. By way of illustration, here are relevant provisions from the Archives Act 1983 (Cth). Note in particular s 6(1)(e) and (f) (which have been placed in italics):

5 Establishment and functions of National Archives of Australia

(1) There shall be … an organization by the name of the National Archives of Australia.

(2) The functions of the National Archives of Australia are, subject to this Act:

   (a) to ensure the conservation and preservation of the existing and future archival resources of the Commonwealth;

   (b) to encourage and foster the preservation of all other archival resources relating to Australia;

   (c) to promote, by providing advice and other assistance to Commonwealth institutions, the keeping of current Commonwealth records in an efficient and economical manner and in a manner that will facilitate their use as part of the archival resources of the Commonwealth;

   (d) to ascertain the material that constitutes the archival resources of the Commonwealth;

   (e) to have the custody and management of Commonwealth records … that:

      (i) are part of the archival resources of the Commonwealth;

      (ii) ought to be examined to ascertain whether they are part of those archival resources; or

      (iii) although they are not part of those archival resources, are required to be permanently or temporarily preserved;

   (f) to seek to obtain, and to have the custody and management of, material … not in the custody of a Commonwealth institution, that forms part of the archival resources of
the Commonwealth and, in the opinion of the Director–General, ought to be in the custody of the Archives …

(h) to encourage, facilitate, publicise and sponsor the use of archival material;

(j) to make Commonwealth records available for public access in accordance with this Act and to take part in arrangements for other access to Commonwealth records;

(k) to conduct research, and provide advice, in relation to the management and preservation of records and other archival material; …

6 Powers of Archives

(1) The Archives may do all things that are necessary or convenient to be done for or in connection with the performance of its functions and, in particular, without limiting the generality of the foregoing, may:

(a) establish and control repositories or other facilities to house or exhibit material of the Archives …

(b) undertake the survey, appraisal, accessioning, arrangement, description and indexing of Commonwealth records;

(c) make arrangements for the acquisition by the Commonwealth of, or of copyright in relation to, or arrangements relating to the custody of, material that forms part of the archival resources of the Commonwealth …

(e) make copies, by microfilming or otherwise, of archival material, but not so as to infringe copyright (other than copyright owned by the Commonwealth) subsisting in the material;

(f) arrange for the publication of material forming part of the archival resources of the Commonwealth or works based on such material, but not so as to infringe copyright (other than copyright owned by the Commonwealth) subsisting in the material or works;

(g) publish indexes of, and other guides to, archival material;

(h) authorize the disposal or destruction of Commonwealth records …

Question 1c: Is there otherwise a general understanding of what an archive is, and if so, what is that understanding and what does it derive from? (e.g., does it derive from judicial decisions, industry practice, etc.?)

As noted in response to question 1a, in the Copyright Act, the term ‘archives’ means a non-profit institution maintaining a collection of documents or material of historical significance or public
interest for the purpose of conserving and preserving those documents or material. There are two important points in relation to this definition.

First, it extends beyond the common usage of archives, that is, a repository of documents or records. In 2000, an amendment was introduced into the definition to clarify that the definition is intended to include certain galleries and museums. The Explanatory Memorandum to that legislation stated that it ‘is intended that major collecting institutions, such as the National Gallery of Australia, be included, but not private commercial galleries.’ There is no published information about whether smaller public museums and galleries treat themselves as being within the definition.

Second, the definition only incorporates non-profit archives. In contrast, the Copyright Act’s library and archives provisions generally apply to private and commercial libraries. The Copyright Act does not contain any provisions directing when a body administering an archives will be taken to maintain or operate the collection for the purpose of deriving a profit. Some guidance may be taken from s 18, which deals with for-profit libraries rather than archives. It states that ‘a library shall not be taken to be established or conducted for profit by reason only that the library is owned by a person carrying on a business for profit’. In practice, the library and archives provisions are taken to apply to libraries within commercial firms.

We have located no relevant case law, or published information in relation to industry practice, to establish any more about a general understanding of archives.

**Question 1d: Does Australian copyright law contain provisions of broader application that may nonetheless be relevant to archives (e.g., exceptions or privileges)?**

---

39 Explanatory Memorandum to Copyright Amendment (Digital Agenda) Bill 1999 ¶ 21.

40 Note: ss 49 and 50 expressly exclude for-profit libraries from their operation, but the importance of this exclusion is tempered by s 18 because libraries operated by profit-seeking companies are not necessarily for-profit libraries.

No submission received by the Digital Agenda Review: Report and Recommendations (January 2004) could identify a library that would not be able to make use of ss 49 and 50: ¶ 14.3.
The most obvious example is that permitting fair dealing. The fair dealing exception applies for dealings undertaken for the purposes of research and study,\(^{41}\) criticism or review,\(^{42}\) reporting the news,\(^{43}\) or for the giving of professional advice by a legal practitioner or patent attorney.\(^{44}\) It is not an open-ended US fair use style provision. The term ‘dealing’ is not defined in the Copyright Act, however analysis of the context in which the term is used and the words contained in the surrounding text suggest it means the doing of any act comprised in copyright.\(^{45}\) While the fair dealing defences are extremely relevant to users of cultural institutions, they may be less relevant for the institutions themselves. There are two main reasons for this.

First, the enumerated purposes are limited, and many activities of cultural institutions do not fall within their scope. For instance, copying for the purposes of preservation would not be a fair dealing under Australian law. It has been suggested on a number of occasions that the Copyright Act be amended to follow the open-ended approach to fair dealing preferred in the US.\(^{46}\) However, the Australian legislature has not made such amendments, despite making other substantial changes to the Copyright Act.

Second, on the current interpretation of the law, the fair dealing defence will generally not assist a cultural institution where it performs acts on behalf of users. In *De Garis v Neville Jeffress Pidler Pty Ltd*,\(^{47}\) the respondent company operated a press clippings business. The applicants, two journalists, claimed the company had infringed copyright bysupplying copies of their articles to its clients. The company argued its activities constituted a fair dealing under ss 40, 41 and/or 42 of the Copyright Act. The defence failed. The relevant purpose for assessing fair dealing was that of the alleged infringer. For the s 40 defence, the company’s purpose was not research or

\(^{41}\) *Copyright Act* ss 40, 103C.

\(^{42}\) *Copyright Act* ss 41, 103A.

\(^{43}\) *Copyright Act* ss 42 and 103B.

\(^{44}\) *Copyright Act* s 43(2).


\(^{47}\) *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 95 ALR 625.
study but purely commercial: ‘to supply a photocopy of material already published in return for a fee’.\(^4\) Similarly, its activities did not fall within s 41 because they did not appear to require ‘the passing of a judgment as to the merit of the articles identified. … The task undertaken [was] one of location rather than evaluation.’\(^4\) Finally, its activities were held not to constitute reporting of the news.\(^5\) Unless Australian courts accept a broad definition of purpose – as the Supreme Court of Canada did recently in *CCH v Law Society* [2004] SCC 13 (4 March 2004) – cultural institutions will be forced to rely on the library and archives provisions for activities performed on behalf of users.

The following exceptions in the *Copyright Act* may also be relevant, but raise no particular issues for archives:

- **(a)** Sections 43A, 111A – exceptions for temporary copies made in the course of communication; and
- **(b)** Division 4A of Part III – exceptions in relation to computer programs (e.g., reproduction for the purposes of making back up copies, interoperable products, to correct errors, and for security testing).

**Question 2: To the extent these principles were developed when archives were created and maintained with physical copies, how do they relate to the electronic environment and the manner in which archives (particularly digital archives) currently operate?**

As outlined above, library provisions were first introduced in Australian copyright legislation in the *Copyright Act 1968 (Cth)* on the recommendation of the Spicer Committee. At that stage, copyright material was generally stored and accessed in analogue format, and this was reflected in the drafting of those provisions. Since that time, the provisions have undergone considerable change. In 1980, they were reviewed by the Franki Committee, which reported on the impact on photocopying, and as a result underwent comprehensive amendment, and provisions were added

\(^{48}\) *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 95 ALR 625, 629-30.

\(^{49}\) *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 95 ALR 625, 630-1.

\(^{50}\) *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 95 ALR 625, 631-4.
in relation to archives. The most recent set of amendments were introduced by the *Digital Agenda Act*. In the Explanatory Memorandum to the *Digital Agenda Act*, the government stated the rationale behind these amendments was that ‘libraries and archives should be able to use new technologies to provide access to copyright material for the general community, as long as the economic rights of owners of copyright materials are not unreasonably prejudiced.’  

The *Digital Agenda Act* made the following key changes:

- *Replacement of the word ‘copying’ with ‘reproduction’,* thus extending existing exceptions to the electronic reproduction and communication of material;  

- Amendment of provisions relating to user requests, which allow *reproductions to be provided in electronic format* (subject to a commercial availability test);  

- Introduction of provisions allowing reproduction and communication of works for *administrative purposes*;  

- Introduction of provisions allowing *published works acquired in electronic format* to be made available online *within the premises* of the library or archives on *terminals that do not allow communication or electronic reproduction* of the work;  

- Introduction of provisions allowing *preservation reproductions of original artistic works* to be made available online *within the premises* of the library or archives on *copy-disabled terminals*.

The government is currently in the process of reviewing the operation of amendments introduced by the *Digital Agenda Act*. At this stage, general practices under the *Digital Agenda Act*

---

51 Explanatory Memorandum to the Copyright Amendment (Digital Agenda) Bill 1999 ¶ 68ff.
52 Explanatory Memorandum to the Copyright Amendment (Digital Agenda) Bill 1999 ¶ 68ff.
53 Copyright Act s 49 (7A).
54 Copyright Act s 51A(2), (3).
55 Copyright Act s 49(5A).
56 Copyright Act s 51A(3A), (3B). Note: there is a distinction between terminals that do not allow electronic reproduction and communication, and *copy-disabled* terminals (which do not allow any reproduction).
57 See above, note 1.
remain unclear. For example, there is little reliable information about whether institutions rely on the ability to make material acquired in electronic form available on terminals within their premises. Instead, public institutions may rely more on commercial licensing arrangements in relation to the databases they hold.\footnote{The Digital Agenda Review: Report and Recommendations (January 2004) noted many library interests submitted that little use is made of the terminal provisions, with licences being relied on instead of the Copyright Act provisions: ¶ 14.19.} The 2004 Digital Agenda Review: Report and Recommendations underlines the need for systematic research:

> The review has not had any opportunity to consider objective, independent data that demonstrates current practices and economic or other effects of practices affecting copyright within libraries.\footnote{Digital Agenda Review: Report and Recommendations (January 2004) ¶ 1.8; see also ¶ 8.4-8.11 and ¶ 8.25-8.31.}

Because of the lack of empirical information, the second recommendation the report makes is:

> That the Government commissions a longer term, independent survey or data collection of library copying and communication practices within libraries in respect of digital materials and RMI. (It may also make sense to extend that survey or data collection to copying practices in respect of ‘hard copy’ materials [which were outside the review’s terms of reference]).

> That the Government makes the data collected in that survey publicly available.

> That the Government undertakes further consultation with interested parties in order to reach agreement on the meaning and effect of that data, and any necessary or desirable amendments to the Copyright Act, as a result.\footnote{Digital Agenda Review: Report and Recommendations (January 2004), 37.}

In relation to the operation of Div 5 of Part III – see above, in particular ss 49, 50 and 51A – the report draws on the submission from the National Library of Australia (‘NLA’). The NLA, which is the major supplier of copies in Australia, argued there was no evidence that copyright owners’ markets had been harmed by the provisions. Surveys of document supply to users and other institutions from the NLA’s collection suggested, among other matters, that: inter-library
loans were declining over recent years; only 0.26% of articles supplied in one survey period were copied twice; only 2.5% of supplied items went to corporate libraries; and only 0.7% of supply was from electronic sources. The report concluded:

The decline in inter-library lending, combined with the low rate of lending of electronic copies, suggests that inter-library lending has a negligible impact on publishers’ markets.

Question 3: What limits or privileges, if any, have courts in Australia placed on or provided to archives with respect to:

a. & b. Acquisition, maintenance and updating material
Acquisition, maintenance and updating of material is governed by the enacting legislation (if any) of the relevant institution, state records legislation, legislation regarding privacy and the correction of information in materials held by certain public bodies, as well as any specific contractual obligations arising at deposit of the relevant material. We have not located any judgments that consider these issues in the context of archives.

c. Making the material available to the public:
   i. As physical copies (original or facsimile)
Again, we are not aware of any judgments which consider this issue in the context of archives. The closest decision on point was that in De Garis v Neville Jeffress Pidler Pty Ltd, discussed above.
   ii. In digital form
We are not aware of any judgments which consider this issue in the context of archives.

---

63 Eg State Records Act 1998 (NSW).
64 Eg Privacy Act 1988 (Cth).
65 Eg Freedom of Information Act 1992 (Cth).
Question 4: Are there judicial decisions in Australia addressing publishers’ or archives’ liability with respect to documents included in the archives’ collections that infringe copyright?

We are not aware of any judgments which consider this issue.

However, a similar issue – liability of a service provider for infringing content – was considered by the High Court in *Telstra Corporation Limited v Australasian Performing Rights Association Limited*.\(^66\) APRA owned copyright in the music and lyrics of various songs. Telstra supplied and maintained a telecommunications network in Australia. APRA brought a test case against Telstra alleging that Telstra had infringed its copyright by the provision of ‘on hold’ music when people telephoned:

- Telstra service centres;
- Business and government organisations which engaged Telstra to provide a transmission facility; and
- CustomNet, a service provided by Telstra.

The High Court unanimously held in each of the situations where Telstra participated in the provision of on hold music to callers using mobile telephones, it had ‘broadcast’ the music, within the meaning of s 31(1)(a)(iv) of the *Copyright Act* (as it then was).\(^67\) A majority of the Court also held that in each of the situations where Telstra participated in the provision of on hold music to users of ‘conventional’ (ie landline) telephones, it had transmitted that work to subscribers to a diffusion service within the meaning of s 31(1)(a)(v) of the *Copyright Act* (again, as it then was).\(^68\) More important for present purposes, however, was that the judgment left open the possibility that a carrier or service provider could infringe copyright regardless of whether it had any knowledge of the existence of infringing material, created the infringing material, agreed

---


\(^67\) *Telstra Corporation Limited v Australasian Performing Rights Association Ltd* (1997) 38 IPR 294, 301-4 (Dawson and Gaudron JJ), 304 (Toohey J), 316 (McHugh J), 334-40 (Kirby J).

\(^68\) *Telstra Corporation Limited v Australasian Performing Rights Association Ltd* (1997) 38 IPR 294, 297-300 (Dawson and Gaudron JJ), 327-334 (Kirby J).
to transmit the infringing material, or was able to prevent transmission of the infringing material.\textsuperscript{69} As stated by Kirby J:

It has been suggested that the foregoing conclusions could have significant consequences for other information technologies – including facsimile services, video conferencing and data transmission. In particular, it has been argued that telecommunications carriers and perhaps even internet service providers could potentially become liable as a result of internet users’ downloading works which are protected by copyright. Clearly, such issues go beyond the scope of this appeal. They were not developed in the argument of the parties. However, the parliament may need to consider these questions – and others arising – and to formulate a legislative response to them. They cannot be solved, but have not been overlooked, by me.\textsuperscript{70}

A number of provisions were introduced into the Copyright Act by the Digital Agenda Act in response to these concerns.

(i) **Provisions relevant to direct liability.** These provisions identifying who will be deemed to have ‘made’ an infringing communication. For communications other than broadcasts, the communication will be taken to have been made by the person responsible for determining the content of the communication.\textsuperscript{71} In contrast, a broadcast will be taken to have been made by the person who provided the broadcasting service by which the broadcast was delivered.\textsuperscript{72} During the passage of the Digital Agenda Bill through parliament, there was some concern that the latter provision merely replicated the unsatisfactory state of affairs brought about by the *Telstra v APRA* decision. However, no amendment was made to the bill that was passed by parliament.

(ii) **Provisions relevant to indirect liability (ie authorising infringement of copyright).** The Copyright Act now lists factors that must be taken into account in determining whether a person

\textsuperscript{69} Eg, Saba Hakim, ‘Copyright and the Liability of ISPs’ (1999) 73(9) Law Institute Journal 62, 63-4.

\textsuperscript{70} *Telstra Corporation Limited v Australasian Performing Rights Association Ltd* (1997) 38 IPR 294, 340 (Kirby J).

\textsuperscript{71} Copyright Act s 22(6).

\textsuperscript{72} Copyright Act s 22(5).
has authorised an infringement of copyright. These are intended to codify the factors identified in the common law.\(^73\) These factors are:

(a) the extent (if any) of the person’s power to prevent the doing of the act concerned;
(b) the nature of any relationship existing between the person and the person who did the act concerned; and
(c) whether the person took any reasonable steps to prevent or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice.\(^74\)

There are specific provisions for service providers. Section 39B provides:

A person (including a carrier or carriage service provider) who provides facilities for making, or facilitating the making of, a communication is not taken to have authorised any infringement of copyright in a work merely because another person uses the facilities so provided to do something the right to do which is included in the copyright.

A similar provision is found in section 112E for audio-visual items.

The content and operation of these provisions is currently under review.\(^75\) In particular, there has been concern that sections 39B and 112E (together with the factors listed in sections 36(1A) and 101(1A)) do not provide any real guidance as to when a service provider has authorised infringement, leaving service providers unclear as to what steps they should take to limit or avoid liability for copyright infringement. This can be contrasted with the ‘safe harbour’ provisions of the DMCA.\(^76\) The review has recommended that the Copyright Act be amended to set down a minimum standard in relation to notice and take down procedures, with encouragement that

\(^{73}\) *University of New South Wales v Moorhouse* (1975) 133 CLR 1.

\(^{74}\) Copyright Act ss 36(1A), 101(1A).

\(^{75}\) See above, note 1.

relevant industries bodies negotiate and adopt a more detailed industry code.\textsuperscript{77}

**Question 5:** Have courts in Australia imposed remedies against publishers who did not remove copyright-infringing material from archives over which they maintained control?

We are not aware of any judgments which consider this issue.

**Question 6:** Have courts in Australia imposed remedies against archives that retain or make available this material?

We are not aware of any judgments which consider this issue.

**Question 7:** Have litigants in Australia agreed to settlements in respect of claims of copyright infringement that would affect the contents, maintenance, or public accessibility of material contained in archives? Under what circumstances?

To date there has been no empirical research in Australia in relation to this issue. However, as part of our project on digitisation and cultural institutions, we will be interviewing staff of leading Australian museums, galleries and libraries during 2004 and 2005 in relation to (amongst other things) their copyright management practices. These questions will include how institutions deal with actual or potential claims of copyright infringement.

**Question 8:** Have publishers or archives in Australia sought to avoid potential liability by removing material that may infringe copyright, without waiting to be notified (or sued) by persons claiming to be injured by the material?

See answer for question 7.

\textsuperscript{77} Digital Agenda Review: Report and Recommendations (January 2004) recommendation twelve.
Appendix

Copyright Act 1968 (Cth) extracts

Part II—Interpretation

10 Interpretation

(2) Without limiting the meaning of the expression reasonable portion in this Act, where a literary, dramatic or musical work (other than a computer program) is contained in a published edition of that work, being an edition of not less than 10 pages, a copy of part of that work, as it appears in that edition, shall be taken to contain only a reasonable portion of that work if the pages that are copied in the edition:

(a) do not exceed, in the aggregate, 10% of the number of pages in that edition; or
(b) in a case where the work is divided into chapters exceed, in the aggregate, 10% of the number of pages in that edition but contain only the whole or part of a single chapter of the work.

(2A) Without limiting the meaning of the expression reasonable portion in this Act, if a person makes a reproduction of a part of:

(a) a published literary work (other than a computer program or an electronic compilation, such as a database); or
(b) a published dramatic work;
being a work that is in electronic form, the reproduction is taken to contain only a reasonable portion of the work if:

(c) the number of words copied does not exceed, in the aggregate, 10% of the number of words in the work; or
(d) if the work is divided into chapters—the number of words copied exceeds, in the aggregate, 10% of the number of words in the work, but the reproduction contains only the whole or part of a single chapter of the work.

(2B) If a published literary or dramatic work is contained in a published edition of the work and is separately available in electronic form, a reproduction of a part of the work is taken to contain only a reasonable portion of the work if it is taken to do so either under subsection (2) or (2A), whether or not it does so under both of them.

(2C) If:

(a) a person makes a reproduction of a part of a published literary or dramatic work; and
(b) the reproduction is taken to contain only a reasonable portion of the work under subsection (2) or (2A);
subsection (2) or (2A) does not apply in relation to any subsequent reproduction made by the person of any other part of the same work.

---

Part III—Copyright in original literary, dramatic, musical and artistic works ...

Division 2—Infringement of copyright in works ...

36 Infringement by doing acts comprised in the copyright

(1) Subject to this Act, the copyright in a literary, dramatic, musical or artistic work is infringed by a person who, not being the owner of the copyright, and without the licence of the owner of the copyright, does in Australia, or authorizes the doing in Australia of, any act comprised in the copyright.

(1A) In determining, for the purposes of subsection (1), whether or not a person has authorised the doing in Australia of any act comprised in the copyright in a work, without the licence of the owner of the copyright, the matters that must be taken into account include the following:
   (a) the extent (if any) of the person’s power to prevent the doing of the act concerned;
   (b) the nature of any relationship existing between the person and the person who did the act concerned;
   (c) whether the person took any reasonable steps to prevent or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice.

(2) The next three succeeding sections do not affect the generality of this section. ...

39A Infringing copies made on machines installed in libraries and archives

Where:
   (a) a person makes an infringing copy of, or of part of, a work on a machine (including a computer), being a machine installed by or with the approval of the body administering a library or archives on the premises of the library or archives, or outside those premises for the convenience of persons using the library or archives; and
   (b) there is affixed to, or in close proximity to, the machine, in a place readily visible to persons using the machine, a notice of the prescribed dimensions and in accordance with the prescribed form;

neither the body administering the library or archives nor the officer in charge of the library or archives shall be taken to have authorized the making of the infringing copy by reason only that the copy was made on that machine.

Division 5—Copying of works in libraries or archives

48 Interpretation

In this Division, a reference to an article contained in a periodical publication shall be read as a reference to anything (other than an artistic work) appearing in such a publication.
48A Copying by Parliamentary libraries for members of Parliament

The copyright in a work is not infringed by anything done, for the sole purpose of assisting a person who is a member of a Parliament in the performance of the person’s duties as such a member, by an authorized officer of a library, being a library the principal purpose of which is to provide library services for members of that Parliament.

49 Reproducing and communicating works by libraries and archives for users

(1) A person may furnish to the officer in charge of a library or archives:
   (a) a request in writing to be supplied with a reproduction of an article, or a part of an article, contained in a periodical publication or of the whole or a part of a published work other than an article contained in a periodical publication, being a periodical publication or a published work held in the collection of a library or archives; and
   (b) a declaration signed by him or her stating:
      (i) that he or she requires the reproduction for the purpose of research or study and will not use it for any other purpose; and
      (ii) that he or she has not previously been supplied with a reproduction of the same article or other work, or the same part of the article or other work, as the case may be, by an authorized officer of the library or archives.

(2) Subject to this section, where a request and declaration referred to in subsection (1) are furnished to the officer in charge of a library or archives, an authorized officer of the library or archives may, unless the declaration contains a statement that to his or her knowledge is untrue in a material particular, make, or cause to be made, the reproduction to which the request relates and supply the reproduction to the person who made the request.

(2A) A person may make to an authorized officer of a library or archives:
   (a) a request to be supplied with a reproduction of an article, or part of an article, contained in a periodical publication, or of the whole or a part of a published work other than an article contained in a periodical publication, being a periodical publication or a published work held in the collection of a library or archives; and
   (b) a declaration to the effect that:
      (i) the person requires the reproduction for the purpose of research or study and will not use it for any other purpose;
      (ii) the person has not previously been supplied with a reproduction of the same article or other work, or the same part of the article or other work, as the case may be, by an authorized officer of the library or archives; and
      (iii) by reason of the remoteness of the person’s location, the person cannot conveniently furnish to the officer in charge of the library or archives a request and declaration referred to in subsection (1) in relation to the reproduction soon enough to enable the reproduction to be supplied to the person before the time by which the person requires it.

(2B) A request or declaration referred to in subsection (2A) is not required to be made in writing.
(2C) Subject to this section, where:

(a) a request and declaration referred to in subsection (2A) are made by a person to an authorized officer of a library or archives; and

(b) the authorized officer makes a declaration setting out particulars of the request and declaration made by the person and stating that:

(i) the declaration made by the person, so far as it relates to the matters specified in subparagraphs (2A)(b)(i) and (ii), does not contain a statement that, to the knowledge of the authorized officer, is untrue in a material particular; and

(ii) the authorized officer is satisfied that the declaration made by the person is true so far as it relates to the matter specified in subparagraph (2A)(b)(iii);

an authorized officer of the library or archives may make, or cause to be made, the reproduction to which the request relates and supply the reproduction to the person.

(3) Where a charge is made for making and supplying a reproduction to which a request under subsection (1) or (2A) relates, subsection (2) or (2C), as the case may be, does not apply in relation to the request if the amount of the charge exceeds the cost of making and supplying the reproduction.

(4) Subsection (2) or (2C) does not apply in relation to a request for a reproduction of, or parts of, 2 or more articles contained in the same periodical publication unless the articles relate to the same subject matter.

(5) Subsection (2) or (2C) does not apply to a request for a reproduction of the whole of a work (other than an article contained in a periodical publication), or to a reproduction of a part of such a work that contains more than a reasonable portion of the work unless:

(a) the work forms part of the library or archives collection; and

(b) before the reproduction is made, an authorized officer has, after reasonable investigation, made a declaration stating that he or she is satisfied that a reproduction (not being a second-hand reproduction) of the work cannot be obtained within a reasonable time at an ordinary commercial price.

(5A) If an article contained in a periodical publication, or a published work (other than an article contained in a periodical publication) is acquired, in electronic form, as part of a library or archives collection, the officer in charge of the library or archives may make it available online within the premises of the library or archives in such a manner that users cannot, by using any equipment supplied by the library or archives:

(a) make an electronic reproduction of the article or work; or

(b) communicate the article or work.

(6) The copyright in an article contained in a periodical publication is not infringed by the making, in relation to a request under subsection (1) or (2A), of a reproduction of the article, or of a part of the article, in accordance with subsection (2) or (2C), as the case may be, unless the reproduction is supplied to a person other than the person who made the request.

(7) The copyright in a published work other than an article contained in a periodical publication is not infringed by the making, in relation to a request under subsection (1) or (2A), of a reproduction of the work, or of a part of the work, in accordance with subsection (2) or (2C),
as the case may be, unless the reproduction is supplied to a person other than the person who made the request.

(7A) Subsections (6) and (7) do not apply to the making under subsection (2) or (2C) of an electronic reproduction of:

(a) an article, or a part of an article, contained in a periodical publication; or
(b) the whole or part of a published work, other than such an article;

in relation to a request under this section for communication to the person who made the request unless:

(c) before or when the reproduction is communicated to the person, the person is notified in accordance with the regulations:
   (i) that the reproduction has been made under this section and that the article or work might be subject to copyright protection under this Act; and
   (ii) about such other matters (if any) as are prescribed; and
(d) as soon as practicable after the reproduction is communicated to the person, the reproduction made under subsection (2) or (2C) and held by the library or archives is destroyed.

(7B) It is not an infringement of copyright in an article contained in a periodical publication, or of copyright in a published work, to communicate it in accordance with subsection (2), (2C) or (5A).

(8) The regulations may exclude the application of subsection (6) or (7) in such cases as are specified in the regulations.

(9) In this section:

library does not include a library that is conducted for the profit, direct or indirect, of an individual or individuals.

supply includes supply by way of a communication.

50 Reproducing and communicating works by libraries or archives for other libraries or archives

(1) The officer in charge of a library may request, or cause another person to request, the officer in charge of another library to supply the officer in charge of the first-mentioned library with a reproduction of an article, or a part of an article, contained in a periodical publication, or of the whole or a part of a published work other than an article contained in a periodical publication, being a periodical publication or a published work held in the collection of a library:

(a) for the purpose of including the reproduction in the collection of the first-mentioned library;

(aa) in a case where the principal purpose of the first-mentioned library is to provide library services for members of a Parliament—for the purpose of assisting a person who is a member of that Parliament in the performance of the person’s duties as such a member; or

(b) for the purpose of supplying the reproduction to a person who has made a request for the reproduction under section 49.

(2) Subject to this section, where a request is made by or on behalf of the officer in charge of a library to the officer in charge of another library under subsection (1), an authorized officer of the last-mentioned library may make, or cause to be made, the reproduction to which the
request relates and supply the reproduction to the officer in charge of the first-mentioned library.

(3) Where, under subsection (2), an authorized officer of a library makes, or causes to be made, a reproduction of the whole or part of a work (including an article contained in a periodical publication) and supplies it to the officer in charge of another library in accordance with a request made under subsection (1):

(a) the reproduction shall, for all purposes of this Act, be deemed to have been made on behalf of an authorized officer of the other library for the purpose for which the reproduction was requested; and

(b) an action shall not be brought against the body administering that first-mentioned library, or against any officer or employee of that library, for infringement of copyright by reason of the making or supplying of that reproduction.

(4) Subject to this section, if a reproduction of the whole or a part of an article contained in a periodical publication, or of any other published work, is, by virtue of subsection (3), taken to have been made on behalf of an authorized officer of a library, the copyright in the article or other work is not infringed:

(a) by the making of the reproduction; or

(b) if the work is supplied under subsection (2) by way of a communication—by the making of the communication.

(5) The regulations may exclude the application of subsection (4) in such cases as are specified in the regulations.

(6) Where a charge is made for making and supplying a reproduction to which a request under subsection (1) relates, subsection (4) does not apply in relation to the request if the amount of the charge exceeds the cost of making and supplying the reproduction.

(7) Where:

(a) a reproduction (in this subsection referred to as the relevant reproduction) of, or of a part of, an article, or of the whole or a part of another work, is supplied under subsection (2) to the officer in charge of a library; and

(b) a reproduction of the same article or other work, or of the same part of the article or other work, as the case may be, has previously been supplied under subsection (2) for the purpose of inclusion in the collection of the library; subsection (4) does not apply to or in relation to the relevant reproduction unless, as soon as practicable after the request under subsection (1) relating to the relevant reproduction is made, an authorized officer of the library makes a declaration:

(c) setting out particulars of the request (including the purpose for which the relevant reproduction was requested); and

(d) stating that the reproduction referred to in paragraph (b) has been lost, destroyed or damaged, as the case requires.

(7A) If:

(a) a reproduction is made of the whole of a work (other than an article contained in a periodical publication) or of a part of such a work, being a part that contains more than a reasonable portion of the work; and

(b) the work from which the reproduction is made is in hardcopy form; and
(c) the reproduction is supplied under subsection (2) to the officer in charge of a library; subsection (4) does not apply in relation to the reproduction unless:

(d) in a case where the principal purpose of the library is to provide library services for members of a Parliament—the reproduction is so supplied for the purpose of assisting a person who is a member of that Parliament in the performance of the person’s duties as such a member; or

(e) as soon as practicable after the request under subsection (1) relating to the reproduction is made, an authorized officer of the library makes a declaration:

(i) setting out particulars of the request (including the purpose for which the reproduction was requested); and

(ii) stating that, after reasonable investigation, the authorized officer is satisfied that a copy (not being a second-hand copy) of the work cannot be obtained within a reasonable time at an ordinary commercial price.

(7B) If:

(a) a reproduction is made of the whole of a work (including an article contained in a periodical publication) or of a part of such a work, whether or not the part contains more than a reasonable portion of the work; and

(b) the work from which the reproduction is made is in electronic form; and

(c) the reproduction is supplied under subsection (2) to the officer in charge of a library; subsection (4) does not apply in relation to the reproduction unless:

(d) in a case where the principal purpose of the library is to provide library services for members of a Parliament—the reproduction is so supplied for the purpose of assisting a person who is a member of that Parliament in the performance of the person’s duties as such a member; or

(e) as soon as practicable after the request under subsection (1) relating to the reproduction is made, an authorized officer of the library makes a declaration:

(i) setting out particulars of the request (including the purpose for which the reproduction was requested); and

(ii) if the reproduction is of the whole, or of more than a reasonable portion, of a work other than an article—stating that, after reasonable investigation, the authorised officer is satisfied that the work cannot be obtained in electronic form within a reasonable time at an ordinary commercial price; and

(iii) if the reproduction is of a reasonable portion, or less than a reasonable portion, of a work other than an article—stating that, after reasonable investigation, the authorised officer is satisfied that the portion cannot be obtained in electronic form, either separately or together with a reasonable amount of other material, within a reasonable time at an ordinary commercial price; and

(iv) if the reproduction is of the whole or of a part of an article—stating that, after reasonable investigation, the authorised officer is satisfied that the article cannot be obtained on its own in electronic form within a reasonable time at an ordinary commercial price.

(7C) If:
(a) a reproduction is made in electronic form by or on behalf of an authorised officer of a library of the whole of a work (including an article contained in a periodical publication) or of a part of such a work; and

(b) the reproduction is supplied under subsection (2) to the officer in charge of another library; subsection (4) does not apply in relation to the reproduction unless, as soon as practicable after the reproduction is supplied to the other library the reproduction made for the purpose of the supply and held by the first-mentioned library is destroyed.

(8) Subsection (4) does not apply to a reproduction or communication of, or of parts of, 2 or more articles that are contained in the same periodical publication and that have been requested for the same purpose unless the articles relate to the same subject matter.

(9) In this section, a reference to a library shall be read as a reference to a library other than a library that is conducted for the profit, direct or indirect of an individual or individuals, and as including a reference to archives.

(10) In this section:

supply includes supply by way of a communication.

51 Reproducing and communicating unpublished works in libraries or archives

(1) Where, at a time more than 50 years after the expiration of the calendar year in which the author of a literary, dramatic or musical work, or of an artistic work being a photograph or engraving, died, copyright subsists in the work but:

(a) the work has not been published; and

(b) a reproduction of the work, or, in the case of a literary, dramatic or musical work, the manuscript of the work, is kept in the collection of a library or archives where it is, subject to any regulations governing that collection, open to public inspection; the copyright in the work is not infringed:

(c) by the making or communication of a reproduction of the work by a person for the purposes of research or study or with a view to publication; or

(d) by the making or communication of a reproduction of the work by, or on behalf of, the officer in charge of the library or archives if the reproduction is supplied (whether by way of communication or otherwise) to a person who satisfies the officer in charge of the library or archives that the person requires the reproduction for the purposes of research or study, or with a view to publication, and that the person will not use it for any other purpose.

(2) If the manuscript, or a reproduction, of an unpublished thesis or other similar literary work is kept in a library of a university or other similar institution, or in an archives, the copyright in the thesis or other work is not infringed by the making or communication of a reproduction of the thesis or other work by or on behalf of the officer in charge of the library or archives if the reproduction is supplied (whether by communication or otherwise) to a person who satisfies an authorized officer of the library or archives that he or she requires the reproduction for the purposes of research or study.
51AA Reproducing and communicating works in Australian Archives

(1) The copyright in a work that is kept in the collection of the Australian Archives, where it is open to public inspection, is not infringed by the making or communication by, or on behalf of, the officer in charge of the Archives:
   (a) of a single working copy of the work;
   (b) of a single reference copy of the work for supply to the central office of the Archives;
   (c) on the written request for a reference copy of the work by an officer of the Archives in a regional office of the Archives, where the officer in charge is satisfied that a reference copy of the work has not been previously supplied to that regional office—of a single reference copy of the work for supply to that regional office;
   (d) where the officer in charge is satisfied that a reference copy of the work supplied to a regional office of the Archives is lost, damaged or destroyed and an officer of the Archives in that regional office makes a written request for a replacement copy of the work—of a single replacement copy of the work for supply to that regional office; or
   (e) where the officer in charge is satisfied that a reference copy of the work supplied to the central office of the Archives is lost, damaged or destroyed—of a single replacement copy of the work for supply to that central office.

(2) In this section:

   reference copy, in relation to a work, means a reproduction of the work made from a working copy for supply to the central office, or to a regional office, of the Australian Archives for use by that office in providing access to the work to members of the public.

   replacement copy, in relation to a work, means a reproduction of the work made from a working copy for the purpose of replacing a reference copy of the work that is lost, damaged or destroyed.

   working copy, in relation to a work, means a reproduction of the work made for the purpose of enabling the Australian Archives to retain the copy and use it for making reference copies and replacement copies of the work.

51A Reproducing and communicating works for preservation and other purposes

(1) Subject to subsection (4), the copyright in a work that forms, or formed, part of the collection of a library or archives is not infringed by the making or communicating, by or on behalf of the officer in charge of the library or archives, of a reproduction of the work:
   (a) if the work is held in manuscript form or is an original artistic work—for the purpose of preserving the manuscript or original artistic work, as the case may be, against loss or deterioration or for the purpose of research that is being, or is to be, carried out at the library or archives in which the work is held or at another library or other archives;
   (b) if the work is held in the collection in a published form but has been damaged or has deteriorated—for the purpose of replacing the work; or
   (c) if the work has been held in the collection in a published form but has been lost or stolen—for the purpose of replacing the work.
(2) The copyright in a work that is held in the collection of a library or archives is not infringed by the making, by or on behalf of the officer in charge of the library or archives, of a reproduction of the work for administrative purposes.

(3) The copyright in a work that is held in the collection of a library or archives is not infringed by the communication, by or on behalf of the officer in charge of the library or archives, of a reproduction of the work made under subsection (2) to officers of the library or archives by making it available online to be accessed through the use of a computer terminal installed within the premises of the library or archives with the approval of the body administering the library or archives.

(3A) The copyright in an original artistic work that is held in the collection of a library or archives is not infringed in the circumstances described in subsection (3B) by the communication, by or on behalf of the officer in charge of the library or archives, of a preservation reproduction of the work by making it available online to be accessed through the use of a computer terminal:
   (a) that is installed within the premises of the library or archives; and
   (b) that cannot be used by a person accessing the work to make an electronic copy or a hardcopy of the reproduction, or to communicate the reproduction.

(3B) The circumstances in which the copyright in the original artistic work is not infringed because of subsection (3A) are that either:
   (a) the work has been lost, or has deteriorated, since the preservation reproduction of the work was made; or
   (b) the work has become so unstable that it cannot be displayed without risk of significant deterioration.

(4) Subsection (1) does not apply in relation to a work held in published form in the collection of a library or archives unless an authorized officer of the library or archives has, after reasonable investigation, made a declaration stating that he or she is satisfied that a copy (not being a second-hand copy) of the work cannot be obtained within a reasonable time at an ordinary commercial price.

(5) Where a reproduction of an unpublished work is made under subsection (1) by or on behalf of the officer in charge of a library or archives for the purpose of research that is being, or is to be, carried out at another library or archives, the supply or communication of the reproduction by or on behalf of the officer to the other library or archives does not, for any purpose of this Act, constitute the publication of the work.

(6) In this section:
   preservation reproduction, in relation to an artistic work, means a reproduction of the work made under subsection (1) for the purpose of preserving the work against loss or deterioration.

52 Publication of unpublished works kept in libraries or archives

(1) Where:
   (a) a published literary, dramatic or musical work (in this section referred to as the new work) incorporates the whole or a part of a work (in this section referred to as the old work) to which subsection 51(1) applied immediately before the new work was published;
(b) before the new work was published, the prescribed notice of the intended publication of the work had been given; and

(c) immediately before the new work was published, the identity of the owner of the copyright in the old work was not known to the publishers of the new work; then, for the purposes of this Act, the first publication of the new work, and any subsequent publication of the new work whether in the same or in an altered form, shall, in so far as it constitutes a publication of the old work, be deemed not to be an infringement of the copyright in the old work or an unauthorized publication of the old work.

(2) The last preceding subsection does not apply to a subsequent publication of the new work incorporating a part of the old work that was not included in the first publication of the new work unless:

(a) subsection 51(1) would, but for this section, have applied to that part of the old work immediately before that subsequent publication;

(b) before that subsequent publication, the prescribed notice of the intended publication had been given; and

(c) immediately before that subsequent publication, the identity of the owner of the copyright in the old work was not known to the publisher of that subsequent publication.

(3) If a work, or part of a work, has been published and, because of this section, the publication is taken not to be an infringement of the copyright in the work, the copyright in the work is not infringed by a person who, after the publication took place:

(a) broadcasts the work, or that part of the work; or

(b) electronically transmits the work, or that part of the work (other than in a broadcast) for a fee payable to the person who made the transmission; or

(c) performs the work, or that part of the work, in public; or

(d) makes a record of the work, or that part of the work.

53 Application of Division to illustrations accompanying articles and other works

Where an article, thesis or literary, dramatic or musical work is accompanied by artistic works provided for the purpose of explaining or illustrating the article, thesis or other work (in this section referred to as the illustrations), the preceding sections of this Division apply as if:

(a) where any of those sections provides that the copyright in the article, thesis or work is not infringed—the reference to that copyright included a reference to any copyright in the illustrations;

(b) a reference in section 49, section 50, section 51 or 51A to a reproduction of the article, thesis or work included a reference to a reproduction of the article, thesis or work together with a reproduction of the illustrations;

(c) a reference in section 49 or section 50 to a reproduction of a part of the article or work included a reference to a reproduction of that part of the article or work together with a reproduction of the illustrations that were provided for the purpose of explaining or illustrating that part; and

(d) a reference in section 51A or section 52 to the doing of any act in relation to the work included a reference to the doing of that act in relation to the work together with the illustrations. …
Part IV—Copyright in subject-matter other than works …

Division 6—Infringement of copyright in subject-matter other than works …

104B Infringing copies made on machines installed in libraries and archives

If:

(a) a person makes an infringing copy of, or of part of, an audio-visual item or a published edition of a work on a machine (including a computer), being a machine installed by or with the approval of the body administering a library or archives on the premises of the library or archives, or outside those premises for the convenience of persons using the library or archives; and

(b) there is affixed to, or in close proximity to, the machine, in a place readily visible to persons using the machine, a notice of the prescribed dimensions and in accordance with the prescribed form; neither the body administering the library or archives, nor the officer in charge of the library or archives, is taken to have authorised the making of the infringing copy merely because the copy was made on that machine. …

110A Copying and communicating unpublished sound recordings and cinematograph films in libraries or archives

Where, at a time more than 50 years after the time at which, or the expiration of the period during which, a sound recording or cinematograph film was made, copyright subsists in the sound recording or cinematograph film but:

(a) the sound recording or cinematograph film has not been published; and

(b) a record embodying the sound recording, or a copy of the cinematograph film, is kept in the collection of a library or archives where it is, subject to any regulations governing that collection, accessible to the public; the copyright in the sound recording or cinematograph film and in any work or other subject-matter included in the sound recording or cinematograph film is not infringed:

(c) by the making of a copy or the communication of the sound recording or cinematograph film by a person for the purpose of research or study or with a view to publication; or

(d) by the making of a copy or the communication of the sound recording or cinematograph film by, or on behalf of, the officer in charge of the library or archives if the copy is supplied or communicated to a person who satisfies the officer that he or she requires the copy for the purpose of research or study, or with a view to publication and that he or she will not use it for any other purpose.

110B Copying and communicating sound recordings and cinematograph films for preservation and other purposes

(1) Subject to subsection (3), where a copy of a sound recording, being a sound recording that forms, or formed, part of the collection of a library or archives, is made by or on behalf of the officer in charge of the library or archives:

B-I-38
(a) if the sound recording is held in the collection in the form of a first record—for the
purpose of preserving the record against loss or deterioration or for the purpose of
research that is being, or is to be, carried out at the library or archives in which the
record is held or at another library or archives;

(b) if the sound recording is held in the collection in a published form but has been
damaged or has deteriorated—for the purpose of replacing the sound recording; or

(c) if the sound recording has been held in the collection in a published form but has been
lost or stolen—for the purpose of replacing the sound recording; the making of the
copy does not infringe copyright in the sound recording or in any work or other
subject-matter included in the sound recording.

(2) Subject to subsection (3), where a copy of a cinematograph film, being a cinematograph film
that forms, or formed, part of the collection of a library or archives, is made by or on behalf
of the officer in charge of the library or archives:

(a) if the cinematograph film is held in the collection in the form of a first copy—for the
purpose of preserving the copy against loss or deterioration or for the purpose of
research that is being, or is to be, carried out at the library or archives in which the
copy is held or at another library or archives;

(b) if the cinematograph film is held in the collection in a published form but has been
damaged or has
deteriorated—for the purpose of replacing the cinematograph film; or

(c) if the cinematograph film has been held in the collection in a published form but has been
lost or stolen—for the purpose of replacing the cinematograph film; the making of the
copy does not infringe copyright in the cinematograph film or in any work or other
subject-matter included in the cinematograph film.

(2A) The copyright in a sound recording or cinematograph film that forms, or formed, part of the
collection of a library or archives, or in any work or other subject-matter included in such a
sound recording or film, is not infringed by the communication, by or on behalf of the officer
in charge of the library or archives, of a copy of the sound recording or film made under
subsection (1) or (2) to officers of the library or archives by making it available online to be
accessed through the use of a computer terminal installed within the premises of the library
or archives with the approval of the body administering the library or archives.

(2B) If:

(a) a copy of a sound recording or a cinematograph film is made by or on behalf of the
officer in charge of a library or archives under this section; and

(b) the copy is made for the purpose of research that is being, or is to be, carried out at
another library or archives; the copyright in the sound recording or film, or in any work
or other subject-matter included in it, is not infringed by the communication, by or on
behalf of the officer in charge, of the copy to the other library or archives by making it
available online to be accessed through the use of a computer terminal installed within
the premises of the other library or archives with the approval of the body administering the other library or archives.

(3) Subsection (1) does not apply in relation to a sound recording, and subsection (2) does not apply in relation to a cinematograph film, held in a published form in the collection of a library or archives unless an authorised officer of the library or archives has, after reasonable investigation, made a declaration stating that he or she is satisfied that a copy (not being a second-hand copy) of the sound recording or cinematograph film, as the case may be, cannot be obtained within a reasonable time at an ordinary commercial price.

(4) Where a copy of an unpublished sound recording or an unpublished cinematograph film is made under subsection (1) or (2) by or on behalf of the officer in charge of a library or archives for the purpose of research that is being, or is to be, carried out at another library or archives, the supply or communication of the copy by or on behalf of the officer to the other library or archives does not, for any purpose of this Act, constitute the publication of the sound recording or cinematograph film or of any work or other subject-matter included in the sound recording or cinematograph film.

Part X—Miscellaneous …

203A Retention of declarations in relation to copies made by libraries, archives or institutions

(1) Where, at any time before the expiration of the prescribed retention period after the making of a copy of the whole or a part of a work or other subject-matter in reliance on section 49, 50, 51A or 110B by an authorized officer of a library or archives, a relevant declaration in relation to the making of the copy is not retained in the records of the library or archives:

(a) the body administering the library or archives concerned; and

(b) the officer in charge of the library or archives concerned; are each guilty of an offence punishable, upon conviction, by a fine not exceeding $500.

(4) A body or person is not liable to be convicted twice of an offence against subsection (1) with respect to the retention of the same declaration.

(5) It is a defence to a prosecution of the body administering, or of the officer in charge of, a library or archives for an offence against subsection (1) in relation to the retention of a declaration if the body or person prosecuted (in this subsection referred to as the defendant) satisfies the court that:

(a) in the case of a prosecution of the officer in charge of a library or archives—the declaration relates to the making of a copy of the whole or a part of a work, a sound recording or a cinematograph film before the day on which the defendant became the officer in charge of the library or archives and was not in the possession of the body administering the library or archives at that day; or

(b) in any case—the defendant took all reasonable precautions, and exercised due diligence, to ensure the retention of the declaration in the records of the library or archives, as the case requires.
203D Arrangement of declarations and records

(1) Where the declarations that relate to the making of copies of the whole or parts of works or other subject-matter by an authorized officer of a library or archives in reliance on any of the following sections, namely, sections 49, 50, 51A and 110B, and that are retained in the records of the body administering the library or archives are not arranged in chronological order according to the dates on which the declarations were made:

(a) the body administering the library or archives, as the case may be; and
(b) the officer in charge of the library or archives, as the case may be; are each guilty of an offence punishable, upon conviction, by a fine not exceeding $500.

(5) It is a defence to a prosecution of a body or person for an offence against subsection (1) if the body or person satisfies the court that the body or person took all reasonable precautions, and exercised due diligence, to ensure that the declarations were arranged as mentioned in that subsection.

203E Inspection of records and declarations retained by libraries, archives or institutions

(1) The owner of the copyright in a work, sound recording or cinematograph film, or the agent of such an owner:

(a) may notify the officer in charge of a library or archives, in writing, that he or she wishes to inspect:
   (i) all the relevant declarations retained in the records of the library or archives that relate to the making, in reliance on section 49, 50, 51A or 110B, of copies of works or parts of works or of copies of other subject-matter; or
   (ii) such of those declarations as relate to the making, in reliance on section 49, 50, 51A or 110B, of copies of works or parts of works or of copies of other subject-matter and were made during a period specified in the notice; on a day specified in the notice, being an ordinary working day of the library, archives or institution not less than 7 days after the date of the giving of the notice; and
(b) may, if the notice related to the making of copies of works or parts of works or of copies of other subject-matter in reliance on section 51A or 110B, state in the notice that he or she also wishes to inspect, on the day so specified, the collection of the library or archives.

(4) Where a person gives notice, under subsection (1), to the officer in charge of a library or archives that he or she wishes to inspect certain declarations on a particular day, that person may, during the ordinary working hours of the library or archives, on that day, but not earlier than 10 a.m. or later than 3 p.m., inspect the declarations to which the notice relates and, where the notice relates also to the inspection of the collection of the library or archives, may also during those hours on that day inspect that collection, and, for that purpose, may enter the premises of the library or archives.
(6) Where a person who attends at the premises of a library or archives for the purpose of exercising the powers conferred on him or her by subsection (4) is not provided with all reasonable facilities and assistance for the effective exercise of those powers:
   (a) the body administering the library or archives, as the case may be; and
   (b) the officer in charge of the library or archives, as the case may be; are each guilty of an offence punishable, upon conviction, by a fine not exceeding $500.

(6A) Subsection (6) is an offence of strict liability.

Note: For strict liability, see section 6.1 of the Criminal Code.

(8) The officer in charge of a library or archives shall not be convicted of an offence against subsection (6) if the officer adduces evidence that he or she believed, on reasonable grounds, that the person who attended the premises of the library or archives, as the case may be, as mentioned in that subsection, was provided with all reasonable facilities and assistance for the effective exercise of the powers conferred by subsection (4) and that evidence is not rebutted by the prosecution.

(9) The body administering a library or archives shall not be convicted of an offence against subsection (6) if the body adduces evidence that it took all reasonable precautions, and exercised due diligence, to ensure that the person who attended the premises of the library or archives, as the case may be, as mentioned in that subsection, was provided with all reasonable facilities and assistance for the effective exercise of the powers conferred by subsection (4) and that evidence is not rebutted by the prosecution.

(10) A person who, either directly or indirectly, except with the intention of:
   (a) informing the owner of the copyright in a work or other subject-matter that a copy (including a microform copy) has been made of the work or other subject-matter;
   (b) enforcing a right that a person has under this Act in connection with a work or other subject-matter in which copyright subsists; or
   (c) ensuring compliance with a provision of Division 5 of Part III or with a provision of this Part; makes a record of, or divulges or communicates to a person, information in relation to which subsection (11) applies in relation to the first-mentioned person is guilty of an offence punishable, upon conviction, by a fine not exceeding $500.

(10A) Subsection (10) is an offence of strict liability.

Note: For strict liability, see section 6.1 of the Criminal Code.

(11) This subsection applies in relation to information in relation to a person if, and only if:
   (a) the information was acquired by the person in the course of an inspection conducted by the person under subsection (4); or
   (b) the information was divulged or communicated to the person by another person and this subsection applies in relation to the information in relation to the other person.
203F Additional offences in relation to the making and retention of records and declarations

(1) A person shall not, under section 49, 50, 51A or 110B, make a declaration that the person knows, or ought reasonably to know, is false or misleading in a material particular.

Penalty:
(a) in a case where the person knows that the declaration is false or misleading in a material particular—$500; or
(b) in any other case—$250.

(2) A person shall not intentionally dispose of or destroy, or cause to be disposed of or destroyed, any relevant declaration in relation to the making of a copy of the whole or a part of a work or other subject-matter in reliance on section 49, 50, 51A or 110B, being a declaration in respect of which the prescribed retention period has not expired, if the person knows, or ought reasonably to know, that the prescribed retention period in respect of the declaration has not expired.

Penalty:
(a) in a case where the person knows that the prescribed retention period in respect of the declaration has not expired—$500; or
(b) in any other case—$250.

203G Additional offences relating to declarations under subsections 116A(3) and 132(5F)

(1) A person must not, under subsection 116A(3) or 132(5F), make a declaration, knowing the declaration to be false or misleading in a material particular.

Penalty: Imprisonment for 12 months.

(2) A person must not, under subsection 116A(3) or 132(5F), make a declaration, being reckless as to whether the declaration is false or misleading in a material particular.

Penalty: Imprisonment for 6 months.

(3) A person must not dispose of or destroy, or cause to be disposed of or destroyed, a declaration under subsection 116A(3) or 132(5F), being a declaration whose prescribed retention period has not expired, if the person knows, or is reckless as to whether, that period has not expired.

Penalty: Imprisonment for 6 months.

203H Notation of certain copies etc.

(1) In proceedings against a person or body for infringement of copyright in a work in connection with the making, by or on behalf of an institution, of a reproduction of the work, or of a part of the work, the person or body is not entitled to rely on section 49, 50 or 51A as justification for the making of the reproduction unless, at or about the time the reproduction was made, there was made on the reproduction a notation stating that the reproduction was made on behalf of that institution and specifying the date on which the reproduction was made.
(2) In proceedings against a person or body for infringement of copyright in a sound recording or a cinematograph film in connection with the making, by or on behalf of an institution, of a copy of the sound recording or cinematograph film, the person or body is not entitled to rely on section 110B as justification for the making of the copy unless, at or about the time the copy was made, there was made on, or attached to, the copy a notation stating that the copy was made on behalf of that institution and specifying the date on which the copy was made.

(4) A person who:
   
   (a) makes on a reproduction of a work, or of a part of a work, a notation of the kind referred to in subsection (1); or
   
   (aa) makes on, or attaches to, a copy of a sound recording or a cinematograph film a notation of the kind referred to in subsection (2); being a notation that contains a statement that the person knows, or ought reasonably to know, is false or misleading in a material particular, is guilty of an offence, punishable, upon conviction, by a fine not exceeding:
   
   (c) in a case where the person knows that the statement is false or misleading in a material particular—$500; or
   
   (d) in any other case—$250.

(5) For the purposes of subsections (1) and (2):

   (a) if a reproduction of the whole or part of a work, or a copy of a sound recording or a cinematograph film:
      
      (i) is made, or caused to be made, by an authorized officer of a library; or
      
      (ii) is made by, or on behalf of, the officer in charge of a library;

      being a library of an institution, the reproduction or copy is taken to have been made on behalf of the institution; and

   (b) if a reproduction of the whole or part of a work, or a copy of a sound recording or a cinematograph film:
      
      (i) is made, or caused to be made, by an authorized officer of a library; or
      
      (ii) is made by, or on behalf of, the officer in charge of a library;

      being a library that is not a library of an institution:
      
      (iii) the reproduction or copy is taken to have been made on behalf of the person or body administering the library; and
      
      (iv) those subsections apply as if references to an institution were references to that person or body; and

   (c) if a reproduction of the whole or part of a work, or a copy of a sound recording or a cinematograph film:
      
      (i) is made, or caused to be made, by an authorized officer of archives; or
      
      (ii) is made by, or on behalf of, the officer in charge of archives;

      then:
      
      (iii) the reproduction or copy is taken to have been made by or on behalf of the person or body administrating the archives; and
      
      (iv) those subsections apply as if references to an institution were references to that person or body; and

   (d) if a reproduction, or a record embodying a sound recording, of the whole or part of a work is made by or on behalf of the body administrating an institution, the reproduction or record is taken to have been made on behalf of the institution; and
(e) if a copy of a sound recording or a cinematograph film is made by or on behalf of the body administering an institution, the copy is taken to have been made on behalf of the institution.

(6) The production, in any proceedings:
(a) for infringement of copyright in a work; or
(c) for a contravention of a provision of this Act; of a reproduction of a work, or of a part of a work, bearing a notation or mark of the kind referred to in subsection (1), 135K(1), 135ZY(1), 135ZQ(4) or 135ZT(4) is _prima facie_ evidence of the matters stated in the notation or mark.

(7) For the purposes of subsection (6), where a reproduction of a work or a part of a work, bears a notation or mark of a kind referred to in subsection (1), 135K(1), 135ZX(1), 135ZQ(4) or 135ZT(4) the notation or mark shall, unless the contrary is proved, be deemed to have been made on the reproduction at or about the time the reproduction was made.

(9A) The production, in any proceedings:
(a) for infringement of copyright in a sound recording, a cinematograph film or an eligible item; or
(c) for a contravention of this Act; of a copy of a sound recording or a cinematograph film bearing, or to which there is attached, a notation or mark of the kind referred to in subsection (2), 135K(1), 135ZX(1), 135ZQ(4) or 135ZT(4), is _prima facie_ evidence of the matters stated in the notation or mark.

(9B) For the purposes of subsection (9A), where a copy of a sound recording or a cinematograph film bears, or where there is attached to such a copy, a notation or mark of the kind referred to in subsection (2), 135K(1), 135ZX(1), 135ZQ(4) or 135ZT(4), the notation or mark shall, unless the contrary is proved, be deemed to have been made on or attached to the copy at or about the time the copy was made.

(10) In this section:

_reproduction_, in relation to a work, or part of a work, includes a microform copy, a Braille version, a large print version, or a photographic version of the work, or of the part of the work. …

... Part V—Remedies and offences ...

Division 2A—Actions in relation to circumvention devices and electronic rights management information

116A Importation, manufacture etc. of circumvention device and provision etc. of circumvention service

(1) Subject to subsections (2), (3) and (4), this section applies if:
(a) a work or other subject-matter is protected by a technological protection measure; and
(b) a person does any of the following acts without the permission of the owner or exclusive licensee of the copyright in the work or other subject-matter:
(i) makes a circumvention device capable of circumventing, or facilitating the circumvention of, the technological protection measure;

(ii) sells, lets for hire, or by way of trade offers or exposes for sale or hire or otherwise promotes, advertises or markets, such a circumvention device;

(iii) distributes such a circumvention device for the purpose of trade, or for any other purpose that will affect prejudicially the owner of the copyright;

(iv) exhibits such a circumvention device in public by way of trade;

(v) imports such a circumvention device into Australia for the purpose of:
   (A) selling, letting for hire, or by way of trade offering or exposing for sale or hire or otherwise promoting, advertising or marketing, the device; or
   (B) distributing the device for the purpose of trade, or for any other purpose that will affect prejudicially the owner of the copyright; or
   (C) exhibiting the device in public by way of trade;

(vi) makes such a circumvention device available online to an extent that will affect prejudicially the owner of the copyright;

(vii) provides, or by way of trade promotes, advertises or markets, a circumvention service capable of circumventing, or facilitating the circumvention of, the technological protection measure; and

(c) the person knew, or ought reasonably to have known, that the device or service would be used to circumvent, or facilitate the circumvention of, the technological protection measure.

(2) This section does not apply in relation to anything lawfully done for the purposes of law enforcement or national security by or on behalf of:
   (a) the Commonwealth or a State or Territory; or
   (b) an authority of the Commonwealth or of a State or Territory.

(3) This section does not apply in relation to the supply of a circumvention device or a circumvention service to a person for use for a permitted purpose if:
   (a) the person is a qualified person; and
   (b) the person gives the supplier before, or at the time of, the supply a declaration signed by the person:
      (i) stating the name and address of the person; and
      (ii) stating the basis on which the person is a qualified person; and
      (iii) stating the name and address of the supplier of the circumvention device or circumvention service; and
      (iv) stating that the device or service is to be used only for a permitted purpose by a qualified person; and
      (v) identifying the permitted purpose by reference to one or more of sections 47D, 47E, 47F, 48A, 49, 50, 51A and 183 and Part VB; and
      (vi) stating that a work or other subject-matter in relation to which the person proposes to use the device or service for a permitted purpose is not readily available to the person in a form that is not protected by a technological protection measure.
(4) This section does not apply in relation to the making or importing of a circumvention device:
   (a) for use only for a permitted purpose relating to a work or other subject-matter that is not readily available in a form that is not protected by a technological protection measure; or
   (b) for the purpose of enabling a person to supply the device, or to supply a circumvention service, for use only for a permitted purpose.

(4A) For the purposes of paragraphs (3)(b) and (4)(a), a work or other subject-matter is taken not to be readily available if it is not available in a form that lets a person do an act relating to it that is not an infringement of copyright in it as a result of section 47D, 47E, 47F, 48A, 49, 50, 51A or 183 or Part VB.

(5) If this section applies, the owner or exclusive licensee of the copyright may bring an action against the person.

(6) In an action under subsection (5), it must be presumed that the defendant knew, or ought reasonably to have known, that the circumvention device or service to which the action relates would be used for a purpose referred to in paragraph (1)(c) unless the defendant proves otherwise.

(7) For the purposes of this section, a circumvention device or a circumvention service is taken to be used for a permitted purpose only if:
   (a) the device or service is used for the purpose of doing an act comprised in the copyright in a work or other subject-matter; and
   (b) the doing of the act is not an infringement of the copyright in the work or other subject-matter under section 47D, 47E, 47F, 48A, 49, 50, 51A or 183 or Part VB.

(8) In this section:

   *qualified person* means:
   (a) a person referred to in paragraph 47D(1)(a), 47E(1)(a) or 47F(1)(a); or
   (b) a person who is an authorized officer for the purposes of section 48A, 49, 50 or 51A; or
   (c) a person authorised in writing by the Commonwealth or a State for the purposes of section 183; or
   (d) a person authorised in writing by a body administering an institution (within the meaning of Part VB) to do on behalf of the body an act that is not an infringement of copyright because of that Part.

   *supply* means:
   (a) in relation to a circumvention device—sell the device, let it for hire, distribute it or make it available online; and
   (b) in relation to a circumvention service—provide the service.

(9) The defendant bears the burden of establishing the matters referred to in subsections (3), (4) and (4A).
AUSTRALIA: PHASE II REPORT

MELLON STUDY: THE INTEGRITY OF ARCHIVES

Emily Hudson
Research Fellow
Intellectual Property Research Institute of Australia, and
Centre for Media and Communications Law
University of Melbourne, Australia
e.hudson@unimelb.edu.au

– and –

Andrew T Kenyon
Director
Centre for Media and Communications Law
University of Melbourne, Australia
a.kenyon@unimelb.edu.au
**Preface**

This document contains responses to questions posed by the Columbia University research team in their Phase II Questionnaire, and provides any relevant updates to the responses we provided in Phase I.

At various points, our responses draw on empirical research resulting from the Australian Research Council funded Linkage Project being jointly conducted by the CMCL and IPRIA: ‘Copyright and Cultural Institutions: Digitising Collections in Public Museums, Galleries and Libraries’. As part of the Copyright and Cultural Institutions Project, we conducted interviews with approximately 150 staff of public museums, galleries, libraries and archives in Australia to learn more about: the nature of existing and planned digitisation practices; copyright management in the digitisation process; and staff opinion and experience of copyright law.

Many of their responses are relevant to questions raised in the Phase II Questionnaire, and some general themes from our research are set out in this document. We warmly thank the participants in our research for their assistance.

At other points, where there are no reported decisions or empirical research, we have answered your questions by reference to general principles that exist in Australian law. As noted in the preface to our earlier Phase I Report, this situation may be frustrating at times, but highlights the need for further empirical research in Australia.

Emily Hudson and Andrew Kenyon
October 2005

---

1 Outputs from the Copyright and Cultural Institutions Project are available from the project website at <http://www.law.unimelb.edu.au/cmcl/projects/copyright.html>. The Chief Investigators on the project are Andrew Kenyon and Andrew Christie, and Emily Hudson works as a Research Fellow on the project.
A. COPYRIGHT ANALYSIS

1. Are there judicial decisions in your country addressing publishers’ or archives’ liability with respect to documents included in the archives’ collections that infringe copyright?

We are not aware of any such decisions. But please note our Phase I discussion of service provider liability under Telstra Corporation Limited v Australasian Performing Rights Association Limited.2

2. Have litigants in your country agreed to settlements in respect of claims of copyright infringement that would affect the contents, maintenance, or public accessibility of material contained in archives? Under what circumstances?

During interviews in the Copyright and Cultural Institutions Project, we asked interviewees how their institution handled allegations of copyright infringement. The following themes emerged:

(1) Small number of claims. Only a small number of interviewees reported receiving complaints alleging that their institution had infringed copyright by reproducing, publishing or electronically communicating copyright material. Complaints related to things like publishing a reproduction of an artwork in a book, making a low resolution copy of a photograph available over the internet, or publishing parts of a transcript from an anonymous oral history recording. Interestingly, a few interviewees reported that the only complaints they had received related to moral rights, such as reproductions being a poor colour match for the original, or not being properly attributed.3

The small number of copyright claims may relate to the conservative risk management strategy adopted by many institutions. That is, institutions reported a high reliance on copyright licences when they digitised collection items for the purpose of public access.\(^4\) Where it was not possible to obtain a copyright licence (and the item was still protected by copyright), many institutions would only digitise for internal purposes (which often is permitted under the *Copyright Act 1968* (Cth)).\(^5\) The question of how to deal with ‘orphan works’ – that is, works for which the copyright owner is difficult or impossible to locate – was a key issue arising out of the research.

Resolution of claims generally straightforward. Of those interviewees who reported receiving a complaint in relation to an alleged copyright infringement, there was consensus that dealing with those claims was relatively straightforward and avoided legal proceedings being instituted against the institution. Common responses to infringement claims included paying a retrospective licence fee to a complainant, or removing material from the internet. Again, the ease of dispute resolution may be linked to institutions’ risk management policies. Interviewees reported that where their institution wished to reproduce copyright material for a purpose not covered by an exception in the *Copyright Act*, but staff were unable to obtain a copyright licence, there was often a risk management policy that had to be complied with before the reproduction could be made.

\(^4\) See, eg, Emily Hudson and Andrew T Kenyon, ‘Communication in the digital environment: An empirical study into copyright law and digitisation practices in public museums, galleries and libraries’, IPRIA Working Paper No. 15/05 (July 2005), available at <http://www.ipria.org/publications/workingpapers.html>. We use the term ‘public access’ to refer to any use in the public sphere, such as publishing an image in a book, or making content available on a website.

\(^5\) For example, literary, dramatic, musical and artistic works can be reproduced by cultural institutions for ‘administrative purposes’, and those images may be communicated to staff members within the institution’s premises: *Copyright Act 1968* (Cth) s 51A(2), (3). Cultural institutions can also reproduce manuscripts, original artistic works, sound recordings held as a first record and cinematograph films held as a first film for the purpose of preservation: *Copyright Act 1968* (Cth) s 51A(1)(a), 110B(1)(a), 110B(2)(a).
It seems that in many cases, institutions only proceeded where the risk of dispute was low, and the likelihood of resolution (if an aggrieved party came forward) was high.

We are not aware of any empirical research examining dispute resolution in relation to commercial archives. We are unable to comment on how those bodies experience dispute resolution of copyright claims.

3. **Have publishers or archives in your country sought to avoid potential liability by removing material that may infringe copyright, without waiting to be notified (or sued) by persons claiming to be injured by the material?**

It is unclear whether publishers have unilaterally removed material in order to avoid potential liability for copyright infringement. We do not know of any empirical research in Australia examining this question.

It was clear from interviews in the Copyright and Cultural Institutions Project that the possibility of copyright infringement was a significant element guiding the selection of material to digitise, particularly where digitisation was being performed for access reasons. Interviewees often reported that digitisation projects targeted materials in the public domain, or focused on items for which licences were readily obtainable. Interviewees also spoke of ensuring that their information management systems could distinguish between reproductions that had been cleared for public access, and those that had not. That is, while there were instances of (say) modifying websites to remove possibly infringing content, it appears that much effort was put into copyright compliance prior to public uses being made.

4. **Does your country’s copyright law, or other law (whether statutory or case law) provide any moral rights such as a “right of withdrawal” that could affect archives’ ability to retain an author’s work?**

---

6 This is discussed in Hudson and Kenyon, above n 4.
The *Copyright Act 1968* (Cth) contains moral rights provisions in Part IX, however these provisions do not include a right of withdrawal.\(^7\)

The moral rights provisions contained in Part IX are a relatively recent addition to Australian law, having been introduced by the *Copyright Amendment (Moral Rights) Act 2000* (Cth). The provisions came into force on 21 December 2000.

Moral rights subsist in ‘works’, which in Part IX means literary, dramatic, musical and artistic works, and cinematograph films.\(^8\) The ‘author’ of a work holds the moral rights in relation to it.\(^9\) Legislation has been passed that will confer moral rights on certain performers in live performances, however this legislation will not come into force until the WIPO Performances and Phonograms Treaty is signed and ratified by Australia.\(^10\) The *Copyright Act* expressly provides that moral rights can only be held by individuals,\(^11\) and that moral rights cannot be transferred by assignment, will or operation of law.\(^12\)

The author is granted three moral rights under Part IX:

---


\(^8\) *Copyright Act 1968* (Cth) s 189. Elsewhere in the *Copyright Act*, the term ‘works’ only refers to literary, dramatic, musical and artistic works: *Copyright Act 1968* (Cth) s 10(1).

\(^9\) For cinematograph films, author means the director, producer and screenwriter of the film: ibid s 189.

\(^10\) *US Free Trade Agreement Implementation Act 2004* (Cth).

\(^11\) *Copyright Act 1968* (Cth) s 190.

\(^12\) Ibid s 195AN(3).
(1) *The right of attribution of authorship.*\(^{13}\) This is the right to be attributed as author of the work whenever an ‘attributable act’ is performed in relation to the work. The identification must be clear and reasonably prominent.\(^{14}\) The term ‘attributable act’ means:

(a) for literary, dramatic and musical works – reproduction in a material form, publication, performance in public, communication to the public, and making an adaptation;\(^{15}\)

(b) for artistic works – reproduction in a material form, publication, exhibition in public and communication to the public;\(^{16}\) and

(c) for cinematograph films – making a copy of the film, exhibiting the film in public and communicating the film to the public.\(^{17}\)

(2) *The right not to have authorship falsely attributed.*\(^{18}\) Acts of false attribution are set out separately for literary, dramatic and musical works, artistic works, and cinematograph films. However, these acts are relatively similar, and include:

(a) inserting or affixing another person’s name to the work, in a way that falsely implies that they are the author of the work;

(b) dealing with a work with a name affixed or inserted that the person knows is not an author; and

(c) dealing with an altered version of work as though it is, in fact, the original work.

(3) *The right of integrity of authorship.*\(^{19}\) The right of integrity is the right not to have works subjected to ‘derogatory treatment’.\(^{20}\) What constitutes ‘derogatory treatment’ is defined

---

\(^{13}\) Ibid Part IX, Division 2.

\(^{14}\) Ibid s 196.

\(^{15}\) Ibid s 194(1).

\(^{16}\) Ibid s 194(2).

\(^{17}\) Ibid s 194(3).

\(^{18}\) Ibid Part IX, Division 3.

\(^{19}\) Ibid Part IX, Division 4.

\(^{20}\) Ibid s 195AI(2).
separately (but in fairly similar terms) for literary, dramatic and musical works, artistic works and films. The term ‘derogatory treatment’ covers these situations:

(a) doing an act that results in a ‘material distortion of’, ‘mutilation of’ or ‘material alteration to’ a work that is ‘prejudicial to the author’s honour or reputation’;
(b) doing any other act that is ‘prejudicial to the author’s honour or reputation’; and
(c) exhibiting an artistic work in public in a way that is ‘prejudicial to the author’s honour or reputation because of the manner or place in which the exhibition occurs’.

The general rule is that the duration of moral rights continue in a work until copyright ceases to subsist in that work. The one exception to this rule is the right of integrity in relation to cinematograph films, which expires when the author dies. When an author dies, his or her moral rights are exercised by the ‘legal personal representative’.

It is an infringement of moral rights to do an attributable act without identifying the author, perform an act of false attribution, or to subject a work to derogatory treatment. Certain dealings with works that have been subject to derogatory treatment, as well as commercial dealings with infringing articles, are also prohibited.

There are two significant defences to infringement. Firstly, there will be no infringement of the rights of attribution or integrity when the act was ‘reasonable’ in all the circumstances. The

21 Ibid ss 195AJ to 195AL.
22 Ibid s 195AM.
23 Ibid s 195AM(1).
24 Ibid s 195AN(1).
25 Ibid s 195AO.
26 Ibid s 195AP.
27 Ibid s 195AQ(2).
28 Ibid ss 195AQ(3)-(5).
29 Ibid ss 195AU, 195AV.
30 Ibid ss 195AR, 195AS.
Copyright Act sets out factors that are relevant for determining whether non-attribution or derogatory treatment is reasonable. For example, in determining whether subjecting a literary, dramatic, musical or artistic work to ‘derogatory treatment’ is reasonable, the relevant factors include:

(a) the nature of the work;
(b) the purpose for which the work is used;
(c) the manner in which the work is used;
(d) the context in which the work is used;
(e) any practice, in the industry in which the work is used, that is relevant to the work or the use of the work;
(f) any practice contained in a voluntary code of practice, in the industry in which the work is used, that is relevant to the work or the use of the work;
(g) whether the work was made:
   (i) in the course of the author’s employment; or
   (ii) under a contract for the performance by the author of services for another person;
(h) whether the treatment was required by law or was otherwise necessary to avoid a breach of any law; and
(i) if the work has 2 or more authors – their views about the treatment.  

Secondly, there will be no infringement of moral rights if an act or omission falls within the ambit of a written consent provided by the holder of moral rights in a work. There are special rules in the Copyright Act governing the scope and circumstances of a lawful consent. This will be discussed in further detail below.

The remedies available to a successful plaintiff in a moral rights action include injunction, damages, declarations, orders for public apology, and orders for the reversal or removal of false attribution or derogatory treatment.

---

31 Ibid s 195AS(2).
32 Ibid ss 195AW, 195AWA.
33 Ibid s 195AZA.
(a) If so, are there any judicial decisions which address such moral rights in the context of an author or publisher wishing to remove offending material from a work contained in a library or archives’ collection?

There have been no judicial decisions in Australia in relation to the moral rights in Part IX of the Copyright Act.

(b) Have there been any disputes between authors and publishers (or between authors and libraries/archives) regarding the author’s moral rights in which the author wishes to remove a work from the archives’ collection, to alter the way in which the work is displayed or accessed, or to alter the work itself? If so, how have the parties resolved such disputes?

We are unable to comment fully on whether there have been disputes between authors and publishers in relation to moral rights.

As noted earlier, some interviewees in the Copyright and Cultural Institutions Project reported receiving complaints from authors in relation to infringements of moral rights. Examples included failure to attribute staff photographers when images were used in annual reports and other publications, and concerns from artists that reproductions were a poor colour match to the original, or had been cropped. As discussed above, resolution of such matters appeared to be relatively unproblematic for interviewees.

Interviewees also reported taking action to ensure that a potential infringement of moral rights did not eventuate. For example, a few interviewees reported having merchandise reprinted because it did not adequately reproduce the original. Others spoke of educating designers in relation to moral rights law, as there were instances in which moral rights were inadvertently infringed because designers had cropped work or not property attributed material for purely aesthetic reasons.
Some other steps taken to facilitate compliance with moral rights included:

(1) *Including moral rights provisions in copyright licences.* Many copyright licences used by cultural institutions now include a term in which the creator can set out his or her preferred form of attribution and title of the work.

(2) *Engaging with creators when planning exhibitions or publications.* Institutions wishing to include reproductions of artistic works in an exhibition or publication reported sending proofs to the artist for their comment and approval.

(3) *Use of artist-made derivatives.* Some interviewees reported that artists were responsible for creating derivates of their work. For instance, where an extract of a cinematograph film was required for an exhibition, the film-maker might be asked to supply this, rather than the institution producing it.

(c) Can any such moral rights be contracted away?

It is not possible for the author to transfer his or her moral rights to someone else. However, the *Copyright Act* provides that the holder of moral rights (or a person representing the holder) may provide a written consent to an act or omission, and that it is not an infringement of moral rights to perform an act within the scope of that consent.\(^{34}\)

The *Copyright Act* sets out rules for what may be validly included in a written consent. The scope of this varies for different works and authors, with employees able to give the broadest type of consents.

(1) *Consents relating to cinematograph films, or literary, dramatic, musical or artistic works included in a cinematograph film.*\(^ {35}\) The consent may be given in relation to ‘all or any

---

\(^{34}\) Ibid ss 195AW, 195AWA.

\(^{35}\) Ibid s 195AW.
acts or omissions occurring before or after the consent is given.36 The consent may relate to specified works that already exist, or works of a particular description the making of which has not begun or that are in the course of being made.37

(2) **Consents relating to literary, dramatic, musical or artistic works (other than those included in a cinematograph film).**38 A consent will only have effect if given:

(a) in relation to specified acts or omissions, or specified classes or types of acts or omissions, whether occurring before or after the consent is given; and

(b) in relation to either of the following:

(i) a specified work or specified works existing when the consent is given; or

(ii) a specified work, or works of a particular description, the making of which has not begun or that is or are in the course of being made.

(3) **Consents relating to works made by an employee for the benefit of his or her employer.**39 A consent may be given by an employee:

(a) for films and works included in films – in relation to all works made or to be made by the employee in the course of his or her employment;40 or

(b) for works not included in films – in relation to all or any acts or omissions (whether occurring before or after the consent is given) and in relation to all works made or to be made by the employee in the course of his or her employment.41

A consent given for the benefit of the owner or prospective owner of copyright in the work, unless the consent provides to the contrary, is presumed to extend to the copyright owner’s

---

36 Ibid s 195AW(2).
37 Ibid s 195AW(3).
38 Ibid s 195AWA.
40 Ibid s 195AW(4).
41 Ibid s 195AWA(4).
licensees and successors in title, and to persons authorised by the owner to do acts comprised in the copyright.\textsuperscript{42}

Finally, a consent may be invalidated if it was obtained through duress or false or misleading statements.\textsuperscript{43}

5. Please update the copyright analysis you did last year in connection with the Phase I questionnaire. In particular, have there been any new judicial decisions, legislation or regulations relevant to your earlier analysis?

There have been two significant developments in Australia since submission of our Phase I report in May 2004 that are relevant to the responses given then: the execution of the Free Trade Agreement between the United States and Australia, and the release of an Issues Paper by the federal Attorney-General’s department examining fair use and other copyright exceptions in the digital era.

\textit{(1) Free Trade Agreement between the United States and Australia.} Legislation implementing the Free Trade Agreement was passed by parliament in 2004, with certain provisions coming into force on 1 January 2005.\textsuperscript{44} The implementing legislation amended numerous statutes, including the \textit{Copyright Act}.\textsuperscript{45}

A key amendment arising from the Free Trade Agreement was the extension of the copyright term in Australia.\textsuperscript{46} For example, the \textit{Copyright Act} previously stated that copyright subsists in published literary, dramatic and musical works for the life of the

\begin{itemize}
\item \textsuperscript{42} Ibid ss 195AW(5), 195AWA(5).
\item \textsuperscript{43} Ibid s 195AWB.
\item \textsuperscript{44} \textit{US Free Trade Agreement Implementation Act 2004} (Cth).
\item \textsuperscript{45} For discussion of the Free Trade Agreement, see, eg, Kimberlee Weatherall, ‘Locked In: Australia Gets a Bad Intellectual Property Deal’ (2004-5) 20(4) \textit{Policy} 18.
\item \textsuperscript{46} For a summary of the current rules in relation to copyright term in Australia, see, eg, Hudson and Kenyon, above n 7, 29–32.
\end{itemize}
author plus fifty years; this rule is now life of the author plus seventy years. Thus, for those copyright materials for which the copyright term has been extended, no new materials will enter the public domain for the next twenty years.

A further result of the Free Trade Agreement was the introduction of additional rights for certain performers in live performances, including performers being designated a ‘maker’ of a sound recording of a live performance (and hence owner of copyright in the recording). The implementing legislation also provided for moral rights for performers, however these provisions are not yet in force.

Finally, article 17.4.7 of the Free Trade Agreement set out certain standards in relation to liability for circumvention of ‘effective technological measures’. Australia already has provisions relating to circumvention of technological protection measures, however these provisions will need to be amended under the Free Trade Agreement. These amendments must be made by 1 January 2007. The House Standing Committee on Legal and Constitutional Affairs recently announced that it will hold an inquiry into technological protection measures (TPM) exceptions. The High Court recently considered whether ‘mod chips’ constitute circumvention devices for the purposes of the Copyright Act under provisions preceding the Free Trade Agreement changes. In Stevens v Kabushiki Kaisha Sony Computer Entertainment, the respondents sold computer games for use on Sony PlayStation consoles. Each game included an access code which, when read by the console, would permit the game to be played. Stevens created a mod chip which permitted copies of games that did not have the access code to be played. The respondents alleged that the mod chip was a circumvention device which was capable of circumventing a technological protection measure. The High Court disagreed, holding that a technological protection measure must prevent infringement, and that Sony’s access code, which prevented access after infringement had taken place,
was not such a measure. The Australian Digital Alliance and the Australian Libraries Copyright Committee were given leave to appear as amici curiae before the High Court, and argued that the definition of technological protection measure advanced by Sony would effectively allow rights holders to ‘opt out’ of the fair dealing provisions of the Copyright Act. The High Court did not comment directly on these submissions, although some of its policy reasons supporting the decision may be consistent with them.

(2) Issues paper in relation to fair use and other copyright exceptions in the digital age. In May 2005, the Attorney-General’s Department released an Issues Paper examining the structure of exceptions in the Copyright Act. While much of the Issues Paper dealt with the issue of private copying, it also raised broader issues in relation to the addition of a free-floating fair use exception, and led to numerous submissions examining reform of other exception in the Act. In particular, a number of submissions made in response to the Issues Paper considered the position of cultural institutions, and discussed possible amendments to the libraries and archives provisions.50 The government has not yet released its response to the submissions received. However, the release of the Issues Paper raises the possibility of future reform to Australian law.

B. **Other Substantive Legal Areas**

1. Could you briefly summarize the bodies of law (other than copyright and related rights) that may be relevant to decisions by publishers or libraries/archives to remove materials from archival collections or databases (e.g., libel/defamation, privacy, censorship/national security)?

For each of the areas identified above:

2. Are there judicial decisions in your country addressing publishers’ or archives’ liability with respect to allegedly offending material contained in the archives’ collections?

   (a) What, if any, distinctions do courts in your country articulate between the roles of publishers and of archives?

   (b) According to these decisions or other laws of your country, does the publisher’s liability depend on the extent to which the publisher exercises control over the contents and maintenance of the archives? Does the publisher’s liability depend on any other factors?

   (c) According to these decisions or other laws of your country, does the archives’ liability depend on the extent to which it controls the acquisition and maintenance of the offending material? Does liability depend on the extent to which the archives makes the material accessible to the public? Does the archives’ liability depend on any other factors?

   (d) Have courts in your country imposed remedies against publishers who did not remove material containing allegedly offending material from archives over which they maintained control? If so, what types of remedies were imposed and under what circumstances?
(e) Have courts in your country imposed remedies against archives that retain or make available this material? If so, what types of remedies were imposed and under what circumstances?

In short, we are interested in knowing what bodies of law would motivate removal of documents from archival collections or databases and whether a library or archives could make available the offending material – assuming it has or could obtain a copy – when the publisher may not (or at least, the publisher prefers not to take the legal risk).

(1) Defamation.\textsuperscript{51} In Australia, defamation law varies from state to state. This has been caused by the passage of state legislation that modifies the common law to varying degrees. Thus some states have made relatively minor statutory variations to the common law,\textsuperscript{52} while in others defamation law has been completely codified by statute.\textsuperscript{53} This mosaic of laws means that there is variation in, for example, the meaning of the term ‘defamatory’ and the available defences. In addition, Australia does not apply any US-style ‘single publication’ rule, so the defamation law of multiple states can be relevant if widespread publication is the subject of legal action.

Proposals for uniform defamation law currently exist in Australia, with equivalent Bills before the parliaments of New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia. Given the failure of longstanding efforts to achieve uniformity, it is unclear whether these developments, although promising, will succeed to


\textsuperscript{52} These are: South Australia (Wrongs Act 1936 (SA)) and Victoria (Wrongs Act 1958 (Vic)).

\textsuperscript{53} The ‘code states’ are: Queensland (Defamation Act 1889 (Qld)) and Tasmania (Defamation Act 1957 (Tas)).
pass as planned in 2005. In any event, they will not make substantial changes to the general approach to defamation in Australia; the burden of proof and the available defences will remain markedly different to the US.

To succeed in a defamation action, the plaintiff must demonstrate that defamatory material about the plaintiff has been published (that is, communicated to a third party). The meanings conveyed by the publication, about which the plaintiff complains, are called the imputations. There are a number of tests at common law for determining whether an imputation is defamatory: the ‘hatred, ridicule or contempt’ test, the ‘shun or avoid’ test, and the ‘lowering the estimation’ test. Satisfying any of the tests is sufficient, while the latter test is the most commonly referred to in modern case law. It generally is accepted as requiring that the imputation be disparaging of the plaintiff, in the sense of asserting some moral culpability or blameworthiness for the act or condition asserted.

The defences available in a defamation action include: justification (truth); fair comment; absolute privilege; qualified privilege; innocent dissemination; unintentional defamation; triviality and apology.

54 See, also, Defamation Act 1889 (Qld) s 4(1); Defamation Act 1957 (Tas) s 5(1). The two provisions are similar. The latter provides that ‘an imputation concerning a person or a member of his family, whether that member of his family is living or dead, by which (a) the reputation of that person is likely to be injured; (b) that person is likely to be injured in his profession or trade; or (c) other persons are likely to be induced to shun, avoid, ridicule, or despise that person, is defamatory, and the matter of the imputation is defamatory matter.’

55 See, eg, Parmiter v Coupland (1840) 6 M&W 105; 151 ER 340.

56 See, eg, Dunlop Rubber Co Ltd v Dunlop [1921] 1 AC 367; Youssoupoff v Metro-Goldwyn-Mayer Pictures, Limited (1934) 50 TLR 581.

57 See, eg, Sim v Stretch (1936) 52 TLR 669; Gardiner v John Fairfax and Sons Pty Ltd (1942) 42 SR (NSW) 161; Consolidated Trust Co Ltd v Brown (1948) 49 SR (NSW) 86.

58 Walker, above n 51, 132.

59 Ibid 156.
For the purpose of this report, we will focus on two aspects of defamation law that pose particular issues for publishers and archives: the meaning of the term ‘publication’, and the scope of the ‘innocent dissemination’ defence.

(a) Publication. Liability attaches to the publication of defamatory material, and a defendant may be liable even though he or she is not its original source (such as a media organisation reporting defamatory statements made by a member of the public).

At both common law and under legislation enacted in the code states, the term ‘publication’ is defined to include a wide range of written, aural and visual forms of communication, and can extend to the display of defamatory material. Given the expansive definition of ‘publication’, an archive may be said to have ‘published’ defamatory material if it includes such material in its publicly-accessible collection. However, the definition of ‘publication’ is subject to the defence of ‘innocent distribution’, considered next.

(b) Innocent dissemination. The defence of innocent dissemination applies when a distributor did not know that a publication contained defamatory material (or was likely to contain defamatory material), and this lack of knowledge was not due to negligence. The onus of proof is on the defendant to establish the defence. The

---

60 In the Code states, this is described as ‘unlawful publication’: Defamation Act 1889 (Qld) s 7; Defamation Act 1957 (Tas) s 9(1).

61 See, eg, “Truth” (NZ) Ltd v Philip North Holloway [1960] 1 WLR 997 (Privy Council, on appeal from the Court of Appeal of New Zealand).

62 Defamation Act 1889 (Qld) s 5(2); Defamation Act 1957 (Tas) ss 7(a), (b).

63 Discussed in Walker, above n 51, 270–85.

64 This rule is derived from Emmens v Pottle (1885) 16 QBD 354.
code states have an equivalent defence for ‘innocent sellers’ of books and periodicals.  

It has been noted that ‘while it is clear that a newsagent, bookseller or librarian who is not the author or original publisher may take advantage of this defence as a “distributor”, the position of printers, broadcasters, service providers and bulletin board operators is less certain.’ This situation has arisen due to advances in technology that allow material to be ‘published’ without the level of control and scrutiny that was inevitable with earlier technologies. The most significant contemporary decision on the defence in Australia suggests that it will be hard for many intermediaries to meet the requirements of the defence.

In *Thompson v Australian Capital Television Pty Ltd*, the High Court of Australia considered the position of a television broadcaster (‘Channel 7’) that retransmitted a live-to-air current affairs show produced by another broadcaster. The court held that Channel 7 could not rely on the defence of innocent dissemination. It was treated as an original publisher. Channel 7 had clearly authorised the broadcast to be made, even if it did not produce the underlying program. (Indeed, on a number of occasions, the court observed that Channel 7 could have vetted the program for defamatory content and broadcast it on a time delay.)

This is a markedly different result to a US decision such as *Anvil v ‘60 Minutes’*, in which retransmitting television stations received a program three hours before broadcasting it, with a written summary about the program’s contents and a

---

65 *Defamation Act 1889* (Qld) ss 25, 26; *Defamation Act 1957* (Tas) s 26. It is doubtful that the code provisions apply equally well to non-print publications.

66 Walker, above n 51, 270.


contractual right to edit the program.69 In all these respects, the stations had greater ability to control the transmission than Channel 7. Under US law, however, the stations were mere conduits.70 In Australia, Channel 7 could not avoid liability by broadcasting the material without reviewing it and without using a time delay. The possibility of such actions was significant, not the degree to which control actually was exercised by Channel 7. The decision has been criticised by commentators, but it remains the leading Australian decision on the matter.

All this has led commentators to suggest that internet intermediaries who host content, such as internet service providers or internet content hosts, are unlikely to be able to make use of the defence of innocent dissemination due to a technical, even if impractical, ability to supervise the material.71

However, a separate statutory protection appears to exist for internet content hosts and internet service providers under the Broadcasting Services Act 1992 (Cth). It is discussed below, as it applies to claims under state law generally, not just in relation to defamation claims.

(2) Privacy. In Australia, there is a complex web of legislation at the state72 and federal73 level in relation to privacy. The common law does not recognise a free-standing tort of invasion of privacy,74 as exists, for instance, in the United States75 and New Zealand.76

70 See Collins, above n 51, 185–87.
71 Eg Collins, above n 51, 194–96.
73 Privacy Act 1988 (Cth).
74 See, eg, Victoria Park Racing and Recreation Grounds Co Ltd v Taylor (1937) 58 CLR 479; Australian Consolidated Press Ltd v Ettingshausen (unreported, 13 October 1993) 14 (Kirby P).
That said, the High Court of Australia has not foreclosed this development,\textsuperscript{77} and there is also the possibility that Australia could follow the United Kingdom approach of expanding the breach of confidence doctrine so that it applies to personal information.\textsuperscript{78}

If an archives or publisher falls within the operation of privacy legislation, then it will have certain responsibilities in relation to ‘personal information’ in its possession. These responsibilities are set out in a series of ‘privacy principles’ in the relevant legislation. However, there are exemptions for some records held by cultural institutions, as will be discussed below.

The relevant federal legislation is the \textit{Privacy Act 1988} (Cth):

\begin{enumerate}
\item \textbf{Types of bodies covered by federal privacy legislation.} The \textit{Privacy Act} applies to ‘organisations’ (private sector) and Commonwealth-regulated ‘agencies’ (Commonwealth public sector). A public archives created under a Commonwealth statute may constitute an ‘agency’ for the purposes of the law, while a private archives may constitute an ‘organisation’.\textsuperscript{79} The categorisation of a body as ‘agency’ or ‘organisation’ is relevant to the question of which privacy principles apply. If the body is an agency, it must follow the Information Privacy Principles (IPPs) in section 14 of the \textit{Privacy Act}.\textsuperscript{80} In contrast, organisations


\textsuperscript{74} Hosking and Hosking \textit{v} Runting (2004) 7 HRNZ 301 (Court of Appeal of New Zealand).

\textsuperscript{75} Australian Broadcasting Corporation \textit{v} Lenah Game Meats (2001) 208 CLR 199, [107], [132].

\textsuperscript{76} For examples of this expanded cause of action, see, eg, \textit{A v B Plc \& Anor} [2003] QB 195; \textit{Douglas v Hello!} [2005] HLR 27; \textit{Campbell v MGN Ltd} [2004] 2 AC 457.

\textsuperscript{77} The term ‘organisation’ is defined to mean: (a) an individual; (b) a body corporate; (c) a partnership; (d) any other unincorporated association; or (e) a trust; that is not a small business operator, a registered political party, an agency, a State or Territory authority or a prescribed instrumentality of a State or Territory.

\textsuperscript{78} These are reproduced in the APPENDIX to this report.
must refer to the National Privacy Principles (NPPs) in Schedule 3 of the *Privacy Act*. The content of these principles is similar.

(b) *Regulation of ‘personal information’*: The *Privacy Act* regulates the collection, storage and accessibility of ‘personal information’, defined to mean ‘information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.’

Many of the privacy principles only relate to personal information that is contained in a ‘record’. That term is defined to mean a document, a database (however kept) or a photograph or other pictorial representation of a person. However, certain items are specifically excluded from the meaning of a ‘record’. Relevantly to archives and publishers, this includes:

- a generally available publication;
- anything kept in a library, art gallery or museum for the purposes of reference, study or exhibition; and
- Commonwealth records as defined by the *Archives Act 1983* (Cth) s 3(1) that are in the open access period for the purposes of that Act.

We do not know of any decisions considering the meaning of the words ‘for the purposes of reference, study or exhibition’. These words would appear to distinguish between the publicly-available collections of the institution (which are

---

81 *Privacy Act 1988* (Cth) s 6(1).

82 Ibid.

83 Defined to mean ‘a magazine, book, newspaper or other publication (however published) that is or will be generally available to members of the public’: ibid.

84 That is, if the record is a ‘Commonwealth record’ as defined by the *Archives Act 1983* (Cth) s 3(1), and the record is in the ‘open access period’ (ie created more than 30 years ago), then the record will not be a ‘record’ for the purposes of the *Privacy Act 1988* (Cth).
exempt from the privacy principles) and other internal records of the institution (which are not). The position of closed collections, for which public access is extremely limited, is not clear (an example being collections of Indigenous materials that embody secret or sacred information). There is a possibility that such collections could, if access was sufficiently limited, constitute ‘records’ for the purposes of the Privacy Act. However, given that there is no further indication either in the Privacy Act or case law as to the scope of this exclusion, the argument is currently theoretical only.

Privacy legislation has also been enacted at the state level; for the purposes of this report, we will examine the legislation in Victoria, the Information Privacy Act 2001 (Vic):

(a) *Types of bodies covered by the Victorian privacy legislation.* The Information Privacy Act applies to state-regulated public sector organisations. A public archives created under a state statute may fall within this definition, as might an archives run by a local council. An organisation that falls within the Act must comply with the Information Privacy Principles in Schedule 1 of the Act.

(b) *Regulation of ‘personal information’.* The definition of ‘personal information’ in the Information Privacy Act is similar to that in the federal legislation: ‘information or an opinion (including information or an opinion forming part of a database), that is recorded in any form and whether true or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion, but does not include information of a kind to which the Health Records Act 2001 applies’. Again, there are exceptions for publicly-available information:

---

85 Information Privacy Act 2001 (Vic) s 9.
86 Ibid s 14.
87 Ibid s 3.
Nothing in this Act or in any IPP applies to a document containing personal information, or to the personal information contained in a document, that is –

(a) a generally available publication; or

(b) kept in a library, art gallery or museum for the purposes of reference, study or exhibition; or

(c) a public record under the control of the Keeper of Public Records that is available for public inspection in accordance with the Public Records Act 1973; or

(d) archives within the meaning of the Copyright Act 1968 of the Commonwealth.88

This provision differs from its federal counterpart by the addition of paragraph (d). The definition of ‘archives’ in the Copyright Act refers to archival material in specified institutions,89 as well as collections of archives, museums and galleries more generally.90 This would seem to have the effect of making paragraph (b) redundant to the extent that it refers to records kept in art galleries and museums. It would also avoid any questions in relation to the mean of the phrase ‘for the purposes of reference, study or exhibition’ (as discussed above in relation to the federal legislation), again, at least for galleries and museums. There appears to have been no case law interpretation of this provision.

We are not aware of any court cases in Australia addressing the liability of publishers or archives in relation to an alleged infringement of privacy. Many privacy complaints are

88 Ibid s 11(1).
89 These institutions are the Australian Archives, the Archives Office of New South Wales, the Public Record Office and the Archives Office: Copyright Act 1968 (Cth) s 10(1).
90 The collections of non-profit bodies that hold material of historical significance or public interest for the purpose of conserving or preserving those items also fall within the definition of ‘archives’: ibid s 10(4). The Copyright Act expressly notes that ‘museums and galleries are examples of bodies that could have collections covered [within] the definition of archives’.
not the subject of court proceedings, but are directed to Privacy Commissioners at the state or federal level.\textsuperscript{91} In many instances these complaints are resolved without any determination being made; for example, the federal Privacy Commissioner has only made seven binding determinations since 1989. In our research, we have not located any relevant decisions or case notes relating to the liability of archives or publishers.

\textbf{(3)} \textit{Archives legislation}. In Australia, large state and federal archives have been established to administer government records and other archival material.\textsuperscript{92} The legislation establishing each archive sets out the types of records the archive is required to collect, the management of those records, and their public accessibility. For the purposes of this report, we will focus on the \textit{Archives Act 1983} (Cth), which establishes the National Archives of Australia.\textsuperscript{93}

The functions of the National Archives include to identify, collate, manage and preserve Commonwealth records\textsuperscript{94} and other important Australian archival resources, and to makes these materials available for public access, subject to restrictions in the Act\textsuperscript{95}.

The general rule is that once a Commonwealth institution\textsuperscript{96} no longer needs ready access to a Commonwealth record, or a record has been in existence for 25 years, that record

\begin{itemize}
\item \textsuperscript{93} \textit{Archives Act 1983} (Cth) s 5(1). See<www.naa.gov.au/>.
\item \textsuperscript{94} The term ‘Commonwealth record’ includes a ‘record’ that is the property of the Commonwealth or a Commonwealth institution, as well as other records deemed by regulation to constitute Commonwealth records: ibid s 3(1). The term ‘record’ covers a broad range of written, visual and audio-visual material: s 3(1).
\item \textsuperscript{95} Ibid s 5(2).
\end{itemize}
should be transferred to the National Archives.\textsuperscript{97} The National Archives also has the power to require access to Commonwealth records in the custody of other institutions.\textsuperscript{98} Some records are exempt from these general rules. The \textit{Archives Act} also prohibits the unauthorised destruction or alteration of Commonwealth records.\textsuperscript{99}

The \textit{Archives Act} sets our rules regarding the public accessibility of Commonwealth records.\textsuperscript{100} Thus:

Subject to this Part, the Archives shall cause all Commonwealth records in the open access period\textsuperscript{101} that are in the custody of the Archives or of a Commonwealth institution, other than exempt records, to be made available for public access.\textsuperscript{102}

Records may be exempt because they contain sensitive or confidential information as described in the \textit{Archives Act}.\textsuperscript{103} There have been a number of cases in which individuals have applied for administrative review of decisions that certain records are exempt; these cases have related to records created by, or documenting, activities of Australian security organisations such as the Australian Security Intelligence Organisation.\textsuperscript{104}

\textsuperscript{96} The term ‘Commonwealth institution’ covers a broad range of institutions, including the Senate and House of Representatives, government departments, federal courts and authorities of the Commonwealth: ibid s 3(1).

\textsuperscript{97} Ibid s 27.

\textsuperscript{98} Ibid s 28.

\textsuperscript{99} Ibid ss 24, 26.

\textsuperscript{100} Ibid Part V, Division 3.

\textsuperscript{101} The ‘open access period’ is 30 years from the end of the year in which the record came into existence: ibid s 3(7).

\textsuperscript{102} Ibid s 31(1).

\textsuperscript{103} Ibid s 33.

We do not know of any cases in which the National Archives (or one of its state-level counterparts) has been sued because it made material available in a manner contrary to its establishing legislation.

(4) **Classification.** A scheme for classification of offensive print publications, films and computer games exists in Australia.\(^{105}\) There is some variation as to the extent that each state or territory takes part in the scheme, and to the standards of material that are available.\(^{106}\) However, for present purposes, it is sufficient to note that the details are not significant for archives. Apart from the Office of Film and Literature Classification’s general reluctance to become involved in classifying material held or exhibited in libraries, galleries, archives and other cultural institutions, there is a wide defence that can apply to material made available on the internet. This provision was aimed at potential liability in relation to classification, but it is important to note that it appears to apply to all types of common law and statutory liability under state and territory law. (Federal statutory liability is not affected by this provision.)

The relevant part of the *Broadcasting Services Act 1992* (Cth) provides:

(1) A law of a State or Territory, or a rule of common law or equity, has no effect to the extent to which it:

(a) subjects, or would have the effect (whether direct or indirect) of subjecting, an Internet content host to liability (whether criminal or civil) in respect of hosting particular Internet content in a case where the host was not aware of the nature of the Internet content; or

---

\(^{105}\) See eg *Classification (Publications, Films and Computer Games) Act 1995* (Cth) and *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic). The federal Office of Film and Literature Classification makes determinations (although media broadcasters operate under a co-regulatory model), which are enforced via largely equivalent legislation from each state and territory.

\(^{106}\) For a brief overview, see eg, Butler and Rodrick, above n 51, 397–401.
(b) requires, or would have the effect (whether direct or indirect) of requiring, an Internet content host to monitor, make inquiries about, or keep records of, Internet content hosted by the host...107

Equivalent protections exist for internet service providers. The scope of the provision is affected by the definition of ‘internet content host’ as a person who hosts or plans to host content in Australia, and by the definition of ‘internet content’ which means information that:

(a) is kept on a data storage device; and
(b) is accessed, or available for access, using an Internet carriage service;
but does not include:
(c) ordinary electronic mail; or
(d) information that is transmitted in the form of a broadcasting service.108

This suggests that archives who host material in Australia will have a broad defence in relation to any statutory or common law action that arises under state law, where the archives does not know of the quality of particular content. (In addition, archives should not be required to monitor or keep records about content.) It is important to note that actual knowledge appears to be required to lose protection, rather than knowledge that would be reasonable in the particular circumstances. The provisions, however, are untested in court. In any event, the provisions apply only to material hosted within Australia, not to material that is accessible within Australia from an internet site hosted outside Australia.

3. Have litigants in your country agreed to settlements that would affect the contents, maintenance, or public accessibility of material contained in archives? If so, what types of settlements have been reached and under what circumstances?

108 Ibid Schedule 5, cl 3.
We are not aware of any empirical research dealing with this question. However, it is likely that complaints have been made analogous to those reported by interviewees in the Copyright and Cultural Institutions Project in relation to allegations of defamation.

4. Have publishers, aggregators or archives in your country sought to avoid potential liability by removing allegedly offending material, without waiting to be notified (or sued) by persons claiming to be injured by the material? If so, under what circumstances?

A few interviewees in the Copyright and Cultural Institutions Project mentioned that they vetted material for possible defamatory or offensive content before including that material on publicly-accessible websites. However, given that our research focussed on copyright management, these comments were not pursued in any detail.

Other research at the Centre for Media and Communications Law suggests media companies refrain from publishing some material online which is published in print or broadcast.109 Examples include material that may be defamatory of individuals thought to be litigious, particularly some foreign political figures. More commonly, material is not published online due to concerns with possible liability for contempt of court. (Under Australian law, far stricter limits exist on media reporting related to pending legal proceedings than in the US.110) It appears likely that some such media material would be removed after publication, to correct mistakes or following complaints from potential litigants. However, we are not aware of any empirical research dealing directly with this question.

5. What is the potential liability in your country for publication of allegedly offending material?


110 For an overview of Australian law on contempt see Walker, above n 51.
Depending on the cause of action, the remedies available to a successful plaintiff include damages (including exemplary or punitive damages), an account of profits, an injunction, an order for delivery up and/or destruction of infringing copies, and orders for public apology or retraction.111

(a) Is there any statutory or case law authority in your country for reducing damages in the case of non-profit libraries or archives acting in good faith?

The Copyright Act provides some authority for limiting damages where a defendant has acted in good faith. Section 115(3) provides:

Where, in an action for infringement of copyright, it is established that an infringement was committed but it is also established that, at the time of the infringement, the defendant was not aware, and had no reasonable grounds for suspecting, that the act constituting the infringement was an infringement of the copyright, the plaintiff is not entitled under this section to any damages against the defendant in respect of the infringement, but is entitled to an account of profits in respect of the infringement whether any other relief is granted under this section or not.

(b) What factors do courts in your country use in assessing damages?

Some general guidelines have been developed by the courts in assessing damages. Thus, the size of damages may be calculated by reference to:

- any fee that a copyright owner may have fairly charged for the use of the copyright material;

- the loss of commercial opportunity or profit (eg, loss of sales) that may have resulted from the defendant’s actions, provided the lost opportunity is not purely speculative and has been caused by the defendant’s infringing conduct;

111 See, eg Copyright Act 1968 (Cth) ss 115, 116.
• the diminution in value of the plaintiff’s copyright by the defendant making an inferior reproduction, or the loss of exclusivity of the plaintiff’s work; or
• the loss of reputation or the loss of the opportunity to enhance one’s reputation.

It should be stressed that these are merely guidelines, and the precise calculation of damages is assessed according to the circumstances of each case. In the end, the assessment of damages calculates an appropriate amount taking into consideration all the relevant evidence.

It is also important to note that damages in relation to defamation are presumed and ‘at large’ – that is, once plaintiffs have established that material defamatory of them was published, they are presumed to have suffered loss and need not establish, for example, any particular financial loss. The situation is unlike that for most civil actions and means that comparatively large and unpredictable sums can be awarded. Australian courts have made some efforts to address these concerns and, in some jurisdictions, judges determine the quantum of any defamation damages.112

In any comparative consideration of potential damages, it is important to consider also how litigation is funded. That is, how are lawyers paid and any court costs met? The usual practice in Australia is that the winning party in a civil dispute is awarded a large percentage of their lawyers’ fees, which must be paid by the losing side. Thus, the potential losses for any breach of copyright, defamatory publication or so on are not just the damages that may be awarded, but the need to pay one’s own lawyers as well as the vast majority of the costs of the other side’s lawyers. This is a very different model of litigation than the US system, and it can be expected to be a significant influence on how risk is evaluated by publishers and archives.113

6. Are there any industry standards or accepted practices in your country, other than withdrawal of an article, for addressing offending material contained in an archives

---


113 The Australian (and similar English) model for legal costs was found to be a notable factor in comparing US, Australian and English defamation law and media conduct: Weaver et al, above n 109.
or database? For example, are there any practices concerning legends or disclaimers to accompany offending material in order to continue to make it available?

Interviewees from the Copyright and Cultural Institutions Project reported the use of copyright ‘disclaimers’ on publications and websites. These statements typically state that while all reasonable efforts have been made to locate the owners of copyright in material used, any person who believes that their rights have been infringed is invited to contact the institution. While such disclaimers may be relevant to any discretionary award of damages, they have no direct legal effect. As noted in the answer to part A, question 2, in some cases this may result in payment of a retrospective licence fee, while in others institutions may remove material from the internet.

C. **Contract Analysis**

1. **Do contract provisions between archives and publishers in your country commonly address the issue of removing a work from the collection? If so, how do they do so? Do they address labeling, hyperlinking or any other means of dealing with the offending material other than removing it?**

We discussed licences for large, commercial databases with a number of interviewees on the Copyright and Cultural Institutions Project, and also reviewed some licences in order to get an impression of their structure and common terms. Our sample size was small and extrapolations should only be made with care.

We are unable to say whether contracts ‘commonly’ address removal of work from a collection, or other means of dealing with offending material. In the licences we reviewed, the question of removal of infringing material was not directly addressed. That said, those contracts expressly or implicitly permitted changes to the licensed product by the commercial publisher, which would appear to extend to removing works from the product.
In Australia, a consortium of state, territory and national libraries has formed ‘for the purpose of acquiring access to commercial electronic information resources’ (the ‘CASL Consortium’).\textsuperscript{114} The aim of the Consortium ‘is to simplify licensing arrangements, improve cost benefits for member libraries, and to explore opportunities for making electronic product more widely available to Australians, regardless of where they live.’

The CASL Consortium has produced a document titled ‘Statement of Principles Guiding Licence Negotiation’.\textsuperscript{115} Principle 9.6 recommends that:

A Licence should require the Vendor to defend, indemnify, and hold the Members harmless from any action based on a claim that use of the Product in accordance with the Licence infringes any patent, copyright, trade mark or trade secret of any third party. The Licence should include a procedure for dealing with infringements.

And principle 9.7 recommends that:

The Licence should include a warranty that the Vendor has the right to grant the Licence and that the Members’ use of the resources contained in the Product will not infringe the Intellectual Property rights of any person.

The guidelines do not refer expressly to removing infringing material.

2. To what extent might a publisher avoid liability related to the offending material through its contractual arrangements with a library or archives in your country? Do publishers’ contracts commonly contain provisions aimed at limiting or avoiding liability for offending material?


\textsuperscript{115} Available at <http://www.caslconsortium.org/licenceprinciples.html>. 
In the contracts that we reviewed, it was standard for the product owner to state that it did not warrant that use of the licensed products would be uninterrupted or error-free, and did not warrant the accuracy or completeness of the products. One licence stated that the product owner ‘disclaimed’ liability ‘for any offensive, defamatory, or infringing materials’ in the licensed products, while another stated that offensive, pornographic or violent material ‘may be accessible’, and that the product owner ‘makes no representations or warranties as to the suitability of the information accessible’ in the product.

Disclaimers that are drafted in excessively broad terms might be void under the *Trade Practices Act 1974* (Cth). That statute deals with consumer protection (among other things) and prohibits corporations from engaging in conduct that is misleading or deceptive, making false or misleading representations, and so on. The *Trade Practices Act* provides that whenever a corporation supplies goods or services, certain undertakings are impliedly made in relation to those goods or services, including that they are of merchantable quality and fit for their purpose. A term of a contract that purports to exclude or restrict such an implied warranty is void. This rule can even apply where the governing law of the contract is overseas. For example, a clause that purports to exclude all warranties for merchantability and fitness of a commercial database may be void in Australian law. In contrast, the *Trade Practices Act*...

---

117 Ibid s 53.
118 Ibid ss 71, 74.
119 Ibid s 68(1).
120 Ibid s 67. That section provides that ‘where: (a) the proper law of a contract for the supply by a corporation of goods or services to a consumer would, but for a term that it should be the law of some other country or a term to the like effect, be the law of any part of Australia; or (b) a contract for the supply by a corporation of goods or services to a consumer contains a term that purports to substitute, or has the effect of substituting, provisions of the law of some other country or of a State or Territory for all or any of the provisions of this Division; this Division applies to the contract notwithstanding that term’.
121 Such a clause may also be contrary to section 53(g) of the *Trade Practices Act*, which provides that a corporation must not, in trade or commerce, in connection with the supply or possible supply of goods or services, ‘make a false or misleading representation concerning the existence, exclusion or effect of any
would not appear to prohibit a statement that (say) the database provider does not warrant that access will be uninterrupted, so long as an uninterrupted service is nevertheless of merchantable quality and fit for its purpose.

A related question relates to the ability of a publisher to ‘contract out’ of the Copyright Act by including provisions that purport to limit reproduction and communication of database contents under unremunerated exceptions in the Copyright Act. One example that we encountered was a licence between a US publisher and an Australian institution in which the publisher wanted adherence to the CONTU Guidelines, which allow a lower number of reproductions to be made for inter-library loan than permitted under the inter-library loan exceptions of the Australian Copyright Act.122 It seems that this was not a lone example. In an inquiry undertaken by the Copyright Law Review Committee in 2002, it was observed that electronic trade in copyright materials is subject to agreements that purport to exclude or modify exceptions in the Copyright Act.123

Whether such provisions are enforceable is ‘unsettled’ in Australian law as ‘there is no consistent basis upon which legal challenges can be mounted.’124 That is, submissions received by the CLRC generally accepted that agreements that exclude or modify copyright exceptions are, prima facie, enforceable in contract law.125 As such, any grounds for challenging those agreements would need to be found elsewhere. On the question of whether equitable approaches to unconscionability could provide a remedy, the CLRC concluded the doctrine was ‘unlikely to apply to most contracts the subject of this reference.’126 Similarly, consumer protection legislation was found to be of limited assistance, as agreements which exclude or modify

---

122 Copyright Act 1968 (Cth) s 50.
124 Ibid [5.130].
125 Ibid [5.17]. The CLRC also discussed whether terms in ‘clickwrap’ or ‘browsewrap’ agreements are incorporated into a contract: [5.05]–[5.16].
126 Ibid [5.32].
exceptions are not inherently misleading or deceptive.\textsuperscript{127} Furthermore, even if legal challenge was theoretically possible, there may be practical impediments to such action being taken.\textsuperscript{128}

The CLRC recommended that the \textit{Copyright Act} be amended to provide that an agreement (or provision of an agreement) that purports to exclude or modify certain exceptions (such as the fair dealing exceptions, and libraries and archives provisions) has no effect.\textsuperscript{129} However, in the absence of such an amendment being introduced, it may be that many contractual limitations on the operation of copyright exceptions are, under current law, enforceable.

3. Have courts in your country enforced contractual obligations to remove or withdraw archived material? If so, under what circumstances?

We are not aware of any judicial decisions dealing with this question.

4. To what extent do contracts in your country between publishers, databases, and libraries allow libraries to create their own archival or preservation copies of material to which libraries have access through databases? If contracts allow libraries or archives to make such copies, are there limitations as to when libraries or archives may create those preservation/archival copies? (E.g., may a library allow its users to use those copies or are they strictly for “back-up” purposes in the event the publisher no longer provides access)?

The question of preservation copying and post-licence access is significant for cultural institutions, as indicated by the following statement in the CASL Consortium’s Statement of Principles Guiding Licence Negotiation:

\textsuperscript{127} Ibid [5.58]. That is, a licence that gives the misleading impression that it summarise the effect of the \textit{Copyright Act} might contravene sections 52 or 53 of the \textit{Trade Practices Act}. However, it is possible to draft an agreement that does not have such an effect, while still overriding copyright exceptions.

\textsuperscript{128} Ibid [7.11] (‘the Committee is not convinced that existing remedies provide an effective or realistic solution for users in cases where contracts purport to exclude or modify the copyright exceptions’).

\textsuperscript{129} Ibid [7.49].
4. Archiving/Preservation. 4.1 The Consortium requires perpetual access to electronic information to which it has subscribed. A Licence should specify who has permanent archival responsibility for the Product and under what conditions the Consortium may access or refer Users to the archival copy.

We are not able to say how commonly clauses in relation to archiving or preservation are included in database contracts, or the effect of those clauses. The contracts we examined on the Copyright and Cultural Institutions Project were silent on this issue, which would suggest preservation copying or archiving was not permitted. (And while the Copyright Act permits libraries and archives to engage in some acts of administrative and preservation copying, those provisions only apply to materials that are in the collection of the institution.)
APPENDIX: INFORMATION PRIVACY PRINCIPLES

Privacy Act 1988 (Cth) section 14

Principle 1
1. Personal information shall not be collected by a collector for inclusion in a record or in a generally available publication unless:
   (a) the information is collected for a purpose that is a lawful purpose directly related to a function or activity of the collector; and

   (b) the collection of the information is necessary for or directly related to that purpose.

2. Personal information shall not be collected by a collector by unlawful or unfair means.

Principle 2
Where:
(a) a collector collects personal information for inclusion in a record or in a generally available publication; and
(b) the information is solicited by the collector from the individual concerned;
the collector shall take such steps (if any) as are, in the circumstances, reasonable to ensure that, before the information is collected or, if that is not practicable, as soon as practicable after the information is collected, the individual concerned is generally aware of:
(c) the purpose for which the information is being collected;
(d) if the collection of the information is authorised or required by or under law—the fact that the collection of the information is so authorised or required; and
(e) any person to whom, or any body or agency to which, it is the collector's usual practice to disclose personal information of the kind so collected, and (if known by the collector) any person to whom, or any body or agency to which, it is the usual practice of that first-mentioned person, body or agency to pass on that information.

Principle 3
Where:
(a) a collector collects personal information for inclusion in a record or in a generally available publication; and
(b) the information is solicited by the collector;
the collector shall take such steps (if any) as are, in the circumstances, reasonable to ensure that, having
regard to the purpose for which the information is collected:
(c) the information collected is relevant to that purpose and is up to date and complete; and
(d) the collection of the information does not intrude to an unreasonable extent upon the personal affairs
of the individual concerned.

Principle 4
A record-keeper who has possession or control of a record that contains personal information shall ensure:
(a) that the record is protected, by such security safeguards as it is reasonable in the circumstances to
take, against loss, against unauthorised access, use, modification or disclosure, and against other
misuse; and
(b) that if it is necessary for the record to be given to a person in connection with the provision of a
service to the record-keeper, everything reasonably within the power of the record-keeper is done to
prevent unauthorised use or disclosure of information contained in the record.

Principle 5
1. A record-keeper who has possession or control of records that contain personal information
shall, subject to clause 2 of this Principle, take such steps as are, in the circumstances,
reasonable to enable any person to ascertain:

(a) whether the record-keeper has possession or control of any records that contain personal
information; and
(b) if the record-keeper has possession or control of a record that contains such information:
   (i) the nature of that information;
   (ii) the main purposes for which that information is used; and
   (iii) the steps that the person should take if the person wishes to obtain access to the record.

2. A record-keeper is not required under clause 1 of this Principle to give a person information if the
record-keeper is required or authorised to refuse to give that information to the person under the
applicable provisions of any law of the Commonwealth that provides for access by persons to
documents.
3. A record-keeper shall maintain a record setting out:
   (a) the nature of the records of personal information kept by or on behalf of the record-keeper;
   (b) the purpose for which each type of record is kept;
   (c) the classes of individuals about whom records are kept;
   (d) the period for which each type of record is kept;
   (e) the persons who are entitled to have access to personal information contained in the records and
       the conditions under which they are entitled to have that access; and
   (f) the steps that should be taken by persons wishing to obtain access to that information.

4. A record-keeper shall:
   (a) make the record maintained under clause 3 of this Principle available for inspection by members
       of the public; and
   (b) give the Commissioner, in the month of June in each year, a copy of the record so maintained.

**Principle 6**
Where a record-keeper has possession or control of a record that contains personal information, the
individual concerned shall be entitled to have access to that record, except to the extent that the record-
keeper is required or authorised to refuse to provide the individual with access to that record under the
applicable provisions of any law of the Commonwealth that provides for access by persons to documents.

**Principle 7**
1. A record-keeper who has possession or control of a record that contains personal information shall take such steps (if any), by way of making appropriate corrections, deletions and additions as are, in the circumstances, reasonable to ensure that the record:
   (a) is accurate; and
   (b) is, having regard to the purpose for which the information was collected or is to be used and to any purpose that is directly related to that purpose, relevant, up to date, complete and not misleading.

2. The obligation imposed on a record-keeper by clause 1 is subject to any applicable limitation in a law of the Commonwealth that provides a right to require the correction or amendment of documents.

3. Where:
(a) the record-keeper of a record containing personal information is not willing to amend that record, by making a correction, deletion or addition, in accordance with a request by the individual concerned; and
(b) no decision or recommendation to the effect that the record should be amended wholly or partly in accordance with that request has been made under the applicable provisions of a law of the Commonwealth;

the record-keeper shall, if so requested by the individual concerned, take such steps (if any) as are reasonable in the circumstances to attach to the record any statement provided by that individual of the correction, deletion or addition sought.

**Principle 8**

A record-keeper who has possession or control of a record that contains personal information shall not use that information without taking such steps (if any) as are, in the circumstances, reasonable to ensure that, having regard to the purpose for which the information is proposed to be used, the information is accurate, up to date and complete.

**Principle 9**

A record-keeper who has possession or control of a record that contains personal information shall not use the information except for a purpose to which the information is relevant.

**Principle 10**

1. A record-keeper who has possession or control of a record that contains personal information that was obtained for a particular purpose shall not use the information for any other purpose unless:
   (a) the individual concerned has consented to use of the information for that other purpose;
   (b) the record-keeper believes on reasonable grounds that use of the information for that other purpose is necessary to prevent or lessen a serious and imminent threat to the life or health of the individual concerned or another person;
   (c) use of the information for that other purpose is required or authorised by or under law;
   (d) use of the information for that other purpose is reasonably necessary for enforcement of the criminal law or of a law imposing a pecuniary penalty, or for the protection of the public revenue; or
   (e) the purpose for which the information is used is directly related to the purpose for which the information was obtained.
2. Where personal information is used for enforcement of the criminal law or of a law imposing a pecuniary penalty, or for the protection of the public revenue, the record-keeper shall include in the record containing that information a note of that use.

**Principle 11**

1. A record-keeper who has possession or control of a record that contains personal information shall not disclose the information to a person, body or agency (other than the individual concerned) unless:
   
   (a) the individual concerned is reasonably likely to have been aware, or made aware under Principle 2, that information of that kind is usually passed to that person, body or agency;
   
   (b) the individual concerned has consented to the disclosure;
   
   (c) the record-keeper believes on reasonable grounds that the disclosure is necessary to prevent or lessen a serious and imminent threat to the life or health of the individual concerned or of another person;
   
   (d) the disclosure is required or authorised by or under law; or
   
   (e) the disclosure is reasonably necessary for the enforcement of the criminal law or of a law imposing a pecuniary penalty, or for the protection of the public revenue.

2. Where personal information is disclosed for the purposes of enforcement of the criminal law or of a law imposing a pecuniary penalty, or for the purpose of the protection of the public revenue, the record-keeper shall include in the record containing that information a note of the disclosure.

3. A person, body or agency to whom personal information is disclosed under clause 1 of this Principle shall not use or disclose the information for a purpose other than the purpose for which the information was given to the person, body or agency.
A. Copyright Analysis

Re question 2, concerning settlement of copyright infringement claims
We understand your question to be: in a dispute between a copyright owner and a publisher /
database provider, could an injunction or order be obtained requiring a library or archive (not a
party to the proceeding) to remove the infringing materials.

Our understanding is that in order for any such order to be made, the library or archives would
need to be joined as a party to the proceeding. That is, while orders can be made for an
injunction (under s 115(2) of the Act) and/or for delivery up or destruction of infringing copies
(under s 116), these only apply to parties to the proceeding, and not third parties in possession of
infringing material.

As noted in your question, it is correct to assume that, if the licensor has retained the right to
withdraw content, it may be able to simply delete infringing material from its database without
the consent or participation of the library or archives. Obviously, this will depend on the precise
wording of the licence terms.

Re question 5, concerning an update on your copyright analysis
The government has not yet released any formal response to submissions received in connection
with its Copyright Exceptions Issues Paper.

For what it’s worth, a number of submissions (including the one written by Kimberlee
Weatherall and Emily Hudson, for IPRIA and the CMCL) discussed the problems caused by
‘orphan works’ in Australia. We understand that the Attorney-General’s department will be holding an inquiry into this at some stage in 2006.

B. Other substantive legal areas

Defamation
It is worth noting that proposals for uniform defamation law in Australia, which were mentioned in our Phase II comments, have been passed by all Australian state and territory parliaments. The reforming Acts can be referred to as the uniform Defamation Acts 2005. They apply to publications made on or after 1 January 2006, with a few minor exceptions. As yet, there is no case law interpretation of any of the new provisions in the Defamation Acts.

Most of the reforms made by the uniform Defamation Acts 2005 do not need to be examined in terms of the issues raised in Phase II. However, there is a new statutory defence of innocent dissemination, which is discussed below.

Defences under the Defamation Acts 2005 apply in addition to common law defences. This means the common law defence of innocent dissemination and the defence under the Broadcasting Services Act 1992 (Cth) are expected to continue to be available in addition to the new statutory defence for innocent dissemination under the Defamation Acts 2005.

In relation to the statutory and common law defences of innocent dissemination, once a library or archives learns of a complaint that alleges a person has been defamed by archive content, it could not continue to rely on the defence. That is, knowledge destroys the defence.

Under the common law defence, there is an added problem that it is difficult for any internet intermediaries to rely on the defence, which we discussed in our Phase II comments. (The statutory defence of innocent dissemination under the Defamation Acts 2005 has attempted to address some of those difficulties, in particular in relation to live broadcasts by television and similar media. However, these changes do not appear relevant to libraries and archives.)
No legend or disclosure that the library or archives attached to the content would provide a clear defence to a future defamation action. A library or archives could argue that such a legend or disclosure changed the meaning conveyed by publication in question. That is, a defamatory allegation in the original publication could *arguably* have been countered by the legend or disclosure. This would be an uncertain and risky argument for a library or archives to make. Arguments could also be made that a legend or disclosure should be taken into account to reduce any damages payable, but we are not aware of any Australian case authority in which this has been raised.

You raise two scenarios and ask for comment. Here, we provide comments in relation to the common law defence of innocent dissemination, the *Broadcasting Services Act 1992* defence, and the *Defamation Acts 2005* defence of innocent dissemination.

**Common law defence of innocent dissemination**

In relation to both scenarios, we emphasise that under the common law defence intermediaries who have the ability to monitor and control content are unlikely to be able to rely on the defence of innocent dissemination because of Australian case law such as *Thompson v Australian Capital Television* (see Phase II comments).

In addition, in scenario 1 the library or archives would be liable for defamatory material that it makes available to patrons. The scenario suggests that the library or archives would have learnt of the allegedly defamatory nature of the content (which is why the content has been removed from databases). That means the library or archives could not rely on the common law or statutory defences for innocent dissemination. And if a court did determine that the content was defamatory, the library or archives would be liable (subject to other defences, such as truth, honest opinion, or qualified privilege). The number of people who had access to the removed content would be relevant to damages, but not to liability as such.

It would be possible for a library or archives to argue that a qualified privilege defence applied in scenario 1. For example, the *Defamation Acts 2005* provide a statutory defence where
publication is made to a person with an interest in a particular subject, and the publication is reasonable in the circumstances. If the library or archives limits access to the removed content to researchers for scholarly purposes, and the content is clearly identified as being subject to an allegation that it is defamatory of the person who has complained, this defence would be arguable. But the application of such a defence to this conduct by a library or archives would be novel. In addition, it is important to note that case law on a similar statutory defence (which existed in NSW from the mid-1970s) suggests that it will be difficult to meet the standard of ‘reasonableness’. The fact that the argument would be novel, combined with the case law on the earlier NSW provision, means that even the limited publication envisaged in scenario 1 would expose the library or archives to risk.

The situation described in scenario 2 would also expose the library or archives to liability for defamatory content if the library or archives knew about the allegedly defamatory nature of the content (or if it should have known). It is also worth considering a slightly different version of scenario 2: If the back up copies were maintained for some purpose other than allowing access to removed articles, and they were accessed by a patron without the library or archives realising that the patron might obtain access to removed articles, the library or archives could argue that the defence of innocent dissemination applied. However, the defence is only available if the library or archives did not know about the content in question and was not negligent in lacking knowledge. This appears difficult to argue. If the library or archives maintains back up copies and allows its patrons to access them, the library or archives would most probably be negligent in failing to realise that patrons could access articles that had been removed due to concerns about defamation. This means that, as with scenario 1, there does not appear to be any realistic possibility of defending the conduct as innocent dissemination.

Broadcasting Services Act 1992 defence
You also asked how the Broadcasting Services Act 1992 (Cth) provisions would apply to each of these scenarios. As outlined on pages 29 and 30 of our Phase II comments, digital archives have a defence under the Broadcasting Services Act where they do not know about the allegedly defamatory quality of content. In scenarios 1 and 2, the archives would know about the content in question. Therefore, the Broadcasting Services Act defence would not apply.
The Broadcasting Services Act provisions do provide stronger protection to archives in one way. They make clear that the archives should not be required to monitor or keep records about content. This means the statutory defence may apply to the slightly different form of scenario 2 discussed above; namely, where the back up copies are kept for a purpose other than allowing access to removed articles (and where access to them is not given for the purpose of accessing removed articles).

Defamation Acts 2005 defence of innocent dissemination

The Defamation Acts 2005 provide a statutory version of the innocent dissemination defence. It is reproduced in Appendix 1 to these comments. It does not appear that the outcome in the two scenarios would be any different under the Defamation Acts 2005 than under the common law defence. This is because the statutory defence also ends when the library or archives knew (or when it should have known) about the allegedly defamatory nature of the content.

Publisher control

There does not appear to be any way in which a publisher could structure the legal relationship with an archive so that problematic material would not need to be removed. The publisher and the archive would each be liable for the content. (They may have agreed particular indemnities between themselves, but either or both could be sued by a defamed person.)

As discussed above, it is unlikely that an archive could rely on the common law or statutory defences of innocent dissemination or on the defence under the Broadcasting Services Act 1992 once it had learnt (or should have learnt) of the problematic quality of the content.

It is worth noting that the limitation period in which a defamation action can be brought under Australian law has been reduced to one year under the Defamation Acts 2005 (and courts are given some discretion to extend this period to three years). However, the period does not run only from the date of first publication. It runs from the date of each publication. That is, material that is available online is published each time that it is accessed, which suggests that the limitation period would not expire for material that is available in a library or archives.
Public accessibility of Commonwealth records

As noted in our previous report, the *Archives Act 1983 (Cth)* governs the acquisition, management and accessibility of ‘Commonwealth records’, including a provision that the National Archives of Australia (‘NAA’):

shall cause all Commonwealth records in the open access period that are in the custody of the Archives or of a Commonwealth institution, other than exempt records, to be made available for public access.¹

‘Exempt records’ are defined in section 33. This definition refers to numerous different types of confidential and sensitive material, such as information the disclosure of which:

- could cause damage to the security, defence or international relations of the Commonwealth;²
- would constitute a breach of confidence,³ or disclose a trade secret;⁴
- could prejudice an investigation or trial, or endanger the life or safety of a person;⁵ and
- would involve the unreasonable disclosure of information relating to the personal affairs of any person (including a deceased person).⁶

The complete list of exempted material in section 33 is set out in Appendix 2.

According to statistics on the Archives’ website, around 97.5% of Commonwealth records over 30 years old are released in whole, while 2% are released with some information removed,⁷ and only 0.5% are totally withheld.⁸

If public access is refused, a written statement of reasons is provided. If a person does not agree with these reasons, he or she may apply for an internal review of the decision by the Archives.

¹ *Archives Act 1983 (Cth)* s 31(1).
² Ibid s 33(1)(a).
³ Ibid s 33(1)(d).
⁴ Ibid s 33(1)(h).
⁵ Ibid s 33(1)(e), (f).
⁶ Ibid s 33(1)(g).
⁷ Ibid s 38.
If, after this review, he or she is still dissatisfied with the decision, an appeal may be made to the Administrative Appeals Tribunal (AAT), which will review the decision on its merits. The decision of the AAT can be appealed in the Federal Court in relation to a point of law.\(^9\)

You have asked what happens to exempt records over time – are they retained, who can access them, and do they become more accessible? First, the NAA has procedures for both appraisal (ie, determining what records need to be captured, for how long, and so on)\(^10\) and disposal\(^11\) of Commonwealth records. In short, exempt records are retained, but flagged as CLOSED – meaning they are not accessible to the public. Second, the decision about whether information is withheld is made by designated staff of the Archives, sometimes in consultation with departments and agencies.\(^12\) Third, it appears that the Archives permits review or a fresh determination of the status of Commonwealth records, as is occurring, for example, in relation to files created by the Australian Security Intelligence Organisation (ASIO).\(^13\) Finally, there are procedures for official access, in which authorised staff of government agencies can view records held by the Archives. This appears to include access to closed records.\(^14\)

**Classification**\(^15\)

As noted in our previous report, Australia has schemes for the classification of offensive print publications, films and computer games. With a few exceptions, all films that are exhibited, sold or hired in Australia must be classified, as must all computer games. In contrast, only ‘submittable publications’ – those print publications that are likely to be restricted to adults – must be classified. The Classification Board is responsible for classifying films, computers games and print publications. A fee is payable for this process.

---


The legal implications of a work being classified relate to both its *availability* and the *manner* of sale or exhibition. That is, some material is ‘refused classification’: this means it cannot be legally exhibited, sold or hired. Other items are given a classification that permits their exhibition, sale or hire, but with restrictions: for instance, magazines that must be sold in opaque wrapping, and only to people aged 18 years and over.

** Liability for mistakes of fact**

In Australia, two areas of law that may be particularly relevant for mistakes of fact: negligent misstatement;\(^\text{16}\) and misleading or deceptive conduct under the *Trade Practices Act 1974 (Cth)*. It is unlikely that a library or archives would be liable under either of these areas in the type of situations considered in phase II.

In relation to negligent misstatement, there has been some recognition that the ambit of negligent misstatement should be narrower than for negligent acts.\(^\text{17}\) This has manifested itself in the cause of action as requiring some special facts that reveal that, objectively measured, that the speaker *assumed responsibility* for the statements made (meaning that it was reasonable for the recipient to rely on them).\(^\text{18}\) Furthermore, the plaintiff must be in the class of people to whom the defendant owed a duty of care.\(^\text{19}\) The upshot of this is that most of the relevant case law relates to information or advice given by professional advisers and public bodies. It is arguable that this law would not apply to many statements in archives. The situation in which they are made and received is not like a relationship in which professional advice is provided.

Section 52 of the *Trade Practices Act* prohibits corporations from engaging in conduct that is misleading or deceptive.\(^\text{20}\) (It is largely duplicated by state Acts that apply to trading activities by non-corporate actors.) Any person who has suffered loss may seek to recover damages. In addition, any person may seek a court order to end the conduct in question. However, an exception applies to publications made by entities carrying on a business of providing


\(^\text{17}\) Ibid 705.

\(^\text{18}\) See, eg, *Shaddock v Parramatta City Council* (1980-81) 150 CLR 225, 250 (Mason J).

\(^\text{19}\) See discussion in Fleming, above n 16, 710–712.

\(^\text{20}\) *Trade Practices Act 1974 (Cth)* s 52.
information. 21 This exception applies to media publishers and would be expected to apply to the library and archives considered in this study.

---

21 Trade Practices Act 1974 (Cth) s 65A.
Appendix 1

Defamation Act 2005 (Vic)

32. Defence of innocent dissemination

(1) It is a defence to the publication of defamatory matter if the defendant proves that –
   (a) the defendant published the matter merely in the capacity, or as an employee or agent, of a subordinate distributor; and
   (b) the defendant neither knew, nor ought reasonably to have known, that the matter was defamatory; and
   (c) the defendant’s lack of knowledge was not due to any negligence on the part of the defendant.

(2) For the purposes of sub-section (1), a person is a subordinate distributor of defamatory matter if the person –
   (a) was not the first or primary distributor of the matter; and
   (b) was not the author or originator of the matter; and
   (c) did not have any capacity to exercise editorial control over the content of the matter (or over the publication of the matter) before it was first published.

(3) Without limiting sub-section (2)(a), a person is not the first or primary distributor of matter merely because the person was involved in the publication of the matter in the capacity of –
   (a) a bookseller, newsagent or news-vendor; or
   (b) a librarian; or
   (c) a wholesaler or retailer of the matter; or
   (d) a provider of postal or similar services by means of which the matter is published; or
   (e) a broadcaster of a live programme (whether on television, radio or otherwise) containing the matter in circumstances in which the broadcaster has no effective control over the person who makes the statements that comprise the matter; or
   (f) a provider of services consisting of –
      (i) the processing, copying, distributing or selling of any electronic medium in or on which the matter is recorded; or
      (ii) the operation of, or the provision of any equipment, system or service, by means of which the matter is retrieved, copied, distributed or made available in electronic form; or
   (g) an operator of, or a provider of access to, a communications system by means of which the matter is transmitted, or made available, by another person over whom the operator or provider has no effective control; or
   (h) a person who, on the instructions or at the direction of another person, prints or produces, reprints or reproduces or distributes the matter for … that … person.
Appendix 2

Section 33 of the Archives Act 1983 (Cth)

(1) For the purposes of this Act, a Commonwealth record is an exempt record if it contains information or matter of any of the following kinds:

(a) information or matter the disclosure of which under this Act could reasonably be expected to cause damage to the security, defence or international relations of the Commonwealth;

(b) information or matter communicated in confidence by or on behalf of a foreign government, an authority of a foreign government or an international organization to the Government of the Commonwealth, to an authority of the Commonwealth or to a person receiving the communication on behalf of the Commonwealth or of an authority of the Commonwealth, being information or matter the disclosure of which under this Act would constitute a breach of that confidence;

(c) information or matter the disclosure of which under this Act would have a substantial adverse effect on the financial or property interests of the Commonwealth or of a Commonwealth institution and would not, on balance, be in the public interest;

(d) information or matter the disclosure of which under this Act would constitute a breach of confidence;

(e) information or matter the disclosure of which under this Act would, or could reasonably be expected to:

   (i) prejudice the conduct of an investigation of a breach, or possible breach, of the law, or a failure, or possible failure, to comply with a law relating to taxation or prejudice the enforcement or proper administration of the law in a particular instance;

   (ii) disclose, or enable a person to ascertain, the existence or identity of a confidential source of information in relation to the enforcement or administration of the law; or

   (iii) endanger the life or physical safety of any person;

(f) information or matter the disclosure of which under this Act would, or could reasonably be expected to:

   (i) prejudice the fair trial of a person or the impartial adjudication of a particular case;

   (ii) disclose lawful methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures; or
(iii) prejudice the maintenance or enforcement of lawful methods for the protection of public safety;

(g) information or matter the disclosure of which under this Act would involve the unreasonable disclosure of information relating to the personal affairs of any person (including a deceased person);

(h) information or matter relating to trade secrets, or any other information or matter having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information or matter were disclosed;

(j) information or matter (other than information or matter referred to in paragraph (h)) concerning a person in respect of his or her business or professional affairs or concerning the business, commercial or financial affairs of an organization or undertaking, being information or matter the disclosure of which would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his or her lawful business or professional affairs or that organization or undertaking in respect of its lawful business, commercial or financial affairs.

(2) For the purposes of this Act, a Commonwealth record is an exempt record if it is of such a nature that:

(a) it would be privileged from production in legal proceedings on the ground of legal professional privilege; and

(b) disclosure of the record would be contrary to the public interest.

(3) For the purposes of this Act, a Commonwealth record is an exempt record if:

(a) it contains information or matter:

(i) that relates to the personal affairs, or the business or professional affairs, of any person (including a deceased person); or

(ii) that relates to the business, commercial or financial affairs of an organization or undertaking; and

(b) there is in force a law relating to taxation that applies specifically to information or matter of that kind and prohibits persons referred to in that law from disclosing information or matter of that kind, whether the prohibition is absolute or is subject to exceptions or qualifications.

(4) In paragraphs (1)(e) and (f) and subsection (3), law means law of the Commonwealth or of a State or Territory.

(5) A reference in this section to an undertaking includes a reference to an undertaking that is carried on by, or by an authority of, the Commonwealth, a State, the Australian Capital Territory or the Northern Territory or by a local government authority.
Question 1  Defamation law in general
There are now equivalent Acts in each Australian state and territory; for example, the Defamation Act 2005 (Vic) and the Defamation Act 2005 (NSW). These supplement the common law. (Australia has one common law throughout all its territory, unlike the US.) Among other things, the Acts provide extra defences to the common law. The important aspects of the Acts are noted in the May 2006 comments from Emily Hudson and me.

Question 2  Defamation law and reasonable publication
There has not been any case law discussion under the uniform defamation Acts about what amounts to ‘reasonable’ publication. However, the similar provision that existed in NSW under its former Defamation Act 1974 (NSW) s 22 was interpreted by NSW courts. Here is a paragraph from page 218 my book, Defamation: Comparative Law and Practice (UCL Press, 2006) which probably provides enough background for you:

Reasonableness under s 22, however, has been restrictively interpreted by the courts in an approach that ‘effectively negates the availability’ of the defence.¹ Under s 22, it has become necessary for most defendants to establish their honest belief in the publication’s truth.² Defendants also must establish that the ‘manner and extent of publication did not exceed what was reasonably required’, that they made reasonable inquiries to check sources, and that their conclusions ‘followed logically, fairly and reasonably’ from what their inquiries revealed.³ These appear to be onerous requirements given the way that s 22 is applied. They are far more than is required for the common law defence of fair

² See Morgan v John Fairfax & Sons (No 2) (1991) 23 NSWLR 374 (NSW CA) which makes clear that the belief must relate to the meaning that the publisher intended.
³ Ibid 388 (Hunt AJA).
comment, for example, where opinion can be exaggerated, prejudiced or obstinate. The s 22 defence is very hard to establish if the facts underlying the publication are not true and ‘proper’ inquiries were not made before publication. The defence appears to be commonly pleaded, but has succeeded in very few cases since it was introduced in 1974.

Question 3  Intermediaries
Intermediaries, like ISPs, generally have little control over content. However, to the extent that they have technological means available to exercise control if they wanted to do so (which appears to be increasing, for example, with the greater use of geolocation software in relation to targeting advertising), they may have difficulty relying on defences of innocent dissemination. (This is probably a fairly minor point in the overall analysis.)

Question 4  Broadcasting Services Act
You are correct in thinking that the defence would not help archives in the situation you describe.

Question 5  There is no relevant new legislation

Question 6  We have no new information regarding contract between publishers and databases

Question 7 Privacy Acts

4 See chapter 2 and eg Merivale v Carson (1887) 20 QBD 275, 281 (Lord Esher MR), 283–84 (Bowen LJ) (Eng CA).
I’m not sure that I understand your question; sorry! If it is still relevant, can you clarify the passages in the October 2005 report from Emily Hudson and me that prompted your query?

**In addition …**

When we met in New York, we mentioned the National Archives of Australia’s digitisation service. The service is changing this month. You can see an information page here: [http://www.naa.gov.au/the_collection/digitisation-service.html](http://www.naa.gov.au/the_collection/digitisation-service.html)

It appears the main changes from the earlier digitisation on demand service are:

- state branches of the National Archives will be part of the new service
- fees will be charged for the new service (previously, fees were only charged for higher resolution images)

As with the former service, it appears that records digitised in this way will then be placed online for any interested person to use. (Only the initial requestor will be charged.)
Overview: The first four questions are answered, with excerpts from supporting materials. While we have not yet answered questions 5 through 8, it is likely that the answers will be variants of “no”, “none” or “not applicable”. We will verify and get those answers shortly.

Question 1:

a) Do the domestic copyright laws of Canada contain provisions specifically addressed to archives? Do they define the term “archive”?

The Copyright Act is the main act dealing with copyright in Canada. Its definition of archives is restricted to the role of archives in the Act itself. As such, the main criterion for an archive under the Act is that it not be operated for profit, and that it be open to the public or researchers:

Copyright Act (R.S. 1985, c. C-42)
S. 2: "library, archive or museum" means
(a) an institution, whether or not incorporated, that is not established or conducted for profit or that does not form a part of, or is not administered or directly or indirectly controlled by, a body that is established or conducted for profit, in which is held and maintained a collection of documents and other materials that is open to the public or to researchers, or
(b) any other non-profit institution prescribed by regulation;

b) Do any other provisions of Canadian law define the term “archive”?

Most substantive definitions of archives in Canadian law come under the “objects” or “functions” sections of their respective acts. Often, the “definitions” sections serve merely to indicate which archive is being referred to. These acts deal primarily (but not exclusively) with public archives, and therefore, their definitions are largely related to their public functions. Objects and functions which are frequently mentioned include: the preservation of documents of public importance (for social, political or cultural reasons), the facilitation of access to these documents, their management, and support for archival communities and their activities.

We have also included a reference to the Foreign Missions and International Organizations Act, which contains a more technical definition of “archives”.

Examples:
The National Archives of Canada Act, R.S., 1985, c. 1 (3rd Supp.) contains a type of definition of archives:

4. (1) The objects and functions of the National Archives of Canada are to conserve private and public records of national significance and facilitate access thereto, to be the permanent repository of records of government institutions and of ministerial records, to facilitate the management of records of government institutions and of ministerial records, and to encourage archival activities and the archival community.


Definitions
1. In this Act, "Archives" means the Archives of Ontario; ("Archives publiques") "Archivist" means the officer appointed to administer this Act. ("archiviste") R.S.O. 1990, c. A.27, s. 1.

Objects of Archives

5. The objects of the Archives are,
   (a) the classification, safekeeping, indexing and cataloguing of all matters transferred to the Archives under section 3;
   (b) the discovery, collection and preservation of material having any bearing upon the history of Ontario;
   (c) the copying and printing of important public documents relating to the legislative or general history of Ontario;
   (d) the collecting of all documents having in any sense a bearing upon the political or social history of Ontario and upon its agricultural, industrial, commercial or financial development;
   (e) the collecting of municipal, school and church records;
   (f) the collection and preservation of pamphlets, maps, charts, manuscripts, papers, regimental muster rolls and other matters of general or local interest historically in Ontario;
   (g) the collection and preservation of information respecting the early settlers of Ontario, including pioneer experience, customs, mode of living, prices, wages, boundaries, areas cultivated, and home and social life;
   (h) the collection and preservation of the correspondence of settlers, documents in private hands relating to public and social affairs and reports of local
events of historic interest in domestic and public life;

(i) the conducting of research with a view to preserving the memory of pioneer settlers in Ontario and of their early exploits and the part taken by them in opening up and developing the Province. R.S.O. 1990, c. A.27, s. 5.

Quebec: Archives Act (R.S.Q., chapter A-21.1)
CHAPTER I
APPLICATION AND DEFINITIONS
Scope.

1. This Act applies to public and private archives. 1983, c. 38, s. 1.

Interpretation:
2. In this Act, unless the context indicates otherwise,
   “archives”;
   “archives” means the body of documents of all kinds, regardless of date, created or received by a person or body in meeting requirements or carrying on activities, preserved for their general information value;
   “private archives”;
   “private archives” means archives other than public archives;
   “public archives”;
   “public archives” means the archives of public bodies;

The rest of article 2 of the Quebec Archives Act has been omitted as it is not relevant to the question at hand.

Manitoba: Archives and Recordkeeping Act, C.C.S.M. c. A132
Definitions
1 In this Act,
"archival record" means a record of archival value
(a) that is a government record in the custody or under the control of the archivist after the expiry of the retention period set out in the records schedule relating to that record,
(b) that is a record referred to in sections 10 to 14 that, by agreement with the archivist,
(i) has been identified as a record of archival value, and
(ii) is in the custody of the archivist after the expiry of a retention period, or
(c) that is a record referred to in section 15 acquired by the archivist on behalf of the government; (« archives »)
"archives" means the Archives of Manitoba referred to in section 2;
(« Archives »)
"archivist" means the Archivist of Manitoba referred to in section 3;
(« archiviste »)
The rest of the definitions have been omitted as they are not relevant to the question at hand.

Purposes of the archives
5 The purposes of the archives are
(a) to provide for the identification and preservation of records of archival value to present and future generations;
(b) to promote and facilitate good recordkeeping respecting government records in order to support accountability and effective government administration;
(c) to make archival records known by means of promotion, publication, exhibition or loan and to facilitate access to them, in accordance with any rights of access provided by law, in legislation or by the terms or conditions of an agreement;
(d) to encourage and assist other organizations in good recordkeeping practices; and
(e) to encourage and assist archival activities and the archival community.

Responsible minister's directions

5 The objects and functions of the Public Archives are to
(a) acquire and preserve Government and private-sector records of Provincial significance and facilitate access to them;
(b) develop policies, standards, procedures and services for effective records management in Government;
(c) be the permanent repository of records of public bodies; and
(d) encourage and assist archival activities and the archival community.

Foreign Missions and International Organizations Act, [1991, c. 41], Schedule II, Vienna Convention on Consular Relations:
Article 1) (k) “consular archives” includes all the papers, documents, correspondence, books, films, tapes and registers of the consular post, together with the ciphers and codes, the card-indexes and any articles of furniture intended for their protection or safekeeping.
c) Is there otherwise a general understanding of what an archive is, and if so, what is that understanding and what does it derive from? (e.g., does it derive from judicial decisions, industry practice, etc.?)

It is fair to conclude that the general understanding of what is meant by an archive is that which is evinced in the above definitions: a compilation of public or private records of public value or significant interest. The administration of the record is not for profit.

This understanding is further supported, though not enhanced, by a key judicial decision. Other than that, there is very little case law on this subject. CCH is the only case which has dealt with the matter, and even then, the definition was limited to a fairly straightforward interpretation of s.2 of the Copyright Act.

In this section, we have also made reference to doctrine and industry practice. The short doctrinal excerpt we have cited below employs a particularly useful definition of archives, one which distinguishes between the functions of an archive and a library. Finally, the definitions found in “industry practice” were found on the websites of national and provincial archives. As these are public archives, their mission statements are quite similar to those found in the acts which empower them. We have included a sampling of their mission statements and mandates, which provide the best insight into their perception of their role as public archives.

Case

**CCH Canadian Ltd. v. Law Society of Upper Canada, 2004 SCC 13** (at paras. 83-84):

“Section 2 of the Copyright Act defines library, archive or museum. In order to qualify as a library, the Great Library: (1) must not be established or conducted for profit; (2) must not be administered or controlled by a body that is established or conducted for profit; and (3) must hold and maintain a collection of documents and other materials that is open to the public or to researchers. The Court of Appeal found that the Great Library qualified for the library exemption. The publishers appeal this finding on the ground that the Law Society, which controls the library, is indirectly controlled by the body of lawyers authorized to practise law in Ontario who conduct the business of law for profit.”

“I concluded in the main appeal that the Law Society's dealings with the publishers' works were fair. Thus, the Law Society need not rely on the library exemption. However, were it necessary, it would be entitled to do so. The Great Library is not established or conducted for profit. It is administered and controlled by the Benchers of the Law Society. Although some of the Benchers, when acting in other capacities, practise law for profit, when they are acting as administrators of the Great Library, the Benchers are not acting as a body established or conducted for profit.”

In paragraphs 135 to 142 of same case’s Court of Appeal decision ([2002] 4 F.C. 213, [2002] F.C.J. No. 690 2002 FCA 187), the definition of archives (relevant to
the given provisions in the Copyright Act) was similar to the one above. The entity must not be established or conducted for profit (or administered or controlled by a body that operates for profit), and its materials must be open to the public or researchers.

**Doctrine**

Jean E Dryden, Chair of the Copyright Committee of the Bureau of Canadian Archivists gives a definition of archival holdings in “Unpublished Works in Archives” (Copyright & New Media Law Newsletter, Summer 1998 (Volume 2, Issue 2), at para. 2):

“Archival holdings differ from those of libraries in that they are, for the most part, unique and irreplaceable unpublished records. They may not be borrowed, nor are holdings duplicated in other institutions across the country. This dictates the way in which archival research is conducted”.

**Industry Practice:**

The “Libraries and Archives Canada” website (found on the Government of Canada website at http://www.lac-bac.gc.ca/04/0416_e.html) explains the fundamental difference between libraries and archives. This definition is quite similar to the one given by Dryden, above:

“Archives collect original unpublished material or primary sources. The records held by archives are unique and irreplaceable. By their very nature archival materials are fragile and vulnerable to improper handling. If an archival document is lost, stolen, or irreparably damaged, the information it contains is lost forever.”

This can be distinguished from libraries, which carry secondary sources that are more easily replaceable.

The mission statement for Library and Archives Canada can be found on the Government of Canada website at
(http://www.lacbac.gc.ca/04/0415_e.html#Our%20Mission):

“Library and Archives Canada is an innovative knowledge institution that combines the collections, services and staff expertise of the former National Library of Canada and National Archives of Canada. Our objective is to provide all Canadians with easy, one-stop access to the texts, photographs and other documents that reflect their cultural, social and political development. Working closely with other archives and libraries, we will continue to acquire and preserve Canada's documentary heritage in all its forms.”

“Our mandate is:
• To preserve the documentary heritage of Canada for the benefit of present and future generations;
• To be a source of enduring knowledge accessible to all, contributing to the cultural, social and economic advancement of Canada;
• To facilitate in Canada cooperation among communities involved in the acquisition, preservation and diffusion of knowledge; and
• To serve as the continuing memory of the government of Canada and its institutions.”

Provincial Archives of Newfoundland and Labrador
(http://www.gov.nf.ca/panl/about.html)
“PANL is mandated, through the Archives Act 1983, to preserve those records of the Government of Newfoundland and Labrador which are deemed to have enduring legal, fiscal, evidential or research value. PANL also collects records from private sources which have enduring value to the history of the province.”

Public Archives and Records Office of Prince Edward Island
http://www.edu.pe.ca/paro/about.asp
“The Public Archives and Records Office of Prince Edward Island (PARO) acquires, preserves, and makes available for public research the records of the government of this province and private-sector papers and records deemed to be of lasting historical value. As well as textual materials such as correspondence files, journals, and newspapers, our holdings are rich in materials in other formats and media such as photographs, maps, architectural drawings, film, and sound recordings. The Archives provides service to students, historians, genealogists, government officials and interested members of the public.”

Archives Nationales du Quebec
http://www.anq.gouv.qc.ca/institution/mandat.htm
« Mission
Les Archives nationales du Québec ont pour double mission de faire servir les documents utiles à la connaissance de l'histoire du Québec, à l'appréciation par les citoyens des décisions gouvernementales passées et à des fins de preuve ou de jurisprudence, d'une part, et de soutenir la gestion des documents administratifs du gouvernement et de l'ensemble des organismes publics visés à la Loi sur les archives, d'autre part. Cette mission s'articule autour des quatre mandats suivants :
• L'orientation de la gestion des archives québécoises.
   Les Archives nationales élaborent ou participent à l'élaboration des orientations formulées par l'État québécois en matière de constitution, de conservation et de diffusion des archives publiques et privées (articles 4, 6 et 14 de la Loi sur les archives) en s'assurant de la tenue à jour du cadre législatif, administratif et normatif qui les régit et en formulant des avis sur les projets de loi ou de règlement québécois ou fédéraux qui sont susceptibles d'en influencer la gestion.
L'encadrement et le soutien à la gestion des archives publiques décentralisées.
Les Archives nationales encadrent la gestion des archives publiques décentralisées par le biais de leur expertise et de leur conseil et par l'approbation et le suivi de l'application des calendriers de conservation de ces organismes.

Le soutien et la collaboration avec le milieu pour la gestion des archives privées.
En plus d'offrir leur expertise et leur conseil aux détenteurs d'archives privées, les Archives nationales les soutiennent en mettant à leur disposition de l'aide financière et en reconnaissant la qualité professionnelle et la richesse des fonds de certains d'entre eux.

La gestion et la diffusion des archives du gouvernement et des tribunaux.
Comme service d'archives de l'État québécois, les Archives nationales encadrent la constitution des archives des ministères, des organismes gouvernementaux et des tribunaux judiciaires puis elles assurent la conservation et la diffusion de leurs archives historiques. Elles offrent également des services de gestion et de garde des documents semi-actifs à l'ensemble de l'Administration gouvernementale.

(Our italics)

d) Does Canadian copyright law contain provisions of broader applications that may nonetheless be relevant to archives (e.g., exceptions or privileges)?

Fair dealing is the most broad “exception” that would be relevant to archives, as well as the various specific exemptions contained in the Copyright Act. We have included the answer to this question in the answer to question 3, below. Since there is very little case law on any of these provisions, we have included the relevant provisions and case law (CCH) under whichever category of exceptions or privileges seems most appropriate.
**Question 2:** To the extent these principles were developed when archives were created and maintained with physical copies, how do they relate to the electronic environment and the manner in which archives (particularly digital archives) currently operate?

This question was difficult to answer, partly because the Copyright Act was recently amended to include the provisions dealing with archives (1997) and as such should already take into account these changes in technologies. In other words, our legislature deliberately chose to not be more precise with respect to archives and new technologies. (That being said, we do not have more specific legislation regarding databases for example, nor have we implemented more precise technological imperatives contained in the DMCA for example.) Moreover, little has been written on archives and technology.

Jean E. Dryden also discusses the way that technology has changed the general approach taken to archives (for reference, see “Unpublished Works in Archives”, above)” at paras. 2-3:

“In an earlier era, researchers traveled to the archival institution(s) holding the records to be studied, and took notes on the information relevant to their work. Modern technology has changed this. Photocopiers, fax machines, and microfilm mean that a researcher does not have to spend weeks in an archives taking notes; instead he or she can spend a few days photocopying any documents that may be of interest and take them home to study at leisure. For more limited inquiries, the researcher may simply request the archives to send photocopies of the relevant documents. Accessibility no longer means simply that the documents are available for consultation in an archive; for the modern researcher, accessibility is virtually synonymous with the availability of copies.”

See also *Copyright Act* (R.S. 1985, c. C-42)
s. 30.1(1)(c) below.
Question 3: What limits or privileges, if any, have courts in Canada placed on or provided to archives with respect to:
   a) acquisition of material
   b) maintenance and updating material
   c) making the material available to the public
      a. as physical copies (original or facsimile), or
      b. in digital form

Fair dealing is the main general “exception” to general copyright rules in Canada. Courts could generally deal with potential copyright violations in libraries and archives under this rubric (to the extent that they have dealt with them at all under the general head of fair dealing). There are, in addition, provisions which provide specific exceptions to libraries, archives and museums.

We also note that the recent CCH decision has effectively equated fair dealing in Canada to fair use in the US in functional terms. Moreover, as the excerpt below indicates, fair dealing is to be understood in the widest terms as an integral part of the copyright balance, and not an “exception”. This is a clear departure from the UK or droit d’auteur approaches.

Unfortunately, since the provisions are quite recent, the specific exemptions for libraries, archives and museums have not yet been thoroughly explored by Canadian courts.

Here, we have indicated the relevant judicial comments in conjunction with the relevant statutory provisions under each heading. We first make reference to fair dealing, as it is a global exemption that can apply to anyone, including archives and libraries.

General Provision

Copyright Act ( R.S. 1985, c. C-42 )

s. 29. Fair dealing for the purpose of research or private study does not infringe copyright.

This provision followed in the UK fair dealing provision. David Vaver, in Copyright Law (Toronto: Irwin Law, 2000 at Chapter 7 (B)(11)) stated, however, that the extent of this exception was still unclear. The Supreme Court of Canada has recently expanded the notion of fair dealing in Canada to something analogous to fair use in the US.

CCH Canadian Ltd. v. Law Society of Upper Canada, 2004 SCC 13, at paras. 48 ff:

“Before reviewing the scope of the fair dealing exception under the Copyright Act, it is important to clarify some general considerations about exceptions to copyright infringement. Procedurally, a defendant is required to prove that his or her dealing with a work has been fair; however, the fair dealing exception is perhaps more properly understood as an integral part of the Copyright Act than
simply a defence. Any act falling within the fair dealing exception will not be an infringement of copyright. The fair dealing exception, like other exceptions in the Copyright Act, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively. As Professor Vaver, supra, has explained, …: "User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation.

As an integral part of the scheme of copyright law, the s. 29 fair dealing exception is always available. Simply put, a library can always attempt to prove that its dealings with a copyrighted work are fair under s. 29 of the Copyright Act. It is only if a library were unable to make out the fair dealing exception under s. 29 that it would need to turn to s. 30.2 of the Copyright Act to prove that it qualified for the library exemption.

In order to show that a dealing was fair under s. 29 of the Copyright Act, a defendant must prove: (1) that the dealing was for the purpose of either research or private study and (2) that it was fair.

The fair dealing exception under s. 29 is open to those who can show that their dealings with a copyrighted work were for the purpose of research or private study. "Research" must be given a large and liberal interpretation in order to ensure that users' rights are not unduly constrained. I agree with the Court of Appeal that research is not limited to non-commercial or private contexts. The Court of Appeal correctly noted, at para. 128, that "[r]esearch for the purpose of advising clients, giving opinions, arguing cases, preparing briefs and factums is nonetheless research". Lawyers carrying on the business of law for profit are conducting research within the meaning of s. 29 of the Copyright Act.

The Copyright Act does not define what will be "fair"; whether something is fair is a question of fact and depends on the facts of each case. See McKeown, supra, at p. 23-6. Lord Denning explained this eloquently in Hubbard v. Vosper, [1972] 1 All E.R. 1023 (C.A.), at p. 1027:

It is impossible to define what is 'fair dealing'. It must be a question of degree. You must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them. If they are used as a basis for comment, criticism or review, that may be a fair dealing. If they are used to convey the same information as the author, for a rival purpose, that may be unfair. Next, you must consider the proportions. To take long extracts and attach short comments may be unfair. But, short extracts and long comments may be fair. Other considerations may come to mind also. But, after all is said and done, it must be a matter of impression. As with fair comment in the law of libel, so with fair dealing in the law of copyright. The tribunal of fact must decide.
At the Court of Appeal, Linden J.A. acknowledged that there was no set test for fairness, but outlined a series of factors that could be considered to help assess whether a dealing is fair. Drawing on the decision in *Hubbard*, *supra*, as well as the doctrine of fair use in the United States, he proposed that the following factors be considered in assessing whether a dealing was fair: (1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the work. Although these considerations will not all arise in every case of fair dealing, this list of factors provides a useful analytical framework to govern determinations of fairness in future cases.

The Court adopted these criteria and went on to elaborate upon them.

**Specific Exemptions**

The 1997 updates to the Copyright Act attempted to clarify some of those pre-CCH fair dealing ambiguities and allow greater latitude for copying etc. for libraries, archives and museums so they could better fulfill their purposes.

**Limits/privileges with respect to archives and maintenance and updating material:**

**Privileges:**

S. 30.1(1) of the Copyright Act indicates that an archive does not infringe copyright when it makes copies in order to preserve rare and original deteriorating elements of its collection (or those at risk of deterioration). It also lists five other circumstances in which copies can be made without infringing copyright in ss. 30.1(1) (b)-(f).

*Copyright Act (R.S. 1985, c. C-42)*

30.1 (1) It is not an infringement of copyright for a library, archive or museum or a person acting under the authority of a library, archive or museum to make, for the maintenance or management of its permanent collection or the permanent collection of another library, archive or museum, a copy of a work or other subject-matter, whether published or unpublished, in its permanent collection

(a) if the original is rare or unpublished and is

(i) deteriorating, damaged or lost, or

(ii) at risk of deterioration or becoming damaged or lost;

(b) for the purposes of on-site consultation if the original cannot be viewed, handled or listened to because of its condition or because of the atmospheric conditions in which it must be kept;
(c) in an alternative format if the original is currently in an obsolete format or the technology required to use the original is unavailable; (d) for the purposes of internal record-keeping and cataloguing; (e) for insurance purposes or police investigations; or (f) if necessary for restoration.

David Vaver explains, in Chapter 7(B)(12)(b)(ii) of Copyright Law, that the restoration exemption should only cover material that is not considered rare, and that it probably refers to activities such as replacing pages torn from a book with photocopies.

**Limitations:**

The above exceptions do not apply when an appropriate copy is commercially available (s.30.1(2)), and any intermediate copy necessary to satisfy s. 30.1(1) must be destroyed, according to s. 30.1(3):

*Copyright Act (R.S. 1985, c. C-42)*

30.1 (2) Paragraphs (1)(a) to (c) do not apply where an appropriate copy is commercially available in a medium and of a quality that is appropriate for the purposes of subsection (1).

David Vaver, in Chapter 7(B)(12)(b)(i) of Copyright Law explains that to determine whether a commercial copy is available, one must take reasonable efforts to locate a suitable copy in Canada at a reasonable price. Even if they cannot find such a copy, the archive must first try to locate a collective society that can license them to make the copies. Only if this license is not granted can the archive go ahead and make copies.

*Copyright Act (R.S. 1985, c. C-42)*

30.1 (3) If a person must make an intermediate copy in order to make a copy under subsection (1), the person must destroy the intermediate copy as soon as it is no longer needed.

30.1 (4) The Governor in Council may make regulations with respect to the procedure for making copies under subsection (1).

**Limits/privileges related to making the material available to the public as physical copies or in digital form:**

Canada has not yet ratified the WIPO WCT and WPPT treaties, and thus “making available” is not illegal under Canadian law. This has been recently affirmed by the Federal Court Trail Division in BMG Canada Inc. v. John Doe, 2004 FC 488 (uploading music files on the internet through P2P software is not illegal), though the decision is on appeal.
In CCH, there was a concern that fax transmissions could be considered a communication to the public (and, therefore, not fall under the fair dealing exemptions). Here, the court explains why a fax transmission to an individual is not a communication to the public:

*CCH Canadian Ltd. v. Law Society of Upper Canada, 2004 SCC 13* at para. 78:

“I agree with these conclusions. The fax transmission of a single copy to a single individual is not a communication to the public. This said, a series of repeated fax transmissions of the same work to numerous different recipients might constitute communication to the public in infringement of copyright.”

**Privileges:**

Section 30.2(1) of the Copyright Act states that any act that would not constitute an infringement of copyright for an individual shall not constitute an infringement for an archive. Section 30.2(2) states that it is not an infringement for an archive to copy an article from a given list of periodicals for use in private study or research.

*Copyright Act (R.S. 1985, c. C-42)*

30.2 (1) It is not an infringement of copyright for a library, archive or museum or a person acting under its authority to do anything on behalf of any person that the person may do personally under section 29 or 29.1.

(2) It is not an infringement of copyright for a library, archive or museum or a person acting under the authority of a library, archive or museum to make, by reprographic reproduction, for any person requesting to use the copy for research or private study, a copy of a work that is, or that is contained in, an article published in

(a) a scholarly, scientific or technical periodical; or

(b) a newspaper or periodical, other than a scholarly, scientific or technical periodical, if the newspaper or periodical was published more than one year before the copy is made.

**Limitations:**

Section 29.3 of the Copyright Act states that none of the exceptions may be carried out with a motive of gain, and gives the definition of a motive of gain in s. 29.3(2)

S. 30.2(3) states that exceptions referred to in s. 30.2(2)(b) allowing for copies to be made of articles published in a newspaper or periodical under certain circumstances do not apply to works of fiction, poetry, drama or music.
30.2(4) states that when a person has satisfied the archive that the copy will be used for research or private study, that person may be provided with a single copy of the work.

30.2(5) states that the copies allowable under ss. 30.2(1-2) must not be made in digital form, and that intermediate copies must be destroyed.

30.21(1) appears to deal with unpublished works, but there are some ambiguities in the drafting.

30.3 deals with “reprographic reproduction” and collective societies.

*Copyright Act (R.S. 1985, c. C-42)*

29.3 (1) No action referred to in section 29.4, 29.5, 30.2 or 30.21 may be carried out with motive of gain.

(2) An educational institution, library, archive or museum, or person acting under its authority does not have a motive of gain where it or the person acting under its authority, does anything referred to in section 29.4, 29.5, 30.2 or 30.21 and recovers no more than the costs, including overhead costs, associated with doing that act.

*Copyright Act (R.S. 1985, c. C-42)*

30.2 (3) Paragraph (2)(b) does not apply in respect of a work of fiction or poetry or a dramatic or musical work.

(4) A library, archive or museum may make a copy under subsection (2) only on condition that

(a) the person for whom the copy will be made has satisfied the library, archive or museum that the person will not use the copy for a purpose other than research or private study; and

(b) the person is provided with a single copy of the work.

(5) A library, archive or museum or a person acting under the authority of a library, archive or museum may do, on behalf of a person who is a patron of another library, archive or museum, anything under subsection (1) or (2) in relation to printed matter that it is authorized by this section to do on behalf of a person who is one of its patrons, but the copy given to the patron *must not be in digital form*. (My italics)

(5.1) Where an intermediate copy is made in order to copy a work referred to in subsection (5), once the copy is given to the patron, the intermediate copy must be destroyed.

(6) The Governor in Council may, for the purposes of this section, make regulations

(a) defining "newspaper" and "periodical";

(b) defining scholarly, scientific and technical periodicals;
(c) prescribing the information to be recorded about any action taken under subsection (1) or (5) and the manner and form in which the information is to be kept; and

(d) prescribing the manner and form in which the conditions set out in subsection (4) are to be met.

Copyright Act (R.S. 1985, c. C-42)

30.21 (1) It is not an infringement of copyright for an archive to make a copy, in accordance with subsection (3), of an unpublished work that is deposited in the archive after the coming into force of this section.

(2) When a person deposits a work in an archive, the archive must give the person notice that it may copy the work in accordance with this section.

(3) The archive may only copy the work if

(a) the person who deposited the work, if a copyright owner, does not, at the time the work is deposited, prohibit its copying;
(b) copying has not been prohibited by any other owner of copyright in the work; and
(c) the archive is satisfied that the person for whom it is made will use the copy only for purposes of research or private study and makes only one copy for that person.

(4) The Governor in Council may prescribe the manner and form in which the conditions in subsection (3) may be met.

(5) Where an archive requires the consent of the copyright owner to copy an unpublished work deposited in the archive before the coming into force of this section but is unable to locate the owner, the archive may copy the work in accordance with subsection (3).

(6) The archive must make a record of any copy made under subsection (5) and keep it available for public inspection, as prescribed.

(7) It is not an infringement of copyright for an archive to make a copy, in accordance with subsection (3), of any work to which subsection 7(4) applies if it was in the archive on the date of coming into force of this section.

Copyright Act (R.S. 1985, c. C-42)

30.3 (1) An educational institution or a library, archive or museum does not infringe copyright where

(a) a copy of a work is made using a machine for the making, by reprographic reproduction, of copies of works in printed form;
(b) the machine is installed by or with the approval of the educational institution, library, archive or museum on its premises for use by students, instructors or staff at the educational institution or by persons using the library, archive or museum; and
(c) there is affixed in the prescribed manner and location a notice warning of infringement of copyright.
(2) Subsection (1) only applies if, in respect of a reprographic reproduction,
   (a) the educational institution, library, archive or museum has entered into an agreement with a collective society that is authorized by copyright owners to grant licences on their behalf;
   (b) the Board has, in accordance with section 70.2, fixed the royalties and related terms and conditions in respect of a licence;
   (c) a tariff has been approved in accordance with section 70.15; or
   (d) a collective society has filed a proposed tariff in accordance with section 70.13.

David Vaver (Chapter 7(B)(12)(e)(iii) of Copyright Law) also notes that the above exceptions for archives only apply to “works”. Only the National Archives of Canada can copy sound recordings or broadcasts for archival purposes:

**Copyright Act (R.S. 1985, c. C-42)**

30.5 The National Archives of Canada may
(a) make a copy of a recording, as defined in section 8 of the National Archives Act, for the purposes of that section; and
(b) at the time that a broadcasting undertaking, within the meaning of subsection 2(1) of the Broadcasting Act, communicates a work or other subject-matter to the public by telecommunication, make a copy for archival purposes of the work or other subject-matter that is included in that communication.

David Vaver notes (in Chapter 7 (B)(12)(c) of Copyright Law) that the above-mentioned exemptions do not apply to the downloading of work from the internet or electronic databases, even if the same article had already appeared in a newspaper or periodical.

**Regulations:** The following are the relevant regulations related to the above provisions. They can be found in: Exceptions for Educational Institutions, Libraries, Archives and Museums (C-42 -- SOR/99-325). These regulations came into force on September 1st, 1999 (s. 9). Below is a summary of their main points.

3. The exceptions in 30.2(1) of the Copyright Act only apply to works.
4. This section lists the information which must be recorded when copying a work under s. 30.2(1) of the Copyright Act, when this information must be recorded, and what must be done with it.
5. This section is similar to s.4, but deals with records kept under s.30.21(6) of the Copyright Act.
6 and 7. These sections relate to requirements that the patron be informed that copies can only be used for research or private study.
8. This section outlines the conditions under which self-serve photocopiers can operate in archives.

RECORDS KEPT UNDER SECTION 30.2 OF THE ACT

3. In respect of activities undertaken by a library, an archive or a museum under subsection 30.2(1) of the Act, section 4 applies only to the reproduction of works.

4. (1) Subject to subsection (2), a library, an archive or a museum, or a person acting under the authority of one, shall record the following information with respect to a copy of a work that is made under section 30.2 of the Act:

   (a) the name of the library, archive or museum making the copy;
   (b) if the request for a copy is made by a library, archive or museum on behalf of a person who is a patron of the library, archive or museum, the name of the library, archive or museum making the request;
   (c) the date of the request; and
   (d) information that is sufficient to identify the work, such as
      (i) the title,
      (ii) the International Standard Book Number,
      (iii) the International Standard Serial Number,
      (iv) the name of the newspaper, the periodical or the scholarly, scientific or technical periodical in which the work is found, if the work was published in a newspaper, a periodical or a scholarly, scientific or technical periodical,
      (v) the date or volume and number of the newspaper or periodical, if the work was published in a newspaper or periodical,
      (vi) the date or volume and number of the scholarly, scientific or technical periodical, if the work was published in a scholarly, scientific or technical periodical, and
      (vii) the numbers of the copied pages.

   (2) A library, an archive or a museum, or a person acting under the authority of one, does not have to record the information referred to in subsection (1) if the copy of the work is made under subsection 30.2(1) of the Act after December 31, 2003.

   (3) A library, an archive or a museum, or a person acting under the authority of one, shall keep the information referred to in subsection (1)

      (a) by retaining the copy request form; or
      (b) in any other manner that is capable of reproducing the information in intelligible written form within a reasonable time.

   (4) A library, an archive or a museum, or a person acting under the authority of one, shall keep the information referred to in subsection (1) with respect to copies made of a work for at least three years.

   (5) A library, an archive or a museum, or a person acting under the authority of one, shall make the information referred to in subsection (1), with respect to copies made of a work, available once a year to one of the following persons, on request made by the person in accordance with subsection (7):

      (a) the owner of copyright in the work;
(b) the representative of the owner of copyright in the work; or
(c) a collective society that is authorized by the owner of copyright in the work to grant licences on their behalf.

(6) A library, an archive or a museum, or a person acting under the authority of one, shall make the information referred to in subsection (1) available to the person making the request, within 28 days after the receipt of the request or any longer period that may be agreed to by both of them.

(7) A request referred to in subsection (5) must be made in writing, indicate the name of the author of the work and the title of the work, and be signed by the person making the request and include a statement by that person indicating that the request is made under paragraph (5)(a), (b) or (c).

RECORDS KEPT UNDER SUBSECTION 30.21(6) OF THE ACT

5. (1) An archive, or a person acting under the authority of one, shall record the following information with respect to a copy of a work that is made under subsection 30.21(5) of the Act:
   (a) the name of the archive making the copy;
   (b) the name of the person requesting the copy or, if the request for a copy is made by another archive on behalf of a person who is a patron of the other archive, the name of the patron and the archive making the request;
   (c) the date of the request; and
   (d) information that is sufficient to identify the work copied.

(2) An archive, or a person acting under the authority of one, shall keep the information referred to in subsection (1)
   (a) in a record maintained by the archive of the names of all individuals who have had access to the work in question;
   (b) by retaining the copy request form; or
   (c) in any other manner that is capable of reproducing the information in intelligible written form within a reasonable time.

(3) An archive, or a person acting under the authority of one, shall keep the information referred to in subsection (1) with respect to copies made of a work for at least three years.

(4) An archive, or a person acting under the authority of one, shall make the information referred to in subsection (1), with respect to copies made of a work, available, on request in writing, to
   (a) the author of the work;
   (b) the owner of copyright in the work; or
   (c) the representative of the author or owner of copyright.

(5) An archive, or a person acting under the authority of one, shall inform a person requesting a copy of a work under subsection 30.21(5) of the Act, in writing, at the time of the request, or if the person has registered as a patron of the archive, at the time of registration, of the fact that the archive will make the information referred to in subsection (1) available, on request, to the persons referred to in paragraphs (4)(a) to (c).
PATRONS OF ARCHIVES

6. (1) If a person requests a copy of a work from an archive under section 30.21 of the Act and the person has registered as a patron of the archive, the archive shall inform the patron in writing at the time of registration
(a) that any copy is to be used solely for the purpose of research or private study; and
(b) that any use of a copy for a purpose other than research or private study may require the authorization of the copyright owner of the work in question.
(2) If a person requests a copy of a work from an archive under section 30.21 of the Act and the person has not registered as a patron of the archive, the archive shall inform the person in writing at the time of the request
(a) that any copy is to be used solely for the purpose of research or private study; and
(b) that any use of a copy for a purpose other than research or private study may require the authorization of the copyright owner of the work in question.

STAMPING OF COPIED WORKS

7. A library, archive or museum, or a person acting under the authority of one, that makes a copy of a work under section 30.2 or 30.21 of the Act shall inform the person requesting the copy, by means of text printed on the copy or a stamp applied to the copy, if the copy is in printed format, or by other appropriate means, if the copy is made in another format,
(a) that the copy is to be used solely for the purpose of research or private study; and
(b) that any use of the copy for a purpose other than research or private study may require the authorization of the copyright owner of the work in question.

NOTICE

8. An educational institution, a library, an archive or a museum in respect of which subsection 30.3(2), (3) or (4) of the Act applies shall ensure that a notice that contains at least the following information is affixed to, or within the immediate vicinity of, every photocopier in a place and manner that is readily visible and legible to persons using the photocopier:
"WARNING!
Works protected by copyright may be copied on this photocopier only if authorized by
(a) the Copyright Act for the purpose of fair dealing or under specific exceptions set out in that Act;
(b) the copyright owner; or
(c) a licence agreement between this institution and a collective society or a tariff, if any.

For details of authorized copying, please consult the licence agreement or the applicable tariff, if any, and other relevant information available from a staff member.
The Copyright Act provides for civil and criminal remedies for infringement of copyright."

Finally, a provision relating to the national archives:

**Limits/privileges with respect to archives and acquisition of material:**

*The National Archives of Canada Act, R.S., 1985, c. 1 (3rd Supp.):*

(2) The Archivist may do such things as are incidental or conducive to the attainment of the objects and functions of the National Archives of Canada and, without limiting the generality of the foregoing, may

(a) acquire records or obtain the care, custody or control of records;

**Self-Service photocopiers**

These decisions are not directly related to archives, but could certainly have an impact on them, in so far as they relate to “authorization”. Canada has not followed recent Australian jurisprudence on authorization, recently re-affirmed by the Supreme Court in CCH.

Kellock J. (p.11):"Unless what is done by a defendant is to sanction, approve or countenance actual performance, it cannot be said, in my opinion, that it has "authorized" performance.”

*CCH Canadian Ltd. v. Law Society of Upper Canada, 2004 SCC 13 at paras. 40-42*

The trial judge declined to deal with this issue, in part because of the limited nature of the evidence on this question. The Federal Court of Appeal, relying in part on the Australian High Court decision in Moorhouse v. University of New South Wales, [1976] R.P.C. 151, concluded that the Law Society implicitly sanctioned, approved or countenanced copyright infringement of the publishers' works by failing to control copying and instead merely posting a notice indicating that the Law Society was not responsible for infringing copies made by the machine's users.

With respect, I do not agree that this amounted to authorizing breach of copyright. *Moorhouse, supra*, is inconsistent with previous Canadian and British approaches to this issue. See D. Vaver, *Copyright Law* (2000), at p. 27, and McKeown, supra, at p. 21-108. In my view, the *Moorhouse* approach to authorization shifts the balance in copyright too far in favour of the owner's rights and unnecessarily
interferes with the proper use of copyrighted works for the good of society as a whole.

Applying the criteria from *Muzak, supra*, and *De Tervagne, supra*, I conclude that the Law Society's mere provision of photocopiers for the use of its patrons did not constitute authorization to use the photocopiers to breach copyright law.

First, there was no evidence that the photocopiers had been used in a manner that was not consistent with copyright law. As noted, a person does not authorize copyright infringement by authorizing the mere use of equipment (such as photocopiers) that could be used to infringe copyright. In fact, courts should presume that a person who authorizes an activity does so only so far as it is in accordance with the law. Although the Court of Appeal assumed that the photocopiers were being used to infringe copyright, I think it is equally plausible that the patrons using the machines were doing so in a lawful manner.

Second, the Court of Appeal erred in finding that the Law Society's posting of the notice constitutes an express acknowledgement that the photocopiers will be used in an illegal manner. The Law Society's posting of the notice over the photocopiers does not rebut the presumption that a person authorizes an activity only so far as it is in accordance with the law. Given that the Law Society is responsible for regulating the legal profession in Ontario, it is more logical to conclude that the notice was posted for the purpose of reminding the Great Library's patrons that copyright law governs the making of photocopies in the library.

Finally, even if there were evidence of the photocopiers having been used to infringe copyright, the Law Society lacks sufficient control over the Great Library's patrons to permit the conclusion that it sanctioned, approved or countenanced the infringement. The Law Society and Great Library patrons are not in a master-servant or employer-employee relationship such that the Law Society can be said to exercise control over the patrons who might commit infringement: see, for example, *De Tervagne, supra*. Nor does the Law Society exercise control over which works the patrons choose to copy, the patron's purposes for copying or the photocopiers themselves.

In summary, I conclude that evidence does not establish that the Law Society authorized copyright infringement by providing self-service photocopiers and copies of the respondent publishers' works for use by its patrons in the Great Library. I would allow this ground of appeal.

David Vaver states (in Chapter 7(B)(12)(d) of *Copyright Law*) that the courts’ approach to self-service photocopiers at libraries, archives and museums seems to mirror the British one: authorization means sanctioning, approving or granting or purporting to grant authority. The Australian approach, by contrast, includes merely countenancing, permitting or even condoning infringements.
CANADA: PHASE II REPORT

Canadian Research on the Legal Treatment of Archives

Prepared by Tara Berish, Christine Stecura & David Lametti

McGill Centre for IP Policy

For the Columbia University, Legal Treatment of Archives Project

9 November 2005
A. Copyright Analysis

1) Are there judicial decisions in your country addressing publishers’ or archives’ liability with respect to documents included in the archives’ collections that infringe copyright?

Answer:

There are no cases which directly address this question. However, Zamacois v. Douville [1943] 2 D.L.R. 257 [Zamacois] contains a comment which might be illuminating. In this case, a newspaper was found to have infringed copyright. The plaintiffs sought (amongst other things) an order to have the copies of the newspaper which contained the infringing work returned to the plaintiff. The order was denied, on the grounds that these works formed part of the newspaper’s archives, would not be sold, and would remain in the possession of the defendants.

It is not clear from the decision whether the public had access to the archives, but the implication seems to be that material which infringes copyright can be held in an archive on the assumption that the public will not generally have easy access to it. It is also interesting to note that, in this case, the infringing party was also the holder of the archival material, and therefore, liability must be, in some sense, shared.

A more recent case, Robertson v. The Thomson Corporation et al., [2004] O.J. No. 4029 [Robertson] addresses a similar question. Robertson deals more explicitly with some of the questions which are addressed merely in passing in Zamacois. In Robertson, the plaintiff (Robertson) sued the Toronto Globe and Mail for copyright infringement. In addition, she sought a restraining order on behalf of Globe and Mail employees, in the aim of preventing the inclusion of their works in the newspapers’ electronic databases (sometimes referred to in the case as its archives).

The main question in this case is whether the newspaper’s arrangement and selection of articles (the evidence of its skill and judgment in creating a compilation) are preserved when the content is transferred to its electronic databases. Although Robertson has the copyright over her own work, the Globe has the copyright over its compilation. It will retain this copyright protection even if the medium of the compilation is altered, but to the extent that the compilation itself is altered, Robertson can sue for unauthorized reproduction of her work. In this case, the court holds that the Globe’s electronic database is not protected because the newspaper’s original arrangement of the articles has not been preserved and a substantial part of the newspaper has not been reproduced within it. In addition, a CD-ROM database is found to be beyond copyright protection as the search engine allows users to access articles from several newspapers at once, thus going beyond the original format and content of the printed version of the Globe. The Globe and Mail is, therefore, found guilty of infringing copyright – there is no discussion of the archives’ liability per se. We must bear in mind, however, that this may not be the final word on the subject, as leave to appeal the decision to the Supreme Court of Canada has been granted.
a) What, if any, distinctions do courts articulate between the roles of publishers and of archives in these cases?

**Answer:** Both Zamacois and Robertson present difficulties in properly answering this question, as they both involve defendants who are simultaneously the publishers and “archivists” of the works involved. However, the trend seems to indicate that it would be unlikely that an archive would be held responsible for the infringing actions of the publisher. In addition, although the court in Robertson found that the plaintiff did not have standing to invoke the right to restrain publication, this right would be available to other plaintiffs in the future. This might affect the archives’ holdings, even if the archive is never found liable for infringement.

b) Does the publisher’s liability depend on the extent to which the publisher exercises control over the contents and maintenance of archives?

**Answer:** In the cases we examined, the publishers have exercised complete control over the archives in question, and, in fact, are really the same body. In these cases, the liability seems to attach to the publishing aspect of the entity, rather than the archiving aspect. It is quite likely that this would be the case in different circumstances, but there are no existing cases which support this opinion.

c) Does archives’ liability depend on the extent to which it controls the acquisition and maintenance of the offending material? Does liability depend on the extent to which the archives make the material accessible to the public? Does the archives’ liability depend on any other factors?

**Answer:** There are no cases which address these questions. However, according to s. 38.1(6)(b) of the Copyright Act, R.S.C. 1985, c. C-42 an archive which is sued under conditions described in s. 38.2 of the Copyright Act is not liable for statutory damages – instead, it is liable for “a maximum amount equal to the amount of royalties that would have been payable to the society in respect of the reprographic reproduction”, under certain conditions:

38.2

38.2(1) **Maximum amount that may be recovered**

An owner of copyright in a work who has not authorized a collective society to authorize its reprographic reproduction may recover, in proceedings against an educational institution, library, **archive** or museum that has reproduced the work, a maximum amount equal to the amount of royalties that would have been payable to the society in respect of the reprographic reproduction, if it were authorized, either

(a) under any agreement entered into with the collective society; or
(b) under a tariff certified by the Board pursuant to section 70.15.

38.2(2) **Agreements with more than one collective society**

Where agreements respecting reprographic reproduction have been signed with more than one collective society or where more than one tariff applies or where
both agreements and tariffs apply, the maximum amount that the copyright owner may recover is the largest amount of the royalties provided for in any of those agreements or tariffs.

38.2(3) Application
Subsections (1) and (2) apply only where
(a) the collective society is entitled to authorize, or the tariff provides for the payment of royalties in respect of, the reprographic reproduction of that category of work; and
(b) copying of that general nature and extent is covered by the agreement or tariff.

2) Have litigants in your country agreed to settlements in respect of claims of copyright infringement that would affect the contents, maintenance, or public accessibility of material contained in archives?

Answer: Despite our best efforts we were not able to obtain such anecdotal information.

3) Have publishers of archives in your country sought to avoid potential liability by removing material that may infringe copyright, without waiting to be notified (or sued) by persons claiming to be injured by the material?

Answer: This anecdotal information could not be obtained; however the policy of the National Library of Canada is to balance the interests between copyright owners and the interest of the public served by reasonable access.

4) Does your country’s copyright law, or other law (whether statutory or case law) provide any moral rights such as a “right of withdrawal” that could affect archives’ ability to retain an author’s work?

Answer: There are provisions within the Copyright Act, R.S.C. 1985, c. C-42 which deal with moral rights, although we have not found any such provisions in any other Canadian legislation. We have provided the provisions, along with comments where appropriate, below:

Moral rights are defined in s.2 of the Copyright Act:

2. Definitions

... "moral rights" means the rights described in subsection 14.1(1);
...
Section 14.1 of the *Copyright Act* provides the overall framework for moral rights within the act:

**Part I -- Copyright and Moral Rights in Works**

**Moral Rights**

14.1(1) **Moral rights**
The author of a work has, subject to section 28.2, the right to the integrity of the work and, in connection with an act mentioned in section 3, the right, where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym and the right to remain anonymous.

14.1(2) **No assignment of moral rights**
Moral rights may not be assigned but may be waived in whole or in part.

14.1(3) **No waiver by assignment**
An assignment of copyright in a work does not by that act alone constitute a waiver of any moral rights.

14.1(4) **Effect of waiver**
Where a waiver of any moral right is made in favour of an owner or a licensee of copyright, it may be invoked by any person authorized by the owner or licensee to use the work, unless there is an indication to the contrary in the waiver.

In Part III of the *Copyright Act* (Infringement of Copyright and Moral Rights and Exceptions to Infringement), you will find provisions relating to the infringement of moral rights, and copyright more generally:

28.1

**28.1 Infringement generally**
Any act or omission that is contrary to any of the moral rights of the author of a work is, in the absence of consent by the author, an infringement of the moral rights.

28.2

**28.2(1) Nature of right of integrity**
The author's right to the integrity of a work is infringed only if the work is, to the prejudice of the honour or reputation of the author,
(a) distorted, mutilated or otherwise modified; or
(b) used in association with a product, service, cause or institution.

**28.2(2) Where prejudice deemed**
In the case of a painting, sculpture or engraving, the prejudice referred to in subsection (1) shall be deemed to have occurred as a result of any distortion, mutilation or other modification of the work.

**28.2(3) When work not distorted, etc.**
For the purposes of this section,
(a) a change in the location of a work, the physical means by which a work is exposed or the physical structure containing a work, or
(b) steps taken in good faith to restore or preserve the work.
shall not, by that act alone, constitute a distortion, mutilation or other modification of the work.

Part IV of the Copyright Act describes the remedies which are available to a copyright holder, and asserts that the same remedies are available for the infringement of moral rights:

34.  
34(1) Copyright  
Where copyright has been infringed, the owner of the copyright is, subject to this Act, entitled to all remedies by way of injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law for the infringement of a right.

34(2) Moral rights  
In any proceedings for an infringement of a moral right of an author, the court may grant to the author or to the person who holds the moral rights by virtue of subsection 14.2(2) or (3), as the case may be, all remedies by way of injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law for the infringement of a right.

34(3) Costs  
The costs of all parties in any proceedings in respect of the infringement of a right conferred by this Act shall be in the discretion of the court.

34(4) Summary proceedings  
The following proceedings may be commenced or proceeded with by way of application or action and shall, in the case of an application, be heard and determined without delay and in a summary way:  
(a) proceedings for infringement of copyright or moral rights;  
(b) proceedings taken under section 44.1, 44.2 or 44.4; and  
(c) proceedings taken in respect of  
(i) a tariff certified by the Board under Part VII or VIII, or  
(ii) agreements referred to in section 70.12.

34(5) Practice and procedure  
The rules of practice and procedure, in civil matters, of the court in which proceedings are commenced by way of application apply to those proceedings, but where those rules do not provide for the proceedings to be heard and determined without delay and in a summary way, the court may give such directions as it considers necessary in order to so provide.

34(6) Actions  
The court in which proceedings are instituted by way of application may, where it considers it appropriate, direct that the proceeding be proceeded with as an action.

34(7) Meaning of "application"  
In this section, "application" means a proceeding that is commenced other than by way of a writ or statement of claim.

Miscellaneous Provisions:  
- Section 33 of the Copyright Act describes how to assess compensation for acts done before recognition (by statute or treaty) of copyright or moral rights.
Section 14.2 describes the term during which moral rights subsist in a work, as well as their succession after the author’s death.

Section 64 describes exceptions to infringement relating to industrial designs and topographies. These exceptions apply equally to copyright and moral rights.

Section 64.2 provides greater certainty by asserting that certain activities relating to computer programs may constitute copyright or moral right infringement.

a) If so, are there any judicial decisions which address such moral rights in the context of an author or publisher wishing to remove offending material from a work contained in a library or archives’ collection?

Answer: No, there are no judicial decisions which address this question.

b) Have there been any disputes between authors and publishers (or between authors and libraries/archives) regarding the author’s moral rights in which the author wishes to remove a work from the archives’ collection, to alter the way in which the work is displayed or accessed, or to alter the work itself? If so, how have the parties resolved such disputes?

Answer: Robertson v. The Thompson Corp. et al. (see question 1, above), looks like fertile ground for this discussion. However, the court stated explicitly that moral rights were not the subject of the appeal in that case (see para. 37).

c) Can any such moral rights be contracted away?

Answer: Section 14.1 of the Copyright Act, which is reproduced under question 4 above, contains the provisions relating to waiver of moral rights. According to these provisions, it is possible to waive one’s moral rights, but they cannot be assigned. Specifically, the Act states that assignment of copyright does not constitute a waiver of moral rights.
Part B – Other Substantive Legal Areas

1) Could you briefly summarize the bodies of law (other than copyright and related rights that may be relevant to decisions by publishers or libraries/archives to remove materials from archival collections or databases (e.g., libel/defamation, privacy, censorship/national security)?

Answer:

In our research, we examined three major areas which might have an effect on an archive or library’s decision to remove materials from the collections or databases: access to information/privacy law, libel/defamation, and censorship/national security. We found no evidence from any of these bodies of law that an archive of library would be held liable for holding offending material or making it available to the public. It seems that once material is in an archive, it is most likely there to stay.

2) Are there judicial decisions in your country addressing publishers’ or archives’ liability with respect to allegedly offending material contained in the archives’ collections?

Answer:

Access to information/Protection of Privacy:

As mentioned in the updated first half of the project, access to information and privacy law may have some effect on how archives or libraries operate, and interact with materials. However, as Beatty v. Canada (Attorney General) (F.C.) [2005] 1 F.C.R. 327 shows, it is unlikely that these laws would require that materials be removed from the archive, as any material which potentially infringed on a person’s right to privacy would not be given to the Archive in the first place.

British Columbia (Attorney General) v. British Columbia (Information & Privacy Commissioner) 2004 BCSC 1597 provides evidence of such a conclusion. In this case, a request was made by Mr. Hayes to obtain the incomplete draft report of the Smith Commission of Inquiry into the affairs of the Nanaimo Commonwealth Holding Society (NCHS). The B.C. Archives denied the order, and Mr. Hayes launched a review of that order. A delegate of the Information & Privacy Commissioner overturned that order, and ordered instead that the archives process Mr. Hayes’ request. The question before the court is whether, indeed, that request should be processed. The court found that since the material requested was a “draft decision of a person acting in a quasi-judicial capacity” (para 82), it should not form part of the archives’ holdings. As such, the Archives were not required to pursue their request to obtain this information any further.

While on first glance it seems that these cases are dealing with the acquisition of material, on further reflection one realizes that cases like these preempt the discussion
of withdrawal altogether. Because anything that might offend privacy laws will not make it into the archive to begin with, there are no concerns about having to withdraw material later. It remains to be seen what would happen if this initial process failed to weed out offending material - however, we believe that the responsibility for such a situation would likely rest with the provider of information, rather than with the Archives themselves.

Most of the Privacy and Access to Information acts (the provincial versions of which are often found within the same statute) in Canada have provisions which refer to public archives. For the most part, these provisions create a general exception for public archives and libraries to the requirements of the rest of the statutes. Since there is not really any case law on these provisions, however, it is difficult to know how these fairly broad exceptions would play out in a practical sense. Basically, what these schemes seem to point to is a fair amount of autonomy given to Archives to carry out their purposes. These purposes (and their limitations), are, of course, outlined in the *Library and Archives of Canada Act*, S.C. 2004, c. 11. Please see Appendix A for provisions.

**Defamation/libel/slander:**

*Hiltz & Seamone Co. v. Nova Scotia (Attorney General)*, 44 C.L.R. (2d) 15, 172 D.L.R. (4th) 488 is the only case we found which discusses the question, and even here we must glean what we can quite indirectly. In this case, a defamatory report and letter were placed in the municipal library (which was open to the public), and thus made available to the general public. The court, however, does not even consider the fact that the library might be liable for this. Instead, the placement of the defamatory material in the library is considered an instance of publication by the publisher itself. This fact was considered in assessing the damages to be awarded against the publisher, but the library’s possible liability was never discussed.

This appears to be the general approach taken by Canadian courts in such instances. There is little case law on the subject, as the fact that potentially defamatory material has been put in an archive or library is usually mentioned only in passing.

Much of the case law regarding the dissemination of defamatory material in Canada seems to have been influenced by *Vizetelly v. Mudie's Select Library*, [1900] 2 Q.B. 170, an English case. This case was cited in *Slack v. Ad-Rite Associates Ltd.*, 1998 CarswellOnt 4997 which, although it is only a lower court case, is quite informative with respect to the law on innocent dissemination of defamatory material. According to this case, a person who has only a passive or subordinate role in disseminating the material will not be found liable for their part in doing so (paras 16-17):

“In general, every person who takes part in the publication of defamatory material bears responsibility for its publication, including writers, editors, printers and distributors. However, a person who acts merely as a distributor
may be able to rely on the defense of innocent dissemination. In *The Law of Defamation in Canada* (Toronto: Carswell, 1987) at pages 283-4, Brown explains the defense:

Persons who play a "subordinate role" in the dissemination of defamatory material, such as vendors of books, magazines, and newspapers, or carriers, librarians and other distributors are not liable for its publication where they are totally ignorant of the defamatory contents of the material, and have no reason to suspect it is libelous... [emphasis added]

“The rationale underlying this defense is that distributors have no opportunity to read all the material that passes through their hands: see *Goldsmith v. Sperrings Ltd.* [1977] 1 W.L.R. 478 (Eng. C.A.). Likewise, liability does not affect persons in the chain of distribution who do only mechanical or menial acts: see *Lobay v. Workers & Farmers Publishing Assn.*, [1939] 2 D.L.R. 272 (Man. Q.B.)

“17 In the leading case of *Vizetelly v. Mudie's Select Library*, [1900] 2 Q.B. 170 (Eng. C.A.) at 180, Romer, L.J. stated:

...I think that, as regards a person who is not the printer or the first or main publisher of a work which contains a libel, but has only taken ... a subordinate role in disseminating it, in considering whether there has been publication of it by him, the particular circumstances under which he disseminated the work must be considered. If he did it in the ordinary way of his business, the nature of the business and the way it was conducted must be looked at; and, if he succeeds in shewing (1.) that he was innocent of any knowledge of the libel contained in the work disseminated by him, (2.) that there was nothing in the work or the circumstances under which it came to him or was disseminated by him which ought to have led him to suppose that it contained a libel, and (3.) that, when the work was disseminated by him, it was not by any negligence on his part that he did not know that it contained the libel, then, although the dissemination of the work by him was prima facie a publication of it, he may nevertheless, on proof of the before-mentioned facts, be held not to have published it.”

While this case does not address the question of an archive or library’s responsibility in disseminating defamatory material, it seems likely that, under this doctrine, such an institution would be seen as having a subordinate role in disseminating it, and thus would not be found liable for doing so. We have not found any case law to contradict such a hypothesis.
**Censorship/national security**

State infringement of freedom of expression in libraries is justified when in pursuit of an objective that is pressing and substantial. A Canadian court has upheld state censorship of library materials related to the promotion of illicit drug use. *Iorfida v. MacIntyre* [1994] O.J. No. 2293.

a) **What, if any, distinctions do courts in your country articulate between the roles of publishers and of archives?**

*Answer:* As mentioned above (particularly in the section relating to defamation and libel), it is far more likely that a publisher will be found liable for any offending material which might be found in an archive than the archive itself. Of course, the fact that in some cases (such as *Robertson v. Thompson Corp.*.) the publisher and the archive will be the same person/entity could confuse the situation, however, one could argue that it is really the publishing role which attracts the liability, as the archive in such cases is generally a passive recipient of material chosen by the publisher.

b) **According to these decisions or other laws of your country, does the publisher’s liability depend on the extent to which the publisher exercises control over the contents and maintenance of the archives? Does the publisher’s liability depend on any other factors?**

*Answer:* We have found nothing more specific to this question than the general principles outlined above.

c) **According to these decisions or other laws of your country, does the archives’ liability depend on the extent to which it controls the acquisition and maintenance of the offending material? Does liability depend on the extent to which the archives make the material accessible to the public? Does the archives’ liability depend on any other factors?**

*Answer:* We have not found any cases which have found archives liable for holding or distributing offending material.

d) **Have courts in your country imposed remedies against publishers who did not remove material containing allegedly offending material from archives over which they maintained control? If so, what types of remedies were imposed and under what circumstances?**
Answer:

Although these questions are meant to deal with areas other than copyright law, this area was the only one which had anything to say on the subject, and therefore, we thought it might be useful to discuss here.

In both Zamacois v. Douville and Robertson v. Thomson Corp. (supra at page 1) courts were faced with situations in which publishers held allegedly offending material in archives over which they maintained control.

In Zamacois, the court decided not to grant an injunction because the offense consisted of printing an “isolated article which is not susceptible of being repeated” (para 120), and not to order the delivery of copies of the newspaper to the plaintiff because the copies were not on sale, and merely formed part of the newspaper’s archives (para 119). The court ordered that the case be remitted to the Registrar in order to establish which profits (if any) were realized through the violation of the plaintiff’s copyright, and thus to determine the question of damages. The court also stated that costs would be considered after further adjudication. Finally, the court stated that the plaintiff was not entitled to punitive or exemplary damages, as the infringement of copyright was not accompanied by fraud or malice.

In Robertson the court denied the plaintiff’s request for injunctive relief on behalf of employees of the Globe, saying she did not have standing to assert it. The reason for this was that an injunction to restrain publication is a personal right, which could not be asserted by Robertson on behalf of other employees. Since Robertson did not make a claim for damages, this question was not discussed. However, it is obvious from the Copyright Act that damages are available for an infringement of copyright:

34.
34(1) Copyright
Where copyright has been infringed, the owner of the copyright is, subject to this Act, entitled to all remedies by way of injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law for the infringement of a right.

34(2) Moral rights
In any proceedings for an infringement of a moral right of an author, the court may grant to the author or to the person who holds the moral rights by virtue of subsection 14.2(2) or (3), as the case may be, all remedies by way of injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law for the infringement of a right.

34(3) Costs
The costs of all parties in any proceedings in respect of the infringement of a right conferred by this Act shall be in the discretion of the court.
e) Have courts in your country imposed remedies against archives that retain or make available this material? If so, what types of remedies were imposed and under what circumstances?

Answer: No

3) Have litigants in your country agreed to settlements that would affect the contents, maintenance, or public accessibility of material contained in archives? If so, what types of settlements have been reached, and under what circumstances?

Answer: Despite our best efforts we were not able to obtain such anecdotal information.

4) Have publishers, aggregators or archives in your country sought to avoid potential liability by removing allegedly offending material, without waiting to be notified (or sued) by persons claiming to be injured by the material? If so, under what circumstances?

Answer: Despite our best efforts we were not able to obtain such anecdotal information.

5) What is the potential liability in your country for publication of allegedly offending material?

Answer: We were not exactly sure how to answer this question. For the most part, however, the potential liability will depend on the area of law which is involved. With respect to access to information/privacy law, public bodies will be subject to judicial review for infringing action.

With respect to defamation law, one could be liable for general damages (which are to be assessed at large, and therefore do not really allow for aggravated damages in the regular sense). The law, case law, however, puts a limit on non-pecuniary damages. Punitive damages may also be awarded, as may be special damages, contemptuous damages, and nominal damages. Finally, injunctions, including interlocutory injunctions and quia timet relief, may be granted against publishers of defamatory material (although the primary award remains damages). (*Canadian Encyclopedic Digest*, paras. 433 - 497, WestlaweCarswell)

a) Is there any statutory or case law authority in your country for reducing damages in the case of nonprofit libraries or archives acting in good faith?

Answer: The only statutory provisions we have found which allow for any limitation in damages for libraries or archives are those found in the *Copyright Act*, and are laid out above. These do not require the archive or library to have acted in good faith. We have not found any case law which addresses this question.
b) What factors do courts in your country use in assessing damages?

**Answer:** According to the *Canadian Encyclopedic Digest* (available on WestlawCarswell), when assessing damages for defamation, “The basic principle is that libel awards, like damage awards for other wrongs, should be based upon a rational attempt to measure in money terms the loss and injury the plaintiff has suffered” (para 443). One should also take into account:

1) Whether or not the plaintiff’s reputation was injured
2) The demeanor and conduct of all parties involved
3) The conduct of the plaintiff (before publication, as well as between publication and the verdict)
4) His or her position and standing
5) His or her possible emotional distress
6) Any expense incurred by the plaintiff in counteracting the defamation
7) Whether or not the plaintiff’s primary role is vindication (which seems to be more relevant if the defendant is unrepentant)
8) Adequacy, absence or refusal or a retraction or apology, and other factors related thereto
9) The nature of the libel, and how closely it touches the plaintiff personally
10) Since the defamation of a professional is regarded as being particularly serious, comments which reflect on a person professionally rather than personally will be considered more harmful
11) Defamation based on distortions of the truth will be considered worse than that which is entirely invented
12) Extent of publication
13) Mode of publication
14) The likelihood of publication to strangers, who would be more likely to believe it
15) Mental distress to the person defamed
16) Whether or not people other than the defendant have made similar allegations (may be a mitigating factor)
17) Measures taken by the plaintiff to rehabilitate his or her reputation will not affect the quantum of damages
18) If the plaintiff had a bad reputation previous to the making of the defamatory statements, this may reduce the quantum of damages awarded
19) “The court may take into account the fact that the defendant has already recovered damages against the proprietor of a newspaper of which the plaintiff is an editor, for an article that was part of the same general series of circumstances in which the defendant uttered the libel currently being sued on.” (para. 458)
20) Defamation of a political figure must draw more restraint when assessing damages, in order to encourage free speech, and in light of the fact that more public debate is available to counteract such statements (paras 443-460)
We have not found any information on factors relating to damages for breach of access to information/privacy law, most likely because any such breaches will generally be subject to judicial review. In addition, we found very little relevant information on censorship and state security.

6) Are there any industry standards or accepted practices in your country, other than withdrawal of an article, for addressing offending material contained in archives or databases? For example, are there any practices concerning legends or disclaimers to accompany offending material in order to continue to make it available?

Answer: In the case of legal databases, where a publication ban has been imposed by courts after a judgment has been released, upon receiving notice of the publication ban, the archivist will remove the judgment from their online service.

Archivists generally will review text to remove personal information, such as Social Insurance Numbers, Pension account numbers, driver’s license information, as well as any identifying information before publishing the documents.

Policies are in place to initial the names of parties involved (i.e. James Gordon Smith becomes J.G.S.) when a case involves young people charged under the Youth Criminal Justice Act, adoption proceedings, child protection proceedings, sexual offences and mental incompetence.

Mr. Daniel Boyer, Wainwright Civil Law Librarian of the McGill University Nahum Gelber Law Library explained, however, that there is no policy for removing offensive (ex. anti-Semitic) material from the McGill archives.
C. Contract Analysis

1) Do contract provisions between archives and publishers in your country commonly address the issue of removing a work from the collection? If so, how do they do so? Do they address labeling, hyperlinking or any other means of dealing with the offending material other than removing it?

**Answer:** Despite our best efforts we were not able to obtain the relevant contractual information.

2) To what extent might a publisher avoid liability related to the offending material through its contractual arrangements with a library or archives in your country? Do publishers’ contracts commonly contain provisions aimed at limiting or avoiding liability for offending material?

**Answer:** Despite our best efforts we were not able to obtain the relevant contractual information.

3) Have courts in your country enforced contractual obligations to remove or withdraw archived material? If so, under what circumstances?

**Answer:** Despite our best efforts we were not able to obtain the relevant contractual information.

4) To what extent do contracts in your country between publishers, databases, and libraries allow libraries to create their own archival or preservation copies of material to which libraries have access through databases? If contracts allow libraries or archives to make such copies, are there limitations as to when libraries or archives may create those preservation/archival copies? (E.g., may a library allow its users to use those copies or are they strictly for “back-up” purposes in the event the publisher no longer provides access)?

**Answer:** Mr. Daniel Boyer, Wainwright Civil Law Librarian of the McGill Nahum Gelber Law Library, provided us with the following information: “Contracts, or [as they are known in the information industry] licenses forbid such practices in their boilerplate provisions. Note that when it comes to licensing information the US & Canada are one jurisdiction in that we must use American contracts and with little wiggle room.”
Appendix A: Provisions from Access to Information and Privacy Acts

- From Federal statutes:

  **Access to Information Act**, R.S.C. 1985, c. A-1, s. 68
  68. Act does not apply to certain materials
  This Act does not apply to
  (a) published material or material available for purchase by the public;
  (b) library or museum material preserved solely for public reference or
      exhibition purposes; or
  (c) material placed in the Library and Archives of Canada, the National Gallery
      of Canada, the Canadian Museum of Civilization, the Canadian Museum of
      Nature or the National Museum of Science and Technology by or on behalf of
      persons or organizations other than government institutions.

  **Privacy Act**, R.S.C. 1985, c. P-21, s. 10
  8(2) Where personal information may be disclosed
  Subject to any other Act of Parliament, personal information under the control
  of a government institution may be disclosed
  …
  (i) to the Library and Archives of Canada for archival purposes;

  …

  8(3) Personal information disclosed by Library and Archives of Canada
  Subject to any other Act of Parliament, personal information under the custody
  or control of the Library and Archives of Canada that has been transferred
  there by a government institution for historical or archival purposes may be
  disclosed in accordance with the regulations to any person or body for research
  or statistical purposes.

  10(1) Personal information to be included in personal information banks
  The head of a government institution shall cause to be included in personal
  information banks all personal information under the control of the government
  institution that
  (a) has been used, is being used or is available for use for an administrative
      purpose; or
  (b) is organized or intended to be retrieved by the name of an individual or by
      an identifying number, symbol or other particular assigned to an individual.

  10(2) Exception for Library and Archives of Canada
  Subsection (1) does not apply in respect of personal information under the
  custody or control of the Library and Archives of Canada that has been
  transferred there by a government institution for historical or archival
  purposes.

  69(1) Act does not apply to certain materials
  This Act does not apply to
  (a) library or museum material preserved solely for public reference or
      exhibition purposes; or
(b) material placed in the Library and Archives of Canada, the National Gallery of Canada, the Canadian Museum of Civilization, the Canadian Museum of Nature or the National Museum of Science and Technology by or on behalf of persons or organizations other than government institutions.

- From the Northwest Territories (identical provisions can be found in Nunavut S.N.W.T. 1994, c. 20):
  
  **Access to Information and Protection of Privacy Act**
  
  S.N.W.T. 1994, c. 20
  
  **3(1) Scope of the Act**
  
  This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:
  
  …
  
  (e) material placed in the Northwest Territories Archives by or for a person other than a public body;
  
  …
  
  **48. When personal information may be disclosed**
  
  A public body may disclose personal information
  
  …
  
  (m) to the Northwest Territories Archives for archival purposes;

- From the Yukon:
  
  **Access to Information and Protection of Privacy Act**
  
  R.S.Y. 2002, c. 1, s. 2
  
  **2. Scope of this Act**
  
  2(1)
  
  This Act applies to all records in the custody, or under the control of a public body, including court administration records, but does not apply to the following
  
  …
  
  (e) material placed in the Yukon Archives by or for a person or agency other than a public body; or
  
  …
  
  **36. Disclosure of personal information**
  
  A public body may disclose personal information only
  
  …
  
  (k) to the Yukon Archives;
  
  …
  
  **39. Disclosure for archival or historical purposes**
  
  The Yukon Archives may disclose personal information for archival or historical purposes if
  
  (a) the disclosure would not be an unreasonable invasion of personal privacy under section 25(3);
(b) the disclosure is for historical research and is in accordance with section 38;
(c) the information is in a record that has been in existence for 100 or more years; or
(d) the information is about a person who has been dead for 25 years or more.

- From Alberta:
  **Freedom of Information and Protection of Privacy Act**  
  R.S.A. 2000, c. F-25

  3. **Scope of this Act**
  This Act
  (a) is in addition to and does not replace existing procedures for access to information or records,
  (b) does not affect access to records
  (i) deposited in the Provincial *Archives* of Alberta, or
  (ii) deposited in the *archives* of a public body
  that were unrestricted before the coming into force of this Act,

  4. **Records to which this Act applies**
  4(1)
  This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:

  (j) material that has been deposited in the Provincial *Archives* of Alberta or the *archives* of a public body by or for a person or entity other than a public body;

  16. **Disclosure harmful to business interests of a third party**
  16(1)
  The head of a public body must refuse to disclose to an applicant information
  (a) that would reveal
    (i) trade secrets of a third party, or
    (ii) commercial, financial, labour relations, scientific or technical information of a third party,
  (b) that is supplied, explicitly or implicitly, in confidence, and
  (c) the disclosure of which could reasonably be expected to
    (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
    (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
    (iii) result in undue financial loss or gain to any person or organization, or
    (iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.
The head of a public body must refuse to disclose to an applicant information about a third party that was collected on a tax return or collected for the purpose of determining tax liability or collecting a tax.

Subsections (1) and (2) do not apply if
(a) the third party consents to the disclosure,
(b) an enactment of Alberta or Canada authorizes or requires the information to be disclosed,
(c) the information relates to a non-arm's length transaction between a public body and another party, or
(d) the information is in a record that is in the custody or under the control of the Provincial Archives of Alberta or the archives of a public body and has been in existence for 50 years or more.

Disclosure of personal information

A public body may disclose personal information only

... 
(p) to the Provincial Archives of Alberta or to the archives of a public body for permanent preservation,

Disclosure of information in archives

The Provincial Archives of Alberta and the archives of a public body may disclose
(a) personal information in a record that
(i) has been in existence for 25 years or more if the disclosure
(A) would not be an unreasonable invasion of personal privacy under section 17, or
(B) is in accordance with section 42,

or
(ii) has been in existence for 75 years or more;
(b) information other than personal information in a record that has been in existence for 25 years or more if
(i) the disclosure of the information would not be harmful to the business interests of a third party within the meaning of section 16,
(ii) the disclosure of the information would not be harmful to a law enforcement matter within the meaning of section 20, and
(iii) the information is not subject to any type of legal privilege under section 27.

[Repealed 2003, c. 21, s. 12(a)(iii)(B).]

Records management

On the recommendation of the Information and Privacy Commissioner, the Standing Committee may make an order
(a) respecting the management of records in the custody or under the control of the Office of the Information and Privacy Commissioner, including their creation, handling, control, organization, retention, maintenance, security,
preservation, disposition, alienation and destruction and their transfer to the Provincial Archives of Alberta;

- From Newfoundland and Labrador:

  **Access to Information and Protection of Privacy Act**
  S.N. 2002, c. A-1.1, s. 5 (Newfoundland and Labrador)

  **5. Application**
  **5(1)**
  This Act applies to all records in the custody of or under the control of a public body but does not apply to

  …

  (i) material placed in the custody of the Provincial Archives of Newfoundland and Labrador by or for a person, agency or organization other than a public body;
  (j) material placed in the archives of a public body by or for a person, agency or other organization other than the public body; or

  …

  The British Columbia statute contains a very similar provision regarding business interests of third parties (see below, s. 21).

  **27. Disclosure harmful to business interests of a third party**
  **27(1)**
  The head of a public body shall refuse to disclose to an applicant information
  (a) that would reveal
     (i) trade secrets of a third party, or
     (ii) commercial, financial, labour relations, scientific or technical information of a third party;
  (b) that is supplied, implicitly or explicitly, in confidence; and
  (c) the disclosure of which could reasonably be expected to
     (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
     (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
     (iii) result in undue financial loss or gain to any person or organization, or
     (iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.
  **27(2)**
  The head of a public body shall refuse to disclose to an applicant information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax.
  **27(3)**
  Subsections (1) and (2) do not apply where
  (a) the third party consents to the disclosure; or
b) the information is in a record that is in the custody or control of the Provincial Archives of Newfoundland and Labrador or the archives of a public body and that has been in existence for 50 years or more.


39(1)
A public body may disclose personal information only

(m) to the Provincial Archives of Newfoundland and Labrador, or the archives of a public body, for archival purposes;

...

39(2)
The disclosure of personal information by a public body shall be limited to the minimum amount of information necessary to accomplish the purpose for which it is disclosed.

42. [Unproclaimed Text -- 32-42] -- Disclosure for archival or historical purposes
The Provincial Archives of Newfoundland and Labrador, or the archives of a public body, may disclose personal information for archival or historical purposes where
(a) the disclosure would not be prohibited by section 30;
(b) the disclosure is for historical research and is in accordance with section 41;
(c) the information is about an individual who has been dead for 20 years or more; or
(d) the information is in a record that has been in existence for 50 years or more.

73. Regulations
The Lieutenant-Governor in Council may make regulations

... (l) providing for the retention and disposal of records by a public body if the Archives Act does not apply to the public body;

...

- From British Columbia:
  Freedom of Information and Protection of Privacy Act
  R.S.B.C. 1996, c. 165, s. 21
  3. Scope of this Act
  3(1)
  This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:
  ...
  (f) material placed in the archives of the government of British Columbia by or for a person or agency other than a public body;
(g) material placed in the **archives** of a public body by or for a person or agency other than a public body;

…

21. **Disclosure harmful to business interests of a third party**

21(1)
The head of a public body must refuse to disclose to an applicant information
(a) that would reveal
(i) trade secrets of a third party, or
(ii) commercial, financial, labour relations, scientific or technical information
of or about a third party,
(b) that is supplied, implicitly or explicitly, in confidence, and
(c) the disclosure of which could reasonably be expected to
(i) harm significantly the competitive position or interfere significantly with
the negotiating position of the third party,
(ii) result in similar information no longer being supplied to the public body
when it is in the public interest that similar information continue to be
supplied,
(iii) result in undue financial loss or gain to any person or organization, or
(iv) reveal information supplied to, or the report of, an arbitrator, mediator,
labour relations officer or other person or body appointed to resolve or inquire
into a labour relations dispute.

21(2)
The head of a public body must refuse to disclose to an applicant information
that was obtained on a tax return or gathered for the purpose of determining tax
liability or collecting a tax.

21(3)
Subsections (1) and (2) do not apply if
(a) the third party consents to the disclosure, or
(b) the information is in a record that is in the custody or control of the
archives of the government of British Columbia or the archives of a public
body and that has been in existence for 50 or more years.

33.2 **Disclosure inside Canada only**
A public body may disclose personal information referred to in section 33
inside Canada as follows:

…

(j) to the archives of the government of British Columbia or the archives of a
public body, for archival purposes;

36. **Disclosure for archival or historical purposes**
The archives of the government of British Columbia, or the archives of a
public body, may disclose personal information or cause personal information
in its custody or under its control to be disclosed for archival or historical
purposes if
(a) the disclosure would not be an unreasonable invasion of personal privacy
under section 22,
(b) the disclosure is for historical research and is in accordance with section 35,
(c) the information is about someone who has been dead for 20 or more years, or
(d) the information is in a record that has been in existence for 100 or more years.

- In Quebec:
  An Act respecting Access to documents held by public bodies and the Protection of personal information, R.S.Q., c. A-2.1
  2. Exception
  This Act does not apply to
  (1) the acts and the register of civil status;
  (2) the registers and other documents kept in registry offices for publication purposes;
  (3) [Repealed 2000, c. 42, s. 95.]
  (3.1) the register instituted under the Act respecting the legal publicity of sole proprietorships, partnerships and legal persons (1993, chapter 48);
  (4) private archives referred to in section 27 of the Archives Act (1983, chapter 38.)
  73. Destruction
  When the object for which nominative information was collected has been achieved, the public body shall destroy the document, subject to the Archives Act (chapter A-21.1).
  79. Restriction
  Sections 64 to 66 and 67.3 to 77 do not apply to documents transferred to the Keeper of the Archives nationales du Québec in accordance with the Archives Act (chapter A-21.1).
  Proposed Amendment -- 79, first paragraph
  Restriction
  Sections 64 to 66 and 67.3 to 77 do not apply to documents transferred to Bibliothèque et Archives nationales in accordance with the Archives Act (chapter A-21.1).

- From Ontario:
  Freedom of Information and Protection of Privacy Act
  R.S.O. 1990, c. F.31
  65(1) Application of Act
  This Act does not apply to records placed in the Archives of Ontario by or on behalf of a person or organization other than an institution or a health information custodian as defined in the Personal Health Information Protection Act, 2004.
  Municipal Freedom of Information and Protection of Privacy Act
  R.S.O. 1990, c. M.56
  52(2) Non-application of Act
  This Act does not apply to records placed in the archives of an institution by or
on behalf of a person or organization other than the institution.

- From Prince Edward Island
  Freedom of Information and Protection of Privacy Act
  S.P.E.I. 2001, c. 37, s. 3
  3. Scope of this Act
  This Act
  …
  (b) does not affect access to records deposited in the Public Archives and Records Office before the coming into force of this Act;
  …
  4(1) Records to which this Act applies
  This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:
  …
  (f) material that has been deposited in the Public Archives and Records Office by or for a person or entity other than a public body;
  …
  • See also s. 21 of the British Columbia act (above), reproduced as s. 14 here
  37(1) Disclosure of personal information
  A public body may disclose personal information only
  …
  (n) to the Public Archives and Records Office or to the archives of a public body for permanent preservation;
  …
  40. Disclosure for research purposes
  The Public Archives and Records Office and the archives of a public body may disclose, for research purposes,
  (a) personal information that is
  (i) in a record that has been in existence for 25 years or more if
  (A) the disclosure would not be an unreasonable invasion of personal privacy under section 15,
  (B) the disclosure is made in accordance with section 39, or
  (C) the information is about an individual who has been dead for 25 years or more, or
  (ii) in a record that has been in existence for 75 years or more; and
  (b) information, other than personal information, that is in a record that has been in existence for 25 years or more if
  (i) the disclosure would not be harmful to the business interests of a third party within the meaning of section 14,
  (ii) the disclosure would not be harmful to a law enforcement matter within the meaning of section 18,
(iii) the information is not subject to any type of legal privilege under section 25, and
(iv) access to the information is not restricted or prohibited by another Act of Prince Edward Island or Canada.

- From Saskatchewan:

  The Freedom of Information and Protection of Privacy Act
  S.S. 1990-91, c. F-22.01, s. 3

  3. Application
  3(1)
  This Act does not apply to:
  (a) published material or material that is available for purchase by the public;
  (b) material that is a matter of public record; or
  (c) material that is placed in the custody of The Saskatchewan Archives Board by or on behalf of persons or organizations other than government institutions.

  23. Confidentiality provisions in other enactments
  23(1)
  Where a provision of:
  (a) any other Act; or
  (b) a regulation made pursuant to any other Act;
  that restricts or prohibits access by any person to a record or information in the possession or under the control of a government institution conflicts with this Act or the regulations made pursuant to it, the provisions of this Act and the regulations made pursuant to it shall prevail.

  23(3)
  Subsection (1) does not apply to:

  …

  (b) section 27 of The Archives Act, 2004;

  …

  29. Disclosure of personal information
  29(1)
  No government institution shall disclose personal information in its possession or under its control without the consent, given in the prescribed manner, of the individual to whom the information relates except in accordance with this section or section 30.

  29(4)
  Subject to any other Act or regulation, the Provincial Archivist may release personal information that is in the possession or under the control of The Saskatchewan Archives Board where, in the opinion of the Provincial Archivist, the release would not constitute an unreasonable invasion of privacy.

- From the Manitoba Act (most provisions are the same as those found in other provincial acts – except the following):
The Freedom of Information and Protection of Privacy Act
S.M. 1997, c. 50
48. Disclosure of records more than 100 years old
The head of a public body or the archives of a public body may disclose personal information in a record that is more than 100 years old.

- Nova Scotia also contains similar provisions to other provincial statutes: See Freedom of Information and Protection of Privacy Act, S.N.S. 1993, c. 5
A. Copyright Analysis

1. Judicial Decisions

Has the Supreme Court of Canada reviewed *Robertson v. The Thomson Corporation et al.?* When is a decision expected? Have any other courts rendered similar or conflicting decisions?

This decision is still pending. As of December 12, 2006, the Supreme Court of Canada has heard the case but judgment has been reserved/rendered with written reasons to follow. It is unclear when the written reasons will become available although the average time between hearing and written reasons is five months.

Our research has not found any similar or conflicting decisions within Canadian jurisprudence.

a) Distinctions between publishers and archives

You commented that, though the plaintiff in *Robertson* “did not have standing to invoke the right to restrain publication, this right would be available to other plaintiffs in the future.” Later - in discussing censorship/national security - you say that this was because an injunction to restrain publication is a personal right, which could not be asserted by Robertson on behalf of other employees. But why could she not assert the right on her own behalf? Was she not an employee of the Globe, or is one employee not sufficient (i.e., does there have to be a “critical mass” to shift the balance of harm to warrant an injunction)? This wasn't clear to us.

The representative plaintiff lacked standing to assert a claim for injunctive relief because her representative claim, in regards to the right to restrain publication under Section 13(3), was merely hypothetical.

As written by the Court of Appeal:

“The motion judge held that the representative plaintiff did not have standing to assert a claim for injunctive relief on behalf of employees of the Globe who were writers because this remedy is a personal right that must be asserted by the employee. No employee has in fact sought an injunction from the Globe or complained about his works being made available on Info Globe Online.” (2001), 15 C.P.R. (4th) 147 at 104.

On appeal, Robertson contended that this ruling limited access to justice and judicial economy as permitted under the *Class Proceedings Act*. However, the Court of Appeal ruled that the motion judge’s ruling should not be interpreted as that “... a class actions can never be brought by employees of a newspaper to restrain publication of their
work,” but rather that in regards to standing “[a] representative plaintiff, just like any litigant, cannot put forward a hypothetical claim and seek judgment from the court.” (2001), 15 C.P.R. (4th) 147 at 107.

The court did not examine whether Robertson could assert the right on her own behalf because Robertson sought a restraining order on behalf of the employees of the Globe and not on behalf of herself.

Furthermore, the reasoning did not explain whether there was a critical mass requirement to warrant an injunction, nor whether she was an employee for the purposes of s.13(3).

Also, presumably it was the distribution of CD-ROMs to which plaintiffs objected. Was there any discussion of the newspapers' internal archive, its format or the uses to which it is put? Is it correct to assume nothing in the opinion sheds further light on how a third-party archive would be affected, regardless of the form in which it maintains or supplies material from archives? (More on this under c), below.)

The plaintiffs challenged both the distribution of CD-ROMs as well as two electronic databases on which her articles were put on.

The first database is Info Globe Online which is a database used by the Globe for storing back issues, accessible by subscription to the Info Globe Dow Jones Interactive publications library. Info Globe Online is distinct from the electronic edition of the Globe.

The second database is the Canadian Periodical Index in electronic form (“CPI.Q”) which is a searchable database that received content from Info Globe Online.

In its decision, the Ontario Court of Appeal held that the inclusion of a keyword search does not destroy the original arrangement and selection of the collective work, nor does it mean that the individual copyright is violated:

“Thus, the fact that one can isolate and view an article from the collective work by the use of electronic software, does not necessarily mean that the dominant or overall purpose of the collective work, a newspaper is lost . . . What is happening in each of these analogous cases is that the user is engaging in a form of management of the newspaper, the collective work, through the use of technology.” (2001), 15 C.P.R. (4th) 147 at 67.

However, the court also found that in the case of the two databases, pursuant to s.3 of the Copyright Act, “‘[a] substantial part’ of the Globe newspaper is not ‘reproduced’ in the databases.” at 87. In the case of Info Globe Online, the court wrote that “[t]he database is a subscription search service that relies on a group of individual articles not necessarily connected to the newspaper and extending beyond the Globe’s content.” (2001), 15 C.P.R. (4th) 147 at 82. Similarly, in regards to the CPI.Q database, the court reasoned that while the article availability of the original print edition of the Canadian Periodical Index
was limited to the publisher’s selection, the CPI.Q database allowed for the entire database to be searched. (2001), 15 C.P.R. (4th) 147 at 84. Therefore, in both cases, the copyright for each database does not extend beyond the original copyright in the initial print work.

There is no discussion of third-party liability in the decision.

b) Archives' liability as a function of the extent of publisher control over archives

When you say “liability seems to attach to the publishing aspect of the entity, rather than the archiving aspect,” are you suggesting that third-party archives would not be similarly liable if they were distributing the offending material, e.g., if they had purchased one of the CD-ROMs at issue, and the publishers' distribution of the CD-ROMs was later enjoined? (We recognize that this is speculative, but we wanted to get your thoughts.)

This is an interesting question. Since the cases I examined never named the archiving function (which would inherently, I believe, involve some sort of distribution) as the infringer, I would assume that the closer an archive stuck to its traditional functions, the safer it would be from liability. However, if an archive began to perform functions which seemed more like those of a publisher (for instance, owning the copyright to the given materials), it is possible that it would then become liable for the offending material itself. Once again, however, I found no cases where an archive had been found liable for the distribution of offending material, so it is difficult to say where the line would be drawn.

c) Archives' liability as a function of control over acquisition and maintenance of offending material

One of the things we're looking at is whether a library's or archive's potential for liability is increased if it makes material publicly available selectively, e.g., if it were to put up on its server material that had been removed by the publisher or intermediary with whom it has contracted for access. (For example, if the library learned that a publisher had removed a potentially libelous or factually incorrect article from its own publicly available database, and the library then obtained the article from its back up copy, and put the article on its own server for scholarly use.) Is there anything in your laws that shed light on this scenario?

In fact, this is a particularly difficult question to answer, as most of the private archives discussed in the case law were, in essence, alter egos of the publishers who provided them with materials. There is nothing, however, in Canadian law which sheds light on the scenario you describe.

Concerning s. 38.2(1): What would happen if the article is not available for copying through a collective society because the problematic nature of the article had cause the rightholder to withdraw authorization to reproduce the article? Would this have any bearing on the archive's liability, or is the mere fact that the article could theoretically
have been authorized for reproduction enough to get the library etc. off the hook for reproduction?

Generally, a rightholder is presumed to be represented by the collective society unless the rightholder specifically opts out. Once the rightholder has specifically opted out of the collective society and withdrawn authorization of the article to be reproduced, it does not seem possible for the offending reproducer to hide behind the presumption of the collective society.

2. Moral Rights

You discuss only the attribution and integrity rights so we assume there is no “right of withdrawal” under Canadian copyright law, but please confirm.

This is correct. The “right of withdrawal,” as understood to mean the right to withdraw a work from public availability, is not explicitly available under the Canadian copyright regime. Nor is a “right of destination”.

B. Other Substantive Legal Areas

1. Other substantive legal areas.

You stated that three major areas might have an effect on an archive or library's decision to remove materials from the collections or databases: access to information/privacy law, libel/defamation, and censorship/national security. Could you please provide a brief summary/overview of the law in each of these areas (e.g., the elements of a cause of action)? It would be helpful to compare the law in Canada to that of the other jurisdictions we are studying.

Access to Information/Privacy Law

There are two relevant statutes: The Privacy Act (R.S., 1985, c. P-21) and the Personal Information Protection and Electronic Documents Act [“PIPEDA”] (2000, c.5).

The Privacy Act applies to the public sector. Under the Privacy Act, Canadians can access information collected about them by the government, as well as challenge the correctness of this information. The purpose of the Act is to protect the privacy of individuals pertaining to the information collected concerning them by the government and to facilitate access by individuals about this information. Generally, under this Act, the information must be collected from the individual herself and must be recent and accurate. It must be collected by a government institution in relation to a program or activity and can only be used for the purpose it was originally solicited for. Finally, any complaints or amendments should be directed to the Privacy Commissioner of Canada for investigation who oversees the Act. The Privacy Act is available at http://laws.justice.gc.ca/en/P-21/index.html.
PIPEDA applies to the private sector. The purpose of this act is to govern the personal information gathered, used and disclosed by the private sector, with a particular attention paid to technological facilitation of collection of information. PIPEDA mandates that information can only be gathered where it is for a reasonable purpose and solely for the purpose it was gathered for. It must be both recent and accurate and is subject to inspection and correction by the consumer. With very limited exception, the information must be gathered only with the knowledge and consent of the consumer. Where the consumer disputes the collection, storage or use of personal information, there are three levels of resolution: First, the individual should seek redress from the organization itself. Second, failing a satisfactory solution, the individual can file a complaint with the Privacy Commissioner, who has the power to investigate the claim. Finally, if the matter is still not resolved, the individual may bring suit to the Federal Court. The full text of PIPEDA is available at http://laws.justice.gc.ca/en/p-8.6/93196.html.

**Libel/Defamation**

Each province has its own laws pertaining to libel and slander. Defamation law is comprised of both libel and slander but only in Ontario, British Columbia and Saskatchewan are they treated differently from each other in that in slander cases the plaintiff must show damages. A defamation suit can be taken by or against corporation or an individual, which could include Internet Service Providers, webmasters, etc. Generally, a cause of action in defamation consists of demonstrating that the defendant used defamatory words in referring to the plaintiff and these words were published to a third party. The standard is reasonableness. Possible defenses include consent, absolute or qualified privilege, fair comment, innocent dissemination (a possible defense for Internet postings) and justification by the truth of the statement. [Source: Canadian Internet Policy and Public Interest Clinic, “Defamation and SLAPS,” http://www.cippic.ca/en/faqs-resources/defamation/]

Jurisdiction and Internet defamation is not clear in Canada however recent case law suggests a limited approach. In *Bangoura v. Washington Post* (2004), 235 D.L.R. (4th) 564, the Ontario Court of Appeal reversed the lower court finding which held that the case followed the subject from jurisdiction to jurisdiction. The Ontario Court of Appeal held that there was no connection between the forum selected and the Plaintiff:

“[i]t was not reasonably foreseeable [when the defamatory statement was published] that Mr. Bangoura would end up as a resident of Ontario three years later. To hold otherwise would mean that a defendant could be sued almost anywhere in the world based upon where a plaintiff may decide to establish his or her residence long after the publication of the defamation.” (2004), 235 D.L.R. (4th) 564 at 25.

In addition, pursuant to s. 298 of the *Criminal Code*, defamatory libel is an indictable offence. It is defined as “matter published, without lawful justification or excuse that is likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or that is designed to insult the person of or concerning whom it is
published.” Furthermore, s.300 states that “[e]veryone who publishes a defamatory libel that he knows is false is guilty of an indictable offence and liable to imprisonment for a term not exceed five years.”

**Censorship/National Security**

State infringement of freedom of expression in libraries is justified when in pursuit of an objective that is pressing and substantial. This was illustrated in *Iorfida v. MacIntyre* [1994] O.J. No. 2293, where an Ontarian court has upheld state censorship of library materials related to the promotion of illicit drug use.

As well, there has been some controversy in Canadian libraries regarding censorship and web filtering. In 2003, employees of the Ottawa Public Library filed a ‘hostile workplace’ grievance with their union complaining that the non-filter policy of the Library potentially exposed them to pornography and other types of offensive media in the workplace. The Library eventually approved a motion that placed filtering software on all terminals but with an option for users 16 years and older to remove the filter. [Source: Canadian Internet Policy and Public Interest Clinic, “Internet Censorship in Public Libraries.” http://www.cippic.ca/en/faqs-resources/internet-censorship-public-libraries/#faq]

Could you also include a brief discussion of liability for mistake of fact in a journal article, how-to guide, or the like? (In the U.S., for example, the publisher of a book or article containing a factual error is generally held not liable for any resultant harm - e.g., poisoning due to mushrooms erroneously identified in a book as safe to eat - due to the “chilling effect” this might have on speech; however, there is a narrow line of cases dealing with air navigation charts where publishers have been held liable.) This is one of the reasons frequently cited by publishers for removing materials from archives.

We have found no Canadian literature or case law which addresses the situation described above. There are, however, several cases concerning newspapers’ liability for libelous statements. For instance, *Gilles E. Néron Communication Marketing Inc. v. Chambre des notaires du Québec*, [2004] 3 S.C.R. 95, 2004 SCC 53, a Canadian Supreme Court case using Quebec law, makes it clear that the veracity of a statement is only one factor to be examined in deciding whether a newspaper liable for defamation. One must also consider the context within which the statement is made. For example, in this case, the court found that the newspaper deliberately attempted to mislead the public, and thus must be held liable for its statements. Similarly, in *Fulton v. West End Times Ltd.*, [1998] B.C.J. No. 7, a newspaper was found liable for defamation when it published the wrong person’s name in an article. Finally, the court in *Getty v. Calgary Herald*, [1991] A.J. No. 304 quoted Brown’s “The Law of Defamation”, which stated that the truth or innocence of a statement is relevant in assessing the quantum of damages for liability for defamation.
The difficulty with these cases are that they apply specifically in the context of defamation, and thus do not really address the *accidental* quality of an error, per se, as the truth or falsity of the statement is not necessarily the most important factor to examine in the determination of liability. Furthermore, a newspaper may be considered to be qualitatively different from the types of literature you mention, due to the pace and frequency of its publication.

There is, however, one case which addresses the situation you discuss more directly. Unfortunately, it is a lower court decision, which has not been reviewed, to our knowledge. In *Haidar v. 613413 Saskatchewan Ltd.*, [1999] S.J. No. 406, the court found that a telephone directory which published the number of a business’s competitor should be held liable for the plaintiff’s losses of business and customer goodwill.

### 2. Judicial Decisions

In your discussion of defamation law, you explained that the court in *Hiltz & Seamone Co. v. Nova Scotia (Attorney General)* did not impose any liability on the library where the defendant had placed a defamatory report and letter in the municipal library. However, did the court require the library to remove the defamatory materials from the library's collection?

At both the trial and the appellate level, neither the Supreme Court of Nova Scotia (see (1997), 164 N.S.R. (2d) 161), nor the Nova Scotia Court of Appeal (see (1998), 167 N.S.R. (2d) 353) required the library to remove the defamatory materials from their collection.

### C. Contract Analysis.

#### 4. Rights under license to make archival copies.

In your response to question 4, you reported that Daniel Boyer, a librarian at the McGill law library, stated that contracts or licenses generally forbid making or retaining archival or preservation copies of material accessed through databases. It is our understanding that such provisions are increasingly common in contracts between U.S. libraries and information providers. Although this privilege may not be offered by publishers in the first instance, libraries and archives (particularly large ones or those acting through consortia) are able to negotiate for it. On the other hand, we are told that libraries usually don't avail themselves of this privilege even if contractually entitled to do so, due to practical constraints. We wonder if you could ask Mr. Boyer if he has seen any indications of such a trend in Canada.
Mr. Boyer’s response:

“This right can indeed be negotiated and sometimes is. I would agree with the statement below ie. that Libraries do NOT avail themselves of this even when they can.”
1. You say that where moral rights are waived in favor of an owner or licensee of the work, the owner – and anyone who is authorized by the owner or licensee – may invoke the moral rights attached to the work. On whose behalf? The creator? The owner? How does this differ from a transfer of moral rights?

Actually, s. 14.1(4) of the Copyright Act provides that the owner or licensee (or anyone authorized by the owner of licensee to use the work) may invoke the *waiver* of moral rights, not the rights themselves. This would explain any confusion over the distinction between the assignment of the rights, and their waiver. Although the subsequent owner or licensee may not invoke the rights themselves, they may invoke the waiver, allowing them to, for instance, refuse to attribute the work in question to the author. Similarly, any subsequent assignment of copyright would, essentially, carry the waiver along with it.

Moral rights cannot be assigned. Section 14.1(4)’s “it” refers to the *waiver* (and not the moral rights). Thus the *waiver* may be invoked by a person authorized by the owner or licensee of the copyright, unless the waiver contains an indication to the contrary.

*Copyright Act (R.S. 1985, c. C-42)*

14.1(4) Effect of waiver

Where a waiver of any moral right is made in favour of an owner or a licensee of copyright, it may be invoked by any person authorized by the owner or licensee to use the work, unless there is an indication to the contrary in the waiver.

2. The report says that any act which could constitute infringement of moral rights is presumed to do so unless there is evidence to the contrary from the author. What about evidence to the contrary from the owner or licensee described above?

Article 28.1 of the *Copyright Act* stipulates that in the absence of the author’s consent, acts or omissions contrary to the moral rights of the author constitute infringement. In the case of the right to integrity, the work is infringed if the work is distorted, mutilated or otherwise modified; or used in association with a product, service, cause or institution to the prejudice of the honour or reputation of the author.

Following the decision in *Snow v. Eaton Centre*, in *Prise de Parole Inc. v. Guérin*, the Federal Court found that determining whether a change was “prejudicial” involves a certain subjective element or judgment on the part of the author so long as it is *reasonably arrived at*. The Court, however, added the requirement of an objective *evaluation of the prejudice, based on public or expert opinion.*

28.1 does not deal with the evidentiary burden of proving the infringement of moral rights, but simply provides that a contravention of the author’s moral rights, without his or her consent, will constitute infringement. It further reinforces the principle that although an author cannot assign his moral rights (thus allowing an assignee to consent to their contravention), he or she can waive them.

Article 28.2 (2) of the Copyright Act applies only to painting, sculpture or engraving. For these works, the prejudice is deemed to have occurred, and is thus not subject to evidence of the above-described subjective and objective elements.

3. If the courts ban publication of a judicial opinion after it has been released do libraries have any recourse to retain it (or retain access to the version of databases that included the opinion after they have removed it)? Do scholars have any way to get access to it?

I could not find any cases that dealt with this question. British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner) [2004] B.C.J. No. 2534 (B.C. Sup. Ct.), however, may prove interesting. This case involved a request for access to an incomplete draft report. The report was prepared by a Commission of Inquiry, which was rescinded before the report was finished, and placed in the BC Archives. The Court found that the Archives were not required to act on the request for access to the draft report. Although much of the decision was based on administrative law principles relating to standards of review, the court also stated that the draft report constituted a “decision”. Moreover, publishing the findings would affect the reputations of those involved, and s. 3(1)(b) of the Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996 was intended to exclude this type of work from a request for access. The Archives’ liability, however, was not discussed.

Once a publication ban is in place, the material is withdrawn from circulation by the archivist. Any diffusion contrary to the ban would leave the institution vulnerable to potential contempt charges.

After the ban is in place, scholars are subject to the limitations placed upon access pursuant to the provisions in the relevant ban or statute. For example, the Youth Criminal Justice Act restricts access to all “records” as defined in s. 2 of the Act to specific classes of individuals enumerated in s. 119(1).


The formal recourses available for third parties (normally the media) to challenge a publication ban are discretionary and exceptional. They are outlined by the Supreme Court of Canada in the following passage from Dagenais v Canadian Broadcasting Corp.:

The judge hearing a motion for a publication ban has the discretion to direct that third parties be given notice and to grant them standing in accordance with the provincial rules
of criminal procedure and the common law principles. If third parties wish to oppose the
motion, they should attend at the hearing, argue to be given status, and if given status,
participate in the motion. When third parties, usually the media, seek to challenge
publication bans ordered by judges under their common law or legislated discretionary
authority, no direct appeal is available through the Criminal Code. If the publication ban
was ordered by a provincial court judge, the third party should make an application for
certiorari to a superior court judge. The common law rule does not authorize publication
bans that limit Charter rights in an unjustifiable manner, so an order implementing such a
ban is an error of law on the face of the record. While certiorari has traditionally been
limited remedially, when a judge exceeds his authority under the common law rule
governing publication bans, the remedies available through a certiorari challenge to the
judge's action should be enlarged to be the same as the remedies that would be available
under the Charter. To challenge a denial of certiorari, third parties should appeal the
superior court judge's decision to the Court of Appeal under s. 784(1) of the Criminal
Code. To challenge a dismissal of an appeal to the Court of Appeal, they should apply for
leave to appeal to the Supreme Court of Canada under s. 40(1) of the Supreme Court Act.
If the publication ban was ordered by a superior court judge, third parties should
challenge the ban by applying for leave to the Supreme Court under s. 40(1). A
publication ban order issued by a superior court judge can be seen as a final or other
judgment of the highest court of final resort in a province or a judge thereof in which
judgment can be had in the particular case. Neither s. 40(3) of the Act nor s. 674 of the
Criminal Code precludes an appeal to the Supreme Court under s. 40(1) in such cases.
. 835 at 837-38.

More generally, this quote from a Canadian Judicial Council Publication may shed some
light on the general approach to publication bans in Canada:

The sub-committee recommends that the ultimate responsibility to ensure that
reasons for judgment comply with publication bans and non-disclosure
provisions should rest with the judge drafting the decision. The sub-committee
recognizes that judges need support in the form of information and resources to
ensure that this responsibility can be carried out. The sub-committee
recommends that the protocol, if adopted, be proposed as a part of the
curriculum of the judgment writing course offered by the National Judicial
Institute. It is also recommended that the Chief Justices in each jurisdiction be
encouraged to provide informational support by maintaining an up to date
document which informs judges of the publication ban and statutory non-
disclosure provisions applicable in their jurisdiction similar to the compendium
appended to the discussion paper. (Open Courts, Electronic Access to Court

4. Can you please tell me the elements of defamation, mistake of fact and invasion of
privacy in Canada?
Defamation:

Under Canadian law, defamation is the act of harming another person’s reputation by saying, writing, or otherwise supplying information about an individual that attacks the person’s character or good name. To establish defamation a plaintiff first has to show that the words complained of were defamatory. This is generally quite easy to do, as any statement which “would have the effect of lowering esteem or respect” for the plaintiff in the minds of the ordinary person would qualify. It is not necessary that these effects be proven, but only that they be possible. In addition, these statements must “reasonably be understood as referring to the plaintiff” and be “published” – communicated or repeated – to at least one third person who “heard it or read it and understood it” in order to qualify as defamatory. A new cause of action arises each time a defamatory statement is repeated.

A finding of defamation must also always be balanced with society’s interest in promoting free speech. Accordingly, several defenses are available in a defamation action. First, the defense of justification is available when the statements made are truthful. Second, the defense of “fair comment” is available in situations where allegedly defamatory comments are merely a matter of opinion, and are identifiable as such by the reasonable reader. Third, certain categories of privilege, such as solicitor-client privilege may protect defamatory comments.

Mistake of Fact:

I am not quite sure what you mean by “mistake of fact” in this context. If you are looking for the elements of a tort or cause of action of “mistake of fact”, I have not come across any evidence that any such tort exists per se in Canada. However, the Canadian Encyclopedic Digest (see Westlaw) states that relief for “mistake” arises in two major contexts: 1) when a transaction, such as a contract, has been invalidated for some mistake, and 2) when a benefit such as a chattel, money or services, has been conferred under a mistaken belief, and must therefore be restored. There is no mention of mistake of fact in a publication, and neither branch of “mistake” seems particularly relevant to the project at hand, but I will provide further information if you are interested.

Invasion of Privacy

Invasion of privacy has a fairly uncertain status in Canadian tort law. Certain provinces provide statutory causes of action in invasion of privacy, but the common law situation is much less clear.

In B.C., a privacy violation will only be made out under the Privacy Act (R.S.B.C. 1996, c. 373) if the following elements are proven:
1) the claimant must enjoy a right to privacy, the scope (“nature and degree”) of which is what is “reasonable in the circumstances”;
2) the nature, incidence and occasion of the defendant’s actions must result in a violation of that right, with all due regard to the relationship between the parties;
3) the violation must have been done willfully, and

Please note that there is no need to prove damages to obtain a remedy under this Act – proof of the invasion of privacy is enough to sustain the action (although to recover money, you would have to show some compensable damages).

Similar legislation exists in Manitoba, Newfoundland and Saskatchewan:

The Privacy Act, C.C.S.M. c. P125 (Manitoba)
Violation of privacy
2(1) A person who substantially, unreasonably, and without claim of right, violates the privacy of another person, commits a tort against that other person.
Action without proof of damage
2(2) An action for violation of privacy may be brought without proof of damage.
Considerations in awarding damages...

Privacy Act, RSNT 1990 CHAPTER P-22 (Newfoundland)
Violation of privacy
3. (1) It is a tort, actionable without proof of damage, for a person, willfully and without a claim of right, to violate the privacy of an individual.

(2) The nature and degree of privacy to which an individual is entitled in a situation or in relation to a matter is that which is reasonable in the circumstances, regard being given to the lawful interests of others; and in determining whether the act or conduct of a person constitutes a violation of the privacy of an individual, regard shall be given to the nature, incidence, and occasion of the act or conduct and to the relationship, whether domestic or other, between the parties.
Violation of privacy
2 It is a tort, actionable without proof of damage, for a person willfully and
without claim of right, to violate the privacy of another person.
Considerations in determining whether there is a violation of privacy

6(1) The nature and degree of privacy to which a person is entitled in any
situation or in relation to any situation or matter is that which is reasonable in the
circumstances, due regard being given to the lawful interests of others.
(2) Without limiting the generality of subsection (1) in determining whether any
act, conduct or publication constitutes a violation of the privacy of a person,
regard shall be given to:
   (a) the nature, incidence and occasion of the act, conduct or publication;
   (b) the effect of the act, conduct or publication on the health and welfare,
or the social, business or financial position, of the person or his family or
relatives;
   (c) any relationship whether domestic or otherwise between the parties to
the action; and
   (d) the conduct of the person and of the defendant both before and after
the act, conduct or publication, including any apology or offer or amends
made by the defendant.

The common law claim to a cause of action in invasion of privacy is much more tenuous.
Currently, there is no specialized tort category for invasion of privacy under the common
law. The courts have not ruled out the possibility of recognizing a separate cause of
action for invasion of privacy; however, courts have not yet ruled that such an action
would succeed, either. This trend with respect to the tort of privacy in the common law
of Canada Ltd., 2006 CanLII 202 (ON S.C.). Indeed, according to Philip H. Osborne in
The Law of Torts, 2nd ed. (Toronto: Irwin Law, 2003), “Many of [the cases which do
exist], however, inhabit the fringes of conventional tort liability and the pleadings
normally include additional allegations of traditional wrongdoing. There are, as yet, only
a few decision on the merits, none of which explores the form, scope, and elements of an
independent common law tort of privacy at any great length” (at 242). Furthermore, most
of these cases are from lower courts, and therefore have little precedential value.
Osborne points out, however, that liability has been imposed in the following privacy-
related circumstances, “unauthorized taping and publication of a private conversation, the
aiming of a surveillance camera into a neighbour’s yard, harassment, and the disclosure
of a sexual assault on an undercover police officer” (at 242).
To date, most courts have vindicated privacy interests through other causes of action such
as trespass and nuisance.
Appendix D

PHASE I REPORT

Questionnaire droit français, le 8 juin 2004

Réponses, Marie Cornu, Directeur de recherches CNRS (CECOJI)

1. a. Do the domestic copyright laws of France contain provisions specifically addressed to archives? Do they define the term “archive”?

Est-ce que les droits d'auteur en France contiennent des dispositions concernant spécifiquement les archives ?


L’article 5 de la directive communautaire précise notamment que les Etats membres ont la faculté de prévoir des exceptions ou limitations au droit de reproduction :

« lorsqu’il s’agit d’actes de reproductions spécifiques effectués par des bibliothèques accessibles au public, des établissements d’enseignement ou des musées ou par des archives, qui ne recherchent aucun avantage commercial ou économique direct ou indirect ».

ou encore (autre exception qui peut concerner les services d’archives audiovisuelles) :

« lorsqu’il s’agit d’enregistrements éphémères d’œuvres effectuées par des organismes de radiodiffusion par leurs propres moyens ou pour leurs propres émissions ; la conservation de ces enregistrements dans les archives officielles peut être autorisée en raison de leur valeur documentaire ».

Ces exceptions ne sont pas obligatoires pour les Etats membres. Ils sont libres de les instituer ou non.

Le projet de loi française de transposition prévoit des dispositions spécifiques qui sont cependant créées au seul bénéfice des institutions en charge du dépôt légal, la Bibliothèque nationale de France, l’Institut national de l’audiovisuel (INA) ou encore le Centre National de la cinématographie. Celles ci pour les besoins de la consultation, de la collecte et de la conservation pourront dans des limites très encadrées procéder librement à certains actes de représentation ou de reproduction (ces exceptions au droit d’auteur seront décrites dans le point 3).
On remarque que ces nouvelles exceptions ne figurent pas dans le corps de règles du Code de la propriété intellectuelle (art ; L122-5 pour les exceptions aux droits d’auteurs) mais dans la loi relative au dépôt légal (aujourd’hui codifiée à l’article L131-1 et suivants du Code du patrimoine). La loi de transposition n’a pas encore été adoptée, mais devrait l’être très prochainement.

**Est-ce que le droit d'auteur en France définit le terme « archive » ?**

Non, le terme d’archives n’est pas défini dans le Code de la propriété intellectuelle.

b. Do any other provisions of French law define the term “archive”?  

**Est-ce qu'il y a d'autres provisions du droit français qui définissent le terme « archive » ?**

Plusieurs textes abordent la question des archives, la loi sur les archives, la loi sur la liberté de communication et la loi sur le dépôt légal. On peut encore citer les dispositions concernant les collections publiques ou les fonds des bibliothèques.

1° les archives en général


« La conservation des archives est organisée dans l’intérêt public tant pour les besoins de la gestion et de la justification des droits des personnes physiques ou morales, publiques ou privées, que pour la documentation historique de la recherche ».

On identifie donc trois fonctions majeures :
- les archives sont des instruments de preuve
- Ils permettent une bonne gestion des services
- Ils constituent une mémoire utile pour la recherche, en particulier la recherche historique.

Le but de cette loi est essentiellement d’organiser la communication des documents publics. Les délais de communication peuvent varier au regard de la nature de l’information contenue. Ces délais peuvent être très longs (jusqu’à 150 ans). La loi aborde en premier lieu les archives publiques mais traite également des archives privées dans la mesure où l’État parfois décide de protéger certaines archives historiques et par ailleurs reçoit en dépôt ou à titre de don ou de legs ou encore acquière des archives d’origine privée, dont la consultation et la conservation peut présenter un intérêt du point de l’histoire et de la recherche. Certaines règles concernent notamment la communication des documents et la possibilité de les reproduire en cas de sortie du territoire.
En dehors de ces points, la question des archives privées peut aussi être réglementée en ce qui concerne la durée de conservation de certains types de documents. Mais de ce point de vue, il n’y a pas de texte général, tout dépend de la nature des documents.

Cette loi contient trois définitions
1) une définition générale des archives :

« Art. L 211-1 du Code du Patrimoine :
« Les archives sont l’ensemble des documents, quels que soient leur date, leur forme et leur support matériel, produits ou reçus par toute personne physique ou morale et par tout service ou organisme public ou privé dans l’exercice de leur activité ».

On remarquera la grande généralité des termes de la loi dont les références majeures sont l’existence d’un support contenant une information, une personne apte à recueillir la masse des documents à l’occasion d’une activité. Ces trois éléments vont permettre, en fonction de leur caractère privé ou public de déterminer la nature des archives, donc leur régime de communication. Il faut aussi relever l’indifférence d’un certain nombre de critères, règles qui ne sont pas sans rappeler les règles relatives à la qualification des œuvres de l’esprit dans la propriété intellectuelle : indifférence de la date (un document est une archive dès qu’il existe, dès sa production, il n’y a pas de critère d’ancienneté comme le connaissent certains systèmes qui distinguent « records » et « archives »), de la forme, du support (il peut s’agir d’un écrit, d’une photographie, d’un enregistrement, d’un support multimédia).

2) Une définition des archives publiques :

Art. L 211-4 :
Les archives publiques sont :
1° Les documents qui procèdent de l'activité de l'Etat, des collectivités locales, des établissements et entreprises publiques ;
2° Les documents qui procèdent de l'activité des organismes de droit privé chargés de la gestion des services publics ou d'une mission de service public ;
3° Les minutes et répertoires des officiers publics ou ministériels (...)”.

3) Une définition des archives privées
L’article L 211-5 du Code du patrimoine ne donne en réalité pas de réelle définition. Elle dit simplement que sont des archives privées tous documents qui ne sont pas des archives publiques. Cette catégorie se dessine donc négativement, d’ou la nécessité de circonscrire précisément le champ des archives publiques. De ce point de vue, un certain nombre de difficultés d’ordre juridique et technique ne manquent pas de se poser, particulièrement dans le domaine des archives politiques ou des archives scientifiques qui sont souvent des fonds mixtes dans lesquels on trouve à la fois des papiers privés et des documents publics.

2° Les archives audiovisuelles
La question des archives de la radio et de la télévision est également abordée dans le droit de la communication audiovisuelle qui traite notamment de la question de la valorisation des fonds d’archives audiovisuelles qui rassemblent les programmes de radio et de télévision diffusés qu’ils soient produits ou achetés (loi du 30 septembre 1986 relative à la liberté de communication réformée par la loi du 1er août 2000). L’Institut National de l’audiovisuel (INA) est investi d’une fonction de conservation et de mise en valeur du patrimoine audiovisuel.

3° Les archives constituées à partir de l’obligation de dépôt légal
Quoique cette loi ne contienne pas le terme d’archives, le texte sur le dépôt légal traite d’un autre type de documents susceptibles de contenir une œuvre de l’esprit. Tout en poursuivant certaines finalités proches de celle de la loi sur les archives 1 (collecte, conservation, constitution et diffusion du patrimoine intellectuel notamment par le moyen de bibliographies nationales, consultation des documents notamment aux fins de recherche), l’ensemble de documents rassemblés ne se définit pas de la même façon. L’obligation de dépôt légal s’impose à toute personne privée ou publique lors de la diffusion au public de tout type de document. La loi en donne la définition :
« les documents imprimés, graphiques, photographiques, sonores, audiovisuels, multimédias, quel que soit leur procédé technique de production, d’édition ou de diffusion, font l’objet d’un dépôt obligatoire, dénommé dépôt légal, dès lors qu’ils sont mis à la disposition du public » (art. L 131-1 du Code du Patrimoine).
Les progiciels, les bases de données, les systèmes experts et les autres produits de l’intelligence artificielle sont soumis à l’obligation de dépôt légal dès lors qu’ils sont mis à la disposition du public par la diffusion d’un support matériel, quel que soit la nature de ce support ».

En principe la référence au document implique l’existence d’un support matériel qui doit être remis aux organismes dépositaires. Mais d’une part, un certain nombre de documents sont collectés par un système d’aspiration des programmes, par exemple en ce qui concerne les programmes audiovisuels.
Par ailleurs, la question de savoir si les sites Web doivent être soumis à l’obligation de dépôt légal est aujourd’hui débattue.
« les documents imprimés, graphiques, photographiques, sonores, audiovisuels, multimédias, quel que soit leur procédé technique de production, d’édition ou de

---

1 La loi sur le dépôt légal est une législation très ancienne qui dès l’origine a une double vocation culturelle et patrimoniale (le premier texte date de François premier) et de contrôle des publications, fonction qui cependant aujourd’hui passe en arrière plan.
Les logiciels, les bases de données sont soumis à l’obligation de dépôt légal dès lors qu’ils sont mis à la disposition du public par la diffusion d’un support matériel, quel que soit la nature de ce support.
« Sont également soumis au dépôt légal les signes, signaux, écrits, images, sons ou messages de toute nature faisant l’objet d’une communication publique en ligne ».

c. Is there otherwise a general understanding of what an archive is, and if so, what is that understanding and what does it derive from? (e.g., does it derive from judicial decisions, industry practice, etc.?)

\[
\text{Y a-t-il d'autre part une notion générale de ce que sont les archives, et si oui, quelle est cette notion et de quoi dérive-t-elle? Par exemple, est-ce qu'elle dérive des décisions judiciaires, de la pratique industrielle, etc. ?}
\]

\[
\text{Voir ci-dessus}
\]

On peut remarquer cependant que, en dépit de son apparente généralité, la loi sur les archives (art. L 211-1 et s.) du Code du patrimoine ne traite pas de l’ensemble des questions liées aux archives et que d’autres textes sont pertinents, sans pour autant utiliser explicitement le terme d’archives. C’est le cas du dépôt légal ou de la loi sur la communication audiovisuelle dans laquelle le sort des archives audiovisuelles est traité en termes de conservation et de mise en valeur. Par ailleurs, d’autres textes pourront éventuellement intervenir, qui encadrent la gestion des musées, ceux-ci pouvant consister en la réunion de collection de documents ou d’archives (par exemple la loi relative aux musées de France, article L 410-1 du Code du patrimoine).

On peut dire que le terme de \textit{document} constitue le dénominateur commun entre plusieurs lois et pourrait être considéré comme un \textit{quasi-synonyme} du terme archives, sous la réserve suivante :

\[
\text{Dans la loi sur les archives, le document désigne le document de base, les archives sont plutôt un ensemble de documents (on en parle au pluriel dans la loi).}
\]

d. Does French copyright law contain provisions of broader application that may nonetheless be relevant to archives (e.g., exceptions or privileges)?

\[
\text{Le droit d'auteur français contient-il des dispositions d'une portée plus large qui peuvent néanmoins être appliquées aux archives? Par exemple, des exceptions ou des prérogatives?}
\]

\[
\text{Oui, en ce qui concerne les prérogatives et la mise en œuvre des exceptions :}
\]

\[
\text{- Les prérogatives}
\]
Le Code de la propriété intellectuelle dispose que toutes les œuvres sont protégées, quelque que soit leur forme, leur genre, leur mérite, leur destination. Dès lors un grand nombre d’archives peuvent être considérées comme des œuvres de l’esprit dès lors qu’elles satisfont au critère d’originalité. Lorsqu’on consulte l’énumération contenue à l’article L 112-2 du Code de la propriété intellectuelle, qui donne une liste des œuvres susceptibles de protection, on observe qu’un certain nombre d’entre elles peuvent être en même temps qualifiées d’archives au sens de la loi sur les archives. C’est le cas, par exemple des écrits en tous genres, des photographies, des dessins, des plans, etc.

Dans les archives publiques, on trouve par exemple les archives scientifiques (archives des chercheurs et enseignants-chercheurs), des archives liées à une activité de création (exemple des maquettes d’architecture ou d’œuvres d’art déposées à l’occasion d’une commande publique).

Par ailleurs, un grand nombre de documents au sens du dépôt légal donnent fréquemment prise soit à des droits d’auteur, soit à des droits voisins (notamment les documents audiovisuels déposés à l’INA) soit aux deux.

En l’occurrence, s’agissant des correspondances, qui sont, par excellence des documents d’archives, la jurisprudence admet depuis fort longtemps leur qualité d’œuvre de l’esprit.

Par ailleurs, on peut citer parmi les décisions reconnaisant la qualité d’œuvre de l’esprit à propos de créations réalisées à partir d’archives, l’arrêt de la cour d’appel de Paris concernant un montage d’images d’archives :

« le fait de choisir dans un fonds d’archives, aussi important que peut l’être celui de la RATP, des documents par définition épars, constituées par des personnes différentes, dans des conditions et à des dates diverses, de sélectionner ceux qui sont susceptibles de s’associer et de les ordonner de telle sorte qu’ils puissent constituer non une succession d’images sans lien entre elles mais un ensemble audiovisuel cohérent, suffit à caractériser une œuvre de l’esprit, reflet de la personnalité de son auteur ( Cour d’appel de Paris, 12 décembre 1995, RIDA, n° 169, p. 273).

Sur les exceptions

Dans la mesure ou les archives sont considérées comme des œuvres, l’ensemble des exceptions a vocation à s’appliquer (exception de citation, copie privée, etc.).

2. To the extent these principles were developed when archives were created and maintained with physical copies, how do they relate to the electronic environment and the manner in which archives (particularly digital archives) currently operate?

Si ces principes ont été développés au temps où les archives contenaient uniquement des documents sous forme physique, comment sont-ils appliqués à l'environnement électronique et à la façon par laquelle les archives, en particulier les archives numériques, fonctionnent actuellement?
Le contexte numérique sans modifier les principes en ce qui concerne l’application du droit d’auteur aux archives, a entraîné quelques aménagements spécifiques ; on peut mentionner l’extension du système de rémunération pour copie privée aux enregistrements numériques et l’interdiction de copie privée des bases de données électronique. Ces dispositions ne concernent pas spécifiquement les archives mais ont une évidente incidence sur les archives électroniques.

Il faut encore mentionner le projet de loi pour la confiance dans l’économie numérique (projet de loi adopté le 13 mai 2004, Sénat, n° 75) qui renforce la responsabilité des « personnes physiques ou morales qui assurent, même à titre gratuit, pour mise à disposition du public par des services de communication au public en ligne, le stockage de signaux, d’écrits, d’images, de sons ou de messages de toute nature » lorsqu’elles ont connaissance du caractère illicite du contenu. Les institutions concernées peuvent être des bibliothèques, des services d’archives ou encore des éditeurs ou associations réunissant les archives d’éditeurs (par exemple en France l’IMEC, institut pour la mémoire de l’édition contemporaine). Informer du contenu illicite, elles auraient l’obligation de retirer le document de la mise en ligne (l’illicéité pouvant être caractérisée en cas de contrefaçon d’une œuvre mais aussi lorsque les contenus portent atteinte à d’autres intérêts privés ou publics, sur la responsabilité, voir point 4). L’entrée en vigueur de ce texte est imminente.

3. What limits or privileges, if any, have courts in France placed on or provided to archives with respect to:

Quelles limites ou prérogatives les tribunaux français ont-ils créée pour les archives concernant:

a. acquisition of material

l’acquisition de documents (y compris autre matériel)

a-a Les procédés spéciaux d’enrichissement des fonds d’archives
Il existe en droit français certains procédés qui permettent à des institutions publiques et certaines institutions privées d’acquérir des archives en dehors des procédés du droit commun:

Le droit de préemption en vente publique, permet à l’Etat, aux collectivités locales, à certaines associations et fondations de se substituer à l’acquéreur, à l’issue des enchères. Ce privilège est applicable très généralement à toutes sortes de catégories de biens culturels dont font partie les archives. Il est par ailleurs explicitement mentionné dans la loi sur les archives (art. L.123-1 et du Code du patrimoine).

D’une façon générale, pour la préemption d’œuvres d’art, notion définie par le décret n° 2001-650 du 19 juillet 2001 relatif aux ventes volontaires de meubles aux enchères publiques, l’article L 123-1 pose le principe de l’exercice du droit de préemption.
« Article L123-1

L'Etat peut exercer, sur toute vente publique d'œuvres d'art ou sur toute vente de gré à gré d'œuvres d'art réalisée dans les conditions prévues par l'article L. 321-9 du code de commerce, un droit de préemption par l'effet duquel il se trouve subrogé à l'adjudicataire ou à l'acheteur.

La déclaration, faite par l'autorité administrative, qu'elle entend éventuellement user de son droit de préemption, est formulée, à l'issue de la vente, entre les mains de l'officier public ou ministériel dirigeant les adjudications ou de la société habilitée à organiser la vente publique ou la vente de gré à gré.

L'officier public ou ministériel chargé de procéder à la vente publique des biens mentionnés au premier alinéa ou la société habilitée à organiser une telle vente en donne avis à l'autorité administrative au moins quinze jours à l'avance, avec toutes indications utiles concernant lesdits biens. L'officier public ou ministériel ou la société informe en même temps l'autorité administrative du jour, de l'heure et du lieu de la vente. L'envoi d'un catalogue avec mention du but de cet envoi peut tenir lieu d'avis. La société habilitée à procéder à la vente de gré à gré des biens mentionnés au premier alinéa notifie sans délai la transaction à l'autorité administrative, avec toutes indications utiles concernant lesdits biens.

La décision de l'autorité administrative doit intervenir dans le délai de quinze jours après la vente publique ou après la notification de la transaction de gré à gré.

Article L123-2

L'Etat peut également exercer ce droit de préemption à la demande et pour le compte d'une collectivité territoriale ou d'une personne morale de droit privé sans but lucratif propriétaire de collections affectées à un musée de France. »

La notion d’œuvres d’art permet aussi de préempter des documents, manuscrits et archives, ces catégories étant mentionnées dans la liste des œuvres d’art.

Plus spécifiquement, le code prévoit que le droit de préemption peut s’exercer sur des documents d’archives privées.

Article L 212-30

Le régime des archives en cas de liquidation judiciaire d'une entreprise est fixé à l'article L. 622-19 du code de commerce ci-après reproduit :


Article L212-31
Tout officier public ou ministériel chargé de procéder à la vente publique d'archives privées ayant ou non fait l'objet d'une décision de classement au titre des archives historiques ou toute société habilitée à organiser une telle vente, doit en donner avis à l'administration des archives au moins quinze jours à l'avance et accompagne cet avis de toutes indications utiles sur ces documents. Cet avis précise l'heure et le lieu de la vente. L'envoi d'un catalogue avec mention du but de cet envoi tiendra lieu d'avis.

En cas de vente judiciaire, si le délai fixé à l'alinéa précédent ne peut être observé, l'officier public ou ministériel, aussitôt qu'il est désigné pour procéder à la vente, fait parvenir à l'administration des archives les indications ci-dessus énoncées.

**Article L212-32**

S'il l'estime nécessaire à la protection du patrimoine d'archives, l'État exerce, sur tout document d'archives privées mis en vente publique, un droit de préemption par l'effet duquel il se trouve subrogé à l'adjudicataire.

**Article L212-33**

L'État exerce également le droit de préemption prévu à l'article L. 212-32 à la demande et pour le compte des collectivités territoriales et des fondations reconnues d'utilité publique. Le même droit est exercé par la Bibliothèque nationale de France pour son propre compte.

En cas de demandes concurrentes, l'autorité administrative détermine le bénéficiaire.

D'autres mécanismes permettent l'enrichissement de fonds d'archives : la **dation en paiement** (remise d'archives en paiement d'une dette fiscale, art. 1716 bis du Code Général des impôts). Des archives scientifiques ont ainsi rejoint les collections publiques. La donation d'œuvres d'art dans des conditions encadrées ouvrent droit à des systèmes d’exonération fiscale (art ; 1131 du Code Général des impôts).

La **reproduction de documents** d’archives destinés à être exportés ; ce mécanisme original permet à l’État de reproduire un document d’archives privées en tout ou partie et subordonner à cette reproduction l’octroi du certificat qui permet la sortie du territoire lorsque le document présente un intérêt, par exemple pour la recherche historique.

**Article L212-29**

L'État peut subordonner la délivrance du certificat prévu à l'article L. 111-2 à la reproduction totale ou partielle, à ses frais, des archives privées non classées qui font l'objet, en application du même article, de la demande de certificat.

Les opérations de reproduction ne peuvent excéder une durée de six mois à compter de ladite demande.
a-b l’obligation de conservation des documents.
Le secteur public :
La conservation du patrimoine archivistique est une mission de service public qui concerne plusieurs institutions chargées de la collecte et de la conservation des fonds d’archives

° l’obligation de conservation des documents publics
Des services d’archives qui doivent collecter l’ensemble des documents produits et générés à l’occasion d’une activité publique (art ; L 211-1 et s. du Code du patrimoine).
La conservation s’organise autour de la notion centrale de fonds d’archives. Un fonds est constitué de l’ensemble des documents détenus par une personne ou un service (archives du premier ministre, archives d’un laboratoire de recherches, etc.). L’unité et donc l’intégrité du fonds s’organise en principe à partir de l’entité qui a réuni les archives, et ce à quelque exceptions près. Dans certains cas, en effet, l’organisation des archives s’est réalisée non sur une base organique mais sur une base thématique. Par exemple les archives du monde du travail sont réunies en un lieu (Roubaix). Un projet a pour ambition de réunir les archives scientifiques.
Certains textes réglementaires évoquent le respect des fonds et de leur structure organique, notamment dans les textes qui instituent le contrôle scientifique et technique qu’exerce l’Etat sur les archives des régions, des départements, des communes ; Mais la loi sur les archives ne contient pas expressément de principe d’intégrité du fonds, qui pourrait être sanctionné. L’obligation relève davantage d’un principe archivistique, d’une pratique administrative.

Article R1421-1 du Code général des collectivités locales
Le contrôle scientifique et technique de l'Etat sur les archives des régions, des départements et des communes, mentionné à l'article L. 1421-6, porte sur les conditions de gestion, de collecte, de tri, d'élimination des documents courants, intermédiaires et définitifs et sur le traitement, le classement, la conservation et la communication des archives. Il est destiné à assurer la sécurité des documents, le respect de l'unité des fonds et de leur structure organique, la qualité scientifique et technique des instruments de recherche, la compatibilité des systèmes de traitement, la mise en valeur du patrimoine archivistique.
Il s'exerce sur pièces ou sur place.

° Le cas particulier des archives audiovisuelles dont l’INA doit assurer la conservation et la mise valeur concerne les programmes et émissions des chaînes publiques. L’INA est ainsi en charge d’une double mission, dépôt légal d’un côté, conservation, mise en valeur des archives audiovisuelles de l’autre. Les deux masses de documents audiovisuels ne coïncident pas toujours :
- d’une part, le dépôt légal s’applique aussi aux personnes privées alors que les archives audiovisuelles que l’INA doit conserver et valoriser sont les archives publiques émanant des chaînes publiques.
D’autre part la loi sur le dépôt légal des documents audiovisuels date de 1992. Tous les fonds antérieurs n’ont pu être collectés au moyen du dépôt légal.
La conservation des archives privées par des services publics d’archives
le service public des archives recueille aussi par la voie de dons, de legs, de préemption, de dation en paiement des fonds d’archives privées ou les ont en dépôt. Dans ce cas, les conditions de conservation peuvent être précisées dans les contrats. Le Code du patrimoine contient des dispositions sur l’intervention possible du propriétaire et les exigences qu’il peut avoir en termes de conservation.

Article L213-6

Lorsque l'Etat et les collectivités territoriales reçoivent des archives privées à titre de don, de legs, de cession, de dépôt révocable ou de dation au sens de l'article 1131 et du I de l'article 1716 bis du code général des impôts, les administrations dépositaires sont tenues de respecter les conditions auxquelles la conservation et la communication de ces archives peuvent être soumises à la demande des propriétaires.

Il faut noter que lorsque les documents sont acquis par l’Etat ou une autre collectivité publique, ils relèvent en principe d’un régime de propriété très protecteur : la domanialité publique (ils sont notamment inaliénables, imprescriptibles, insaisissables). Leur intégrité peut en principe être assurée par ce biais.

Les documents du dépôt légal
Une des missions centrales des institutions en charge du dépôt légal est la collecte et la conservation des documents. Cette fois-ci, la notion de référence n’est pas celle de fonds. Certaines unités sont préservées mais sur des principes différents. D’une part, la conservation s’organise selon la nature du support.
La BNF est compétente pour les documents écrits, l’Institut national de l’audiovisuel pour l’audiovisuel, le centre national de la cinématographie pour les œuvres cinématographiques. Un décret peut par ailleurs confier le dépôt légal de certains documents à un établissement spécifique au vu des garanties qu’il offre notamment sur le plan scientifique. Il ne serait pas absurde de prévoir un dépôt légal spécifique aux productions de la recherche par exemple.

Les fonds des bibliothèques et les collections des musées peuvent aussi détenir des archives. Ils ont aussi en charge la conservation des documents, selon des logiques cependant différentes de celles des services d’archives. Dans ces deux cas, les documents relèvent de la domanialité publique, régime de propriété très protecteur, qui cependant n’exclut pas que puisse être retiré de la vue du public certains documents, en particulier lorsqu’ils ont un contenu illicite.

Les dispositions ci-dessous sont également applicables aux départements et aux régions.

Article R1422-4
Les collections de l'Etat déposées dans les bibliothèques municipales, dont les communes ont l'usage et doivent assurer la conservation, sont placées sous la surveillance des municipalités.

Ces collections peuvent être retirées par le ministre chargé des bibliothèques en cas d'insuffisance de soins ou d'abus de la part des communes.

**Article R1422-9**

Le contrôle technique de l'Etat sur les bibliothèques des communes porte sur les conditions de constitution, de gestion, de traitement, de conservation et de communication des collections et des ressources documentaires et d'organisation des locaux.

Il est destiné à assurer la sécurité des fonds, la qualité des collections, leur renouvellement, leur caractère pluraliste et diversifié, l'accessibilité des services pour tous les publics, la qualité technique des bibliothèques, la compatibilité des systèmes de traitement, la conservation des collections dans le respect des exigences techniques relatives à la communication, l'exposition, la reproduction, l'entretien et le stockage en magasin.

Certaines **institutions privées** assurent la conservation **d’archives privées**. C’est le cas de L’IMEC (Institut de la mémoire de l’édition contemporaine), association qui recueille en dépôt les archives des éditeurs. Les obligations en termes de conservation et de communication sont dans ce cas précisées par contrat. On peut citer encore la fondation des sciences politiques qui a recueilli un grand nombre de fonds d’archives politiques dont par exemple le fonds Edgar Faure.

b. maintenance and updating material
  **L’entretien et la mise à jour de documents**

c. making the material available to the public
  **Rendre les documents disponibles au public**

Les dispositifs évoqués plus haut organisent selon des règles variables la mise à disposition des documents au public. Les usagers se voient parfois reconnaître un véritable droit d’accès.

1) **Le droit des archives publiques**

La loi sur les archives traite de l’accès aux documents publics et institue des délais et forme variables de communication qui vont de la simple consultation à la remise d’une copie physique. Parmi les archives publiques, certains documents sont considérés comme des documents administratifs et sont soumis à un régime particulier de communication.

a) Les documents administratifs

Ils constituent une catégorie spécifique d’archives publiques définies dans la
Loi n° 78-753 du 17 juillet 1978 portant diverses mesures d'amélioration des relations entre l'administration et le public et diverses dispositions d'ordre administratif, social et fiscal, qui proclame que :
« Le droit de toute personne à l'information est précisé et garanti par le présent titre en ce qui concerne la liberté d'accès aux documents administratifs » (article 1).

La loi précise ce qu’il faut entendre par documents administratifs :

Art ; 1er
Sont considérés comme documents administratifs, au sens du présent titre, tous dossiers, rapports, études, comptes rendus, procès-verbaux, statistiques, directives, instructions, circulaires, notes et réponses ministérielles qui comportent une interprétation du droit positif ou une description des procédures administratives, avis, prévisions et décisions, qui émanent de l'Etat, des collectivités territoriales, des établissements publics ou des organismes de droit public ou privé chargés de la gestion d'un service public. Ces documents peuvent revêtir la forme d'écrits, d'enregistrements sonores ou visuels, de documents existant sur support informatique ou pouvant être obtenus par un traitement automatisé d'usage courant.

Ne sont pas considérés comme documents administratifs, au sens du présent titre, les actes des assemblées parlementaires, les avis du Conseil d'Etat et des juridictions administratives, les documents de la Cour des comptes mentionnés à l'article L. 140-9 du code des juridictions financières et les documents des chambres régionales des comptes mentionnés à l'article L. 241-6 du même code, les documents d'instruction des réclamations adressées au Médiateur de la République, les documents préalables à l'élaboration du rapport d'accréditation des établissements de santé prévu à l'article L. 6113-6 du code de la santé publique et les rapports d'audit des établissements de santé mentionnés à l'article 40 de la loi de financement de la sécurité sociale pour 2001 (n° 2000-1257 du 23 décembre 2000).

La loi de 1978 adopte une conception très large quant à la nature des documents définis comme documents administratifs, qui peuvent prendre des formes variables : dossiers, études, rapports, etc. , Sont par exemple considérés comme tels un rapport établi par la cour des comptes dans l’exercice de ses pouvoirs de contrôle ou encore le compte rendu d’une mission de contrôle établie par la CNIL. Les rapports de fouilles archéologiques demandés par l’Etat, accompagnant une autorisation d’effectuer ces fouilles seraient des documents administratifs. Une étude réalisée sur la délinquance à la demande d’une commune constitue un document administratif.

Comme dans la loi sur les archives, le droit d’accès souffre certaines restrictions fondées sur le secret. Les administrations peuvent notamment refuser la consultation ou la

---

4 Frédéric Scanvic, Ibid., p. 61.
communication lorsque les documents administratifs renferment des informations susceptibles de porter atteinte à certains intérêts publics (secret de la défense nationale, politique extérieure, monnaie, crédit public, sûreté de l’État, sécurité publique, déroulement des procédures judiciaires, recherche d’infractions fiscales et douanières par les services compétents) et privés (vie privée, dossiers personnels et médicaux). Sont aussi visés les secrets en matière commerciale et industrielle et plus généralement tout secret protégé par la loi. La loi de 1978 contient par ailleurs des précisions en ce qui concerne le droit d’auteur.

Obligation d’accès et de communication des documents

Les administrations détentrices de ces documents ont une double obligation de consultation et de communication sous la forme d’une copie à l’usager qui en fait la demande et ce gratuitement.

Cependant le droit à communication des documents ne s'applique qu'à des documents achevés. Il ne concerne pas les documents préparatoires à une décision administrative tant qu'elle est en cours d'élaboration.

Par ailleurs, « Il ne s'exerce plus lorsque les documents font l'objet d'une diffusion publique ». Dès lorsque les documents sont communiqués au public, il n’y a plus de nécessité d’un droit d’accès encadré.

Enfin « Il ne s'applique pas aux documents réalisés dans le cadre d'un contrat de prestation de service exécuté pour le compte d'une ou de plusieurs personnes déterminées ».

Conciliation entre droit d’accès et de communication et droit d’auteur

L’article 10 de la loi du 17 juillet 1978 donne » quelques indications en ce qui concerne la conciliation entre droit d’accès et droit à la communication des documents.
Les documents administratifs sont communiqués sous réserve des droits de propriété littéraire et artistique.

L'exercice du droit à la communication institué par le présent titre exclut, pour ses bénéficiaires ou pour les tiers, la possibilité de reproduire, de diffuser ou d'utiliser à des fins commerciales les documents communiqués.

La portée de cette réserve des droits d'auteur peut cependant être source d'incertitude.

Ce qui est sûr, c'est que :

° Pour la simple consultation, on peut raisonnablement penser que l'autorisation de l'auteur n'est pas requise. L'article 10 de la loi de 1978 qui réserve les droits des auteurs ne vise que la communication des documents, qui s'entend au sens de la loi du 17 juillet 1978 de la délivrance d'une copie du document. Bien qu'il mette en jeu d'éventuels droits d'auteurs, ceux-ci se heurtent à la nécessité de rendre accessibles un certain nombre de documents publics.

° En tout état de cause, la communication de ces documents n'autorise pas le détenteur de la copie à les reproduire.

Les solutions sont moins claires en cas de remise d'une copie. Dans une décision, les juges ont considéré que le maire d'une commune ne peut s'abriter derrière le fait qu'il n'est pas l'auteur d'un document ou encore invoquer le respect des droits de propriété intellectuelle, pour refuser la communication d'un document ; Il s'agissait en l'espèce d'un rapport réalisé à la demande de la ville sur la délinquance (Tribunal administratif de Strasbourg, 23 décembre 1993). Cette décision reste cependant isolée. Sans doute les juges ont-ils voulu éviter que la non communication du document prenne pour argument trop facile la question des droits d’auteur.
Si l’on revient aux termes de la loi de 1978, en principe, l’accord de l’auteur devrait être requis.
Il faut cependant distinguer selon la qualité de la personne qui est l’auteur du document.

S’il l’auteur est un agent public ayant produit le document dans le cadre de l’exécution du service, on aura plutôt tendance à considérer que, s’agissant d’une «œuvre de service », les droits de l’auteur seront paralysés. Le droit d’auteur ne constitue alors pas un obstacle à la communication des documents. Un célèbre avis du Conseil d’État (1972) investit en effet l’État de la titularité de l’ensemble des droits sur ce type d’œuvres imposées par les nécessités du service.
On s’aperçoit cependant que

° d’une part, la jurisprudence n’est pas uniforme et n’applique pas nécessairement les principes dégagés par le Conseil d’État, certaines décisions ont au contraire reconnu la qualité d’auteur à des fonctionnaires.

°
° d’autre part que l’on admet que dans certains cas, la règle de titularité de l’État ne puisse jouer par exemple, dans le domaine des productions de la recherche scientifique.

Pour clarifier la situation, la future loi de transposition de la directive portant harmonisation des droits d’auteurs et droits voisins dans la société de l’information apporte des éléments de réponse en abordant la question de la titularité des droits sur les productions intellectuelles des agents publics.

Le principe retenu est que l’auteur agent public, même s’il est considéré comme un auteur, son statut n’y faisant pas obstacle voit tout de même l’exercice de ses droits limités par les exigences du service public, à la fois en ce qui concerne le droit moral et les droits d’exploitation.

En ce qui concerne le droit moral, l’article 17 du projet de loi prescrit :

<table>
<thead>
<tr>
<th>Article 17 du projet de loi</th>
<th>Début du texte</th>
</tr>
</thead>
<tbody>
<tr>
<td>« Après l’article L. 121-7 du code de la propriété intellectuelle, il est inséré un article L. 121-7-1 ainsi rédigé : »</td>
<td></td>
</tr>
<tr>
<td>« Art. L. 121-7-1. - Le droit de divulgation reconnu à l’agent mentionné au troisième alinéa de l’article L. 111-1, qui a créé une œuvre de l’esprit dans l’exercice de ses fonctions ou d’après les instructions reçues, s’exerce dans le respect des règles auxquelles il est soumis en sa qualité d’agent et de celles qui régissent l’organisation, le fonctionnement et l’activité de la collectivité publique qui l’emploie. »</td>
<td></td>
</tr>
<tr>
<td>« L’agent ne peut : »</td>
<td></td>
</tr>
<tr>
<td>« 1° S’opposer à la modification de l’œuvre décidée dans l’intérêt du service par l’autorité investie du pouvoir hiérarchique, lorsque cette modification ne porte pas atteinte à son honneur et à sa réputation ; »</td>
<td></td>
</tr>
<tr>
<td>« 2° Exercer son droit de repentir et de retrait, sauf accord de l’autorité investie du pouvoir hiérarchique. »</td>
<td></td>
</tr>
</tbody>
</table>

Pour les droits d’exploitation, l’article 18 du projet de loi prévoit :

<table>
<thead>
<tr>
<th>Article 18 du projet de loi</th>
<th>Début du texte</th>
</tr>
</thead>
<tbody>
<tr>
<td>Après l’article L. 131-3 du code de la propriété intellectuelle, sont insérés des articles L. 131-3-1 à L. 131-3-3 ainsi rédigés : »</td>
<td></td>
</tr>
<tr>
<td>« Art. L. 131-3-1. - Dans la mesure strictement nécessaire à l’accomplissement d’une mission de service public, le droit d’exploitation d’une œuvre créée par un agent de l’État dans l’exercice de ses fonctions ou d’après les instructions reçues est, dès la création, cédé de plein droit à l’État. »</td>
<td></td>
</tr>
</tbody>
</table>
Dans ce nouveau système, nul doute que la consultation et la communication obéissent à une nécessité publique. La réserve des droits d’auteur ne pourrait alors être opposée :
- que pour la communication des documents publics n’émanant pas d’agents publics
- ou encore pour toute autre utilisation que l’accès ou la communication à l’usager (ex. publication par le service qui détient le document)
- enfin elle joue quoi qu’il en soit pour l’usager, qui ne peut reproduire librement le document communiqué.

b) Le régime des archives publiques autres que les documents administratifs

**Système de communication des documents**

En dehors des documents déjà diffusés ou de ceux qui entrent dans la catégorie des documents administratifs immédiatement communicables, tous les autres documents publics peuvent être communiqués à l’issue d’un temps qui varie selon la nature de l’information que l’on entend protéger. Le délai de droit commun est actuellement de trente ans à compter de la production du document. Ces délais sont rallongés au regard du caractère sensible de certaines informations (ils vont de 60 ans à 150 ans).

Néanmoins, avant l’arrivée du terme, les chercheurs peuvent solliciter des dérogations pour accéder à l’information à titre individuel. Par ailleurs, le ministre peut décider de libérer la consultation de certains fonds avant l’issue du délai. On a eu l’exemple avec les archives concernant la deuxième guerre mondiale.

Dans ces deux hypothèses peuvent se présenter des questions relatives au respect du droit d’auteur.

**Conciliation entre accès aux documents et droits d’auteur**

Contrairement à la loi sur les documents administratifs et assez curieusement, la loi sur les archives ne fait aucune référence au droit d’auteur. Mais cet oubli ne signifie pas que les droits d’auteurs sont totalement neutralisés. La question se pose en des termes différents en ce qui concerne l’accès et la possible reproduction des documents publics.

*L’accès aux documents publics*
La loi sur les archives prévoit uniquement un droit de consultation des archives publiques et non le droit à en obtenir communication, c’est à dire délivrance d’une copie (contrairement au système applicable aux documents administratifs).
Comme pour les documents administratifs, on peut penser que l’auteur ne peut s’opposer à l’accès au document.

La possibilité de reproduire

On peut se demander si par leur nature, les archives publiques neutralisent purement et simplement les droits d’auteur.

Une décision intéressante concerne la reproduction de documents publics : notes en conseils des ministres, correspondances, etc. Ces documents avaient été publiés par J. Attali, donc diffusés dans le cadre d’un ouvrage : Verbatim. J. Lacouture publie à son tour un ouvrage en reproduisant une grande partie de ces documents. J. Attali invoque alors un droit de propriété intellectuelle. Les juges vont minutieusement analyser chaque emprunt pour vérifier l’absence de contrefaçon. Sont distingués notamment les parties originales de l’ouvrage et les documents et sources insusceptibles d’appropriation. Un grand nombre de documents avaient été rédigés dans le cadre du service public, par des conseillers du président, dont faisait partie J. Attali. La décision rappelle le statut particulier de ces productions qui reçoivent « aux termes de la loi du 3 janvier 1979 le statut d’archives publiques celles-ci étant classées dans le domaine public, et comme telles, support et contenu, inaliénables et imprescriptibles, soumises à des règles particulières de communication et de divulgation ». Le caractère inappropriable des documents serait ainsi doublement tiré de leur statut d’archives publiques et de la circonstance qu’elles ont été produites dans le cadre du service public. Les juges semblent bien affirmer que la reproduction de ces documents est libre.

Il est cependant douteux de généraliser la solution à l’ensemble des archives publiques. La solution joue à notre sens pour la masse de documents qui accompagne nécessairement l’accomplissement du service public (notes de service, courriers, papiers administratifs) mais non pour les véritables productions intellectuelles.

Dans le premier cas, en l’occurrence on peut bien soutenir que la personnalité de l’auteur s’efface devant la nécessité publique.
Pour les productions intellectuelles plus substantielles, on imagine mal la négation pure et simple des droits d’auteur. En l’occurrence, la jurisprudence et les usages ne sont pas uniformes sur cette question.

° Certaines décisions ont pu reconnaître des droits d’auteurs, par exemple sur les discours d’hommes politiques (de Gaulle, Malraux) ou encore sur les cours de professeurs au collège de France.

° D’autres décisions ont au contraire dénié à l’auteur ses droits (par exemple pour l’auteur d’une thèse dans une décision confuse et contestable ou encore à propos de cours délivrés dans une université et mis en ligne sur un site).
Là encore, la loi de transposition devrait apporter davantage de certitudes puisqu’elle réserve les droits de l’auteur en cas d’exploitation commerciale. Encore que l’application de cette notion d’exploitation commerciale n’est pas sans soulever des interrogations, en particulier en cas de mise en ligne de certains documents (voir les solutions de la loi de transposition présentées plus haut, à propos des documents administratifs.

Cas particulier des productions scientifiques
D’une façon générale, on admet que les chercheurs et universitaires disposent librement de leurs droits (alors qu’ils sont aussi producteurs d’archives publiques). Le statut d’indépendance et la liberté dont ils jouissent dans l’exercice de leur activité est une des justifications du traitement différencié des autres productions publiques. Les problèmes peuvent aussi résulter de ce que des œuvres non divulguées peuvent être considérées par la loi comme archives et donc devraient être soumises au droit d’accès. Cependant, dans la pratique, au regard du caractère personnel de ces documents (on évoque le terme d’archives personnelles qui est un terme non juridique) le versement de ce type de documents dans un service d’archives sans l’autorisation de l’auteur concerné est rare. Quoiqu’il en soit, on peut considérer que le versement dans un service d’archives ne vaut pas en soi divulgation de l’œuvre, c’est à dire volonté de communiquer son œuvre au public. Cette circonstance est importante dans la question des possibilités d’exploitation de l’œuvre.

° D’une part les exceptions au droit d’auteur (par exemple copie privée ou exception de citation) ne jouent que pour les œuvres divulguées.
° D’autre part, les utilisateurs ne peuvent faire valoir que les œuvres sont dans le domaine public du simple fait qu’elles sont accessibles au public et que le temps de la durée de la protection de 70ans après la mort de l’auteur est écoulé.

Les archives publiques autres que celles produites par les fonctionnaires dans l’exercice de leurs fonctions
Dans l’hypothèse abordée ci-dessus, les archives considérées sont produites par des agents publics.
Mais toutes les archives publiques ne sont pas des œuvres de service, c’est à dire des œuvres créées par des agents publics, dans l’exercice de leurs fonctions. Les archives publiques comprennent également des documents reçus par la collectivité publique donc qui n’émanent pas des agents publics. C’est le cas des correspondances reçues et de toutes sortes de documents, rapports études, commandées par une personne ou un service public. La question de la conciliation entre droit d’accès et droit d’auteur reste entière à leur propos.
Il semble que dès lors qu’on admet le droit d’accès dans le dispositif sur les documents administratifs, il faut aussi l’accueillir pour les archives publiques. A nouveau, on estimera que le versement de documents dans un service d’archives ne vaut pas divulgation. la Cour de Cassation a affirmé très clairement ce principe à propos d’un manuscrit de Malesherbes que des historiens avaient reproduit dans un ouvrage :

« lorsque les auteurs de manuscrits privés ou leurs ayants droit ont déposé ces documents aux Archives nationales pour assurer leur conservation, ce dépôt ne les prive pas du droit
de décider de leur divulgation et l’accord ainsi passé avec l’administration n’emporte pas, à lui seul, autorisation de divulgation »\textsuperscript{5}.

Cette décision concernait des archives privées mises en dépôt, mais on pourrait bien appliquer la solution en ce qui concerne les archives publiques constituées par les documents reçus par la collectivité publique (opinion cependant personnelle qui peut être soumise à débat). En effet, la divulgation suppose un acte de volonté de la part de l’auteur et on pourrait difficilement admettre qu’une obligation légale de versement en tienne lieu.

2 la communication des documents du dépôt légal.
L’idée du dépôt légal est de mettre à disposition du public les documents déposés, notamment aux fins de recherche. Le texte réserve actuellement la question des droits d’auteur et précise dans quelles conditions peut se réaliser l’accès aux documents.

On peut admettre que la mise à disposition ne nécessite pas l’autorisation de l’auteur à condition de respecter un certain nombre de conditions :

° droit pour le chercheur d’accéder à titre individuel (et non collectif, c’est à dire avec son équipe ou encore une nuée d’étudiants) ; la réserve est quelque peu discutable…

° dans l’enceinte de l’organisme, il doit se rendre sur les lieux de l’INA de la BNF, etc., sans pouvoir accéder en ligne à distance, aux documents.

\textbf{Article L132-4}

La consultation des documents déposés, prévue à l'article L. 131-1, se fait dans le double respect des principes définis par le code de la propriété intellectuelle et de ceux inhérents au droit, pour le chercheur, d'accéder à titre individuel, dans le cadre de ses recherches et dans l'enceinte de l'organisme dépositaire, aux documents conservés.

La loi de transposition prévoit de revenir sur ce système pour permettre aux institutions dépositaires d’accomplir certains actes indispensables à la mission de dépôt légal sans avoir à passer par l’autorisation de l’auteur :

\begin{itemize}
  \item \textit{Art. 6-1.} - L’auteur ne peut interdire aux organismes dépositaires, pour l’application de la présente loi :
  \begin{itemize}
    \item 1° La consultation de l’œuvre sur place par des chercheurs dûment accrédités par chaque organisme dépositaire sur des postes individuels de consultation dont l'usage leur est exclusivement réservé ;
    \item 2° La reproduction sur tout support et par tout procédé d'une œuvre, nécessaire à la collecte, à la conservation et à la consultation sur place dans les conditions prévues au 1°.
  \end{itemize}
  \item \textit{Art. 6-2.} - L’artiste-interprète, le producteur de phonogramme ou de vidéogramme, l’entreprise de communication audiovisuelle ne peuvent interdire la reproduction et la
\end{itemize}

\textsuperscript{5} Cass. 1\textsuperscript{ère}, Civ., 15 janvier 1969, D. 1969, j. 476.
communication au public des documents mentionnés à l’article 1er de la présente loi dans les conditions prévues à l’article précédent.

« Art. 6-3. - Le producteur d’une base de données ne peut interdire l’extraction et la réutilisation par mise à disposition de la totalité ou d’une partie de la base dans les conditions prévues à l’article 6-1. »

Pour toute autre utilisation, par exemple, fourniture d’un support, quel qu’il soit, le consentement de l’auteur s’impose. Les institutions dépositaires ont conclu avec les sociétés d’auteurs des accords à ce titre.

3) La communication des archives privées

En ce qui concerne les archives acquises par l’État ou recueillies en vertu d’un dépôt, la loi de 1979 prescrit que l’administration doit respecter les conditions posées par le propriétaire.

**Article L213-6**

Lorsque l’État et les collectivités territoriales reçoivent des archives privées à titre de don, de legs, de cession, de dépôt révocable ou de dation au sens de l'article 1131 et du I de l'article 1716 bis du code général des impôts, les administrations dépositaires sont tenues de respecter les conditions auxquelles la conservation et la communication de ces archives peuvent être soumises à la demande des propriétaires.

On remarque que, même en cas de transfert de propriété à titre onéreux ou gratuit, les propriétaires peuvent imposer leurs conditions. On retrouve dans la pratique, l’invocation d’un délai trentenaire au delà duquel la communication des documents est libre (on se base sur le délai de droit commun de communication des archives publiques). Dans cet intervalle, le propriétaire peut exiger que toute communication nécessite son consentement.

S’il ne prévoit rien dans les contrats de vente ou de donation, c’est à l’administration de décider des règles de communication.

Dans ce système, la loi n’a pas évoqué les droits d’auteur mais leur respect s’impose. Pour qu’un document d’archives privées puisse être rendu accessible ou communiqué, les services d’archives doivent se préoccuper des autorisations nécessaires. A nouveau, le point délicat est dans les archives non divulgées :

° par exemple les correspondances reçues par le propriétaire du fonds mais dont il ne sont pas les auteurs.

° les œuvres anonymes (fonds de photographies par exemple).
1. as physical copies (original or facsimile), or sous forme de copies physiques (originales ou fac-similées), ou

ii. in digital form sous forme numérique

4. Are there judicial decisions in France addressing publishers’ or archives’ liability with respect to documents included in the archives’ collections that infringe copyright?

Y a-t-il des décisions juridiques en France concernant la responsabilité des éditeurs ou des archives vis-à-vis de documents inclus dans les archives qui violent des droits d’auteur?

a. What, if any, distinctions do courts articulate between the roles of publishers and of archives?

Quelles distinctions les tribunaux font-ils entre les rôles des éditeurs et des archives?

b. Does the publisher’s liability depend on the extent to which the publisher exercises control over the contents and maintenance of the archive?

La responsabilité de l’éditeur dépend-elle de l’étendue du contrôle que l’éditeur exerce sur la teneur et l’entretien des archives?

c. Does the archive’s liability depend on the extent to which it controls the acquisition and maintenance of the offending material? Does liability depend on the extent to which the archive makes the material accessible to the public?

La responsabilité des archives dépend-elle de l’étendue du contrôle qu’elles ont sur l’acquisition et l’entretien du matériel incriminant? La responsabilité dépend-elle de la façon dont les archives rendent les documents accessibles au public?

5. Have courts in France imposed remedies against publishers who did not remove copyright-infringing material from archives over which they maintained control?

Les cours en France ont-elles imposé des remèdes contre les éditeurs qui n'ont pas enlevé le matériel violant copyright d'archives sur lesquelles ils ont maintenu la commande?

6. Have courts in France imposed remedies against archives that retain or make available this material?

Les tribunaux français ont-ils imposé des réparations aux archives qui continuent à contenir ou rendent disponibles ces documents?
7. Have litigants in France agreed to settlements in respect of claims of copyright infringement that would affect the contents, maintenance, or public accessibility of material contained in archives? Under what circumstances?

Les plaideurs en France ont-ils règle a l'amiable des actions judiciaires concernant des violations de droits d'auteur qui affectent la teneur, l'entretien, ou l'accessibilité au public des documents contenus dans les archives? Dans quelles circonstances?

8. Have publishers or archives in France sought to avoid potential liability by removing material that may infringe copyright, without waiting to be notified (or sued) by persons claiming to be injured by the material?

Est-ce que les éditeurs ou les archives en France ont tenté d'éviter des responsabilités potentielles en retirant les documents qui violent potentiellement des droits d'auteur, sans attendre d'être effectivement poursuivies par des personnes prétendant subir un dommage du fait des documents concernés?

Mardi 8 juin 2004
Mellon Phase II Questionnaire
France Response

A. Copyright Analysis:
Please answer the following questions. If you have already responded to questions 1-3 below, please skip to question 4.¹

1. Are there judicial decisions in your country addressing publishers’ or archives’ liability with respect to documents included in the archives’ collections that infringe copyright?

There are few judicial decisions dealing with copyright infringement in archives.

For Publishers: Most problems surrounding copyright infringement occur at the publication stage of works or articles (either in hardcopy or online), not during archival operations. On this point, we see more judicial involvement in publishing activity based on different foundations, notably copyright.²

For example, on the topic of distribution of infringing works, judges have recognized the civil responsibility of the publisher and distributor, notwithstanding the fact that all they did was distribute the litigious work in good faith. The judges believe that “infringement is characterized by the reproduction, the representation or the exploitation of a work in violation of the intellectual property rights attached to it independent of all fault or bad faith.” (Cass. Civ. 1ère, 29 mai 2001, Propriétés intellectuelles, oct. 2001, p. 71, obs. P. Sirinelli, dans le même sens, on peut encore citer, Cass. Civ. 1ère, 16 février 1999, RIDA, juill. 1999, p. 303).

To the extent that the author can guarantee to the publisher the peaceful and, absent any contrary agreement (“convention”), exclusive use of the given right (art. L 132-8 of the Code of Intellectual Property), a publisher could turn to the author and make him bear the

¹ [Footnotes that accompanied questions asked by the survey have been omitted.]
² A White Paper has been undertaken on this question by the National Publisher’s Union (Syndicat national de l’édition) which puts emphasis on the reasonable increase of complaints of defamation, rights to images, or invasion of privacy, Livre Blanc, Justice et édition : plaidoyer pour une justice adaptée, SNE, 2003. (White Paper, Justice and publishing: argue for an adapted justice.) This is also how Emmanuel Pierrat analyzes the situation, by indicating that cases of plagiarism for example remain the minorities in comparison to these contentions of person rights and right to information, Florence Noiville, trois questions à E. Pierrat à propos d’un article de P-J Catinchi et M. Van Renthergem (three questions for E. Pierrot about an article written by P-J Catinchi and M Van Renthergem): Ces nègres qui plagient mal, Le Monde, 10 mars 1998. On these issues see also aussi Sylvia Israel, Manuel Roche-Horbette, Nicolas de raulin, Audrey de Garidel, Droit d’auteur et vie privée (copyright and privacy), Légipresse n° 219, mars 2005, chronique, p. 29.
expenses of the condemnation and fees rising out of the litigious publication (damages, manufacturing costs, advertising costs, procedural fees, etc.)

We could also refer to judicial decisions concerning publishers of periodicals. There has been a certain amount of author-friendly decisions in publication of hard copy periodical articles that were subsequently republished online. Judges have decided that the transfer of rights for an article to appear in a written periodical did not include online exploitation, regardless of the qualification given to the journal, thus including collective works. These judicial decisions might be applied to online archival collections, which use publications first published on paper.

**For Archives:** There are no judicial decisions on this point either. In any case, it would be necessary to distinguish cases based on the nature of the archives because in case of dispute, the liability would differ.

1. **Public archive services**

Two parameters must be taken into consideration: 1) the means of communication; simple access or service provisioning by the use of a support (electronic or other copy) 2) the status of the document in regards to intellectual property; some works, as they are the product of civil servants, are considered either freely usable or the state’s property.

For services with public archives (documents produced or received in the context of public activity, for example by administrative bodies, the State, local committees, etc.)³, access stems from the public interest in the documents and is required by the public right to archives. Providing such a document is not infringing as long as it is limited to allowing users to see the document. Putting the document online, or providing it by other means of communication (photocopying, for example), exceeds the right of access and thus involves copyright. The fact that the access can only occur after a certain period (the common law delay is 30 years, and other longer delays are required when dealing with sensitive information) reduces in part the risk of prosecution.

For administrative documents, a specific category of public archives immediately communicable to the public, the law of July 17, 1978 expressly reserves the copyright in case of communication, which the law distinguishes from mere access.

When public archives are created by government officials and could be considered as creative works, we believe that in many cases either the state or the public archives retain the entirety of the rights, and that they are inappropriable.⁴ (original phrasing is awkward).

³ On this aspect of the definition of public and private archives see the first part of the questionnaire.
⁴ see supra the Attali case and the future changes in the law of transposition of copyright and similar rights in the information society. (la loi de transposition sur les droits d’auteur et droits voisins dans la société de l’information.)
2. Private archive services.

To my knowledge, there are no judicial decisions that implicate the liability for infringement of a private archives service. In the case of archives that the State acquires or receives from deposits from individuals, the mission for conservation does not authorize the State to make the document accessible without first having received the consent of the author and complied with any access conditions imposed by the owner of the document itself.

We could give the example of one difficulty which seems not to have gone to trial. A public service put a database online collecting literary collections, which specifically included correspondence. This database not only allowed access to personal information (letter written by one individual to another at a certain time) but it also allowed access to the document itself because many documents had been digitized. In one collection of a famous author was a letter received from a third party. This person had not been consulted about the disclosure of his correspondence and had asked for its removal. A missive letter is most often considered as a creative work, which means the claim of infringement could stem from two sources: the violation of moral rights (by the disclosure) and of economic rights (other complaints could also be involved, for example publicity, privacy, protection of personal facts, maybe even more).

   a. What, if any, distinctions do courts articulate between the roles of publishers and of archives in these cases?

There are no copyright related judicial decisions which distinguish publishers from archives. We can, however, consider that the distinction may come from the function they serve and especially from the nature of the collected archives. Making public archives available is a public interest mission, which has consequences for copyright and more generally for any illegal content.

   b. Does the publisher’s liability depend on the extent to which the publisher exercises control over the contents and maintenance of the archive?

The infringement itself creates the publisher’s liability. He can, at that point, implead the author, see [above].

   c. Does the archives’ liability depend on the extent to which it controls the acquisition and maintenance of the offending material? Does liability depend on the extent to which the archives make the material accessible to the public? Does the archives’ liability depend on any other factors?

For public archives, the archives’ liability depends on the extent and nature of the access provided which is limited, by public right to archives, to mere access [see above]. If from the mere access to documents, a person uses the work in an infringing manner, the archives would not have to worry. For private archives, the nature of the provision of documents does not affect the placement of liability, once there is a violation of the
author’s monopoly. In practice, it is true that opportunities for digitization and online access, often used by archives today, increase dramatically the risks of implicating their liability. I cited the example of the person who learned about the presence of correspondence, of which she was the author, in a collection [see above]. This type of difficulty rarely occurs if the access is limited to consultation in a designated reading room.

If the archives’ liability is designated, when deciding the sanction, the degree of publication will play a role to the extent that the judge is seeking to make good the damages incurred, which necessitates evaluating the extent of the infringement. Damages would vary depending on whether there was a massive publication or not (judges take into consideration the loss suffered and loss of future profits, for example the loss of the opportunity to exploit the work in a new medium).5

2. Have litigants in your country agreed to pretrial settlements in respect of claims of copyright infringement that would affect the contents, maintenance, or public accessibility of material contained in archives? Under what circumstances?

Indeed, many litigants agree to pre-trial settlements. In those cases, it is difficult to know the terms of the settlement.

3. Have parties or archives in your country sought to avoid potential liability by removing material that may infringe copyright, without waiting to be notified (or sued) by persons claiming to be injured by the material?

For Publishers, faced with the increase of judicial activity in publishing, publishers anticipate by paying close attention to the law. For example, a publisher would prefer to forego the use of an infringing illustration or negotiate with the copyright holder when publishing the cover of certain works which might possibly infringe copyright, rather than take the risk, because of potential heavy fines (a fine of 300,000 euros, keeping in mind that this is a maximum amount, for copyright infringement, removal of the work from the market, etc.)

Public archives are not very attentive to intellectual property issues and do not always anticipate potential problems. Private institutions in charge of archives without a doubt take more precautions where these issues are concerned. For example, the IMEC (Institute sur la mémoire de l’édition contemporaine, Institute for the Memory of Contemporary Publishing), an association which receives deposits of private literary collections of authors6 or collections from publishing houses and makes those collections available to users, researchers, etc., carefully drafts their contracts with respect to intellectual property issues.

---

5 For some examples of convictions and method, P-Y Gautier, Propriété littéraire et artistique, 5ème édition refondue, n° 439.
6 For example, they have possession of Barthes collections.
4. Does your country’s copyright law, or other law (whether statutory or case law) provide any moral rights such as a “right of withdrawal” that could affect archives’ ability to retain an author’s work?

You must take account of several factors such as the nature of the archives and the difference between the rights to the physical product and intellectual property rights.

1. As to the tangible property rights:

The right of withdrawal (“le droit de repentire ou de retrait”) does not allow an author to take back the tangible copy of which he is no longer the owner. Rather, it only allows him to renounce the abandonment or assignment of his economic rights or to change the work given to the assignee of the rights. The right of withdrawal can only be used in regards to the assignee according to the terms of article L121-4 of the Intellectual Property Code. For example, an artist cannot withdraw a work from a museum or from the hands of an owner once he transferred the tangible property.

However, in the absence of a tangible object (“support”) (for example, if the work is put online) or if the author conserved the ownership of the tangible object, he can prohibit the communication of his work by use of his right of withdrawal. In the latter case, he can also require the return of the tangible object.7

2. The framework of the right of withdrawal:

The right of withdrawal can only be used under certain conditions. It is a matter of moral right; the author cannot use it because of economic motives because there would be an abuse of the purpose of the right, which would be punished by the courts. In addition, when withdrawing the work, the author must compensate the assignee for any harm caused by the withdrawal (ex: for a publisher, manufacturing fees, advertising fees, etc.).

3. The exception of public archives

The concept of access to public documents can directly impede the right of withdrawal. The civil servant author of a document in a public archive cannot, as far as we know, oppose access to that document. There is no exclusion in the rules concerning archives of in the Intellectual Property Code that anticipates this type of conflict but we imagine that public interest restricts the use of certain rights within copyright. The delays of transmission to the archives (thirty years in general) might naturally diminish these types of problems.

Apart from access to the work, the author can be opposed to any other form of transmission and can renounce a previous agreement, for example in regards to putting his work online.

7 Judges have ruled that photographic agencies must return to photographers any works which the agencies retained as deposit, unless there were explicit contractual provisions to the contrary.
The future law transposing into French law the European directive on copyright and neighboring rights contains certain provisions governing the right of withdrawal for civil servants, which could concern public archives.

Article 17 sets forth

| After article L. 121-7 of the intellectual property code, article L. 121-7-1 will be inserted as such: |
| “Art. L. 121-7-1. – The right of disclosure given to the agent as defined in the third paragraph of art. L. 111-1, who created an original work as part of his government activities or as a result of certain instructions, may only be exercised if they respect the rules that he had to obey as agent and to those rules that regulate the organization, functioning and activity of the public collectivity that employed him. The agent cannot |
| 1. Oppose the modification of the work decided for the interest of the service by the proper hierarchal authority, when this modification does not harm his honor or reputation |
| 2. Use his right of withdrawal except with the authorization of the proper hierarchal authority. |

In the case of creations of public agents, the right of withdrawal can thus not harm the collection of archives.

a. If so, are there any judicial decisions which address such moral rights in the context of an author or publisher wishing to remove offending material from a work contained in a library or archive’s collection?

To my knowledge, there are no judicial decisions of that nature.

b. Have there been any disputes between authors and publishers (or between authors and libraries/archives) regarding the author’s moral rights in which the author wishes to remove a work from the archive’s collection, to alter the way in which the work is displayed or accessed, or to alter the work itself? If so, how have the parties resolved such disputes?

We could cite some similar cases. A plastic artist cited to the right of withdrawal because the gallery had not complied with the conditions of exhibition of the work. The judges did not allow use of the right in this context. (See A. Lucas’ observations under the Paris Cour d’appel, 6th June 2000, Intellectual property, October 2001 p. 61.)

In other hypothetical situations, it is not the right of withdrawal that is implicated but rather the right to the respect of the work (“le droit au respect de l’oeuvre”) which allows for the withdrawal of the work.

There are some judicial decisions concerning publishers. For example the presentation of a work “under a title and advisory caution where the publisher reduces the information and content of the work” was considered as impairing the rights of a publication (Cour
The context in which the work is presented may also be considered as offensive to the author (“denaturant”), for an example in which a work was used during an electoral campaign (Cour d’appel de Versailles, 20 décembre 2001, RIDA, avril 2002, p. 319, note Kérever).

c. Can any such moral rights be contracted away?

The author cannot contract away his moral rights because moral rights are inalienable noneconomic rights. From this perspective, we can be skeptical about creative commons licenses and instances when the author consents in advance to the right to modify the work, as they appear contrary to French law.

Judicial decisions do not always judge with greatest rigor the abdicative agreements, especially in regards to the right to the integrity of the work. However, we can cite the opinion of the Cour de cassation from January 28, 2003 as in a sense, being very protecting of the rights of the author. This decided, based both on the common law of contracts (article 1174 of the Civil Code concerning the prohibition of conditions solely depending upon the will of a party) and on intellectual property law, that: “all obligation contracted away by someone under a condition depending on the will of a party (“condition potestatif”) is null and void.” This rule of public order has been used to reinforce copyright. The Cour de cassation “followed the complementary argumentation in support of the appeal: the clause by which the author grants to the other party to the contract, in an anticipatory and general manner the exclusive decision as to what modifications the latter wishes to proceed with, describes a ‘potestatif’ behavior. Thus, the litigious authorization becomes null by application of copyright law as well as the principles in the common law of contracts. It is not often that the latter helps the author to disengage himself from his obligations under a contract manifestly drafted with disregard as to his moral prerogatives.”

We must underscore that article L 132-11 of the CPI (code of intellectual property) expressly prohibits the publisher from modifying the work. “Without written authorization from the author, no changes can be made to the work.” The publisher will thus not be able to modify the work on his own initiative, even if it contains illegal content (defamation, insults, copyright infringement, etc.). In those cases, the publisher must either go back to the author, refuse to publish the work or remove it from distribution.

5. Please update the copyright analysis you did last year in connection with the Phase I questionnaire. In particular, have there been any new judicial decisions, legislation or regulations relevant to your earlier analysis?

For sanctions and procedures in matters of infringement, we can bring up the confiscation of works infringing copyright, which consists of removing the works that are illegal reproductions of the original work. The conditions of the offence were modified by the

---

8 Légipresse n°201, III, p. 31, commentaire A. Maffre-Bauger.
9 See, E. Pierrat, guide du droit d’auteur a l’usage des éditeurs, p.87.

Article L332-1 du Code de la propriété intellectuelle

(Loi n° 98-536 du 1 juillet 1998 art. 4 Journal Officiel du 2 juillet 1998)

Sheriffs and, where there are no sheriffs, the trial court judges are obligated to, at the request of any author of a work protected by the livre 1er, or of the author’s assignees or any eligible person, confiscate all illicit reproductions of that work.

If the confiscation will delay or suspend certain public presentations or performances already in place or announced, a special authorization from the president of the higher court (“tribunal de grande instance”) must be obtained. The president of the tribunal de grande instance can also in the same manner, order:

1° The suspension of any manufacture which could lead to the illicit reproduction of a work.
2° The confiscation, whatever the day or time, of illicit copies, already manufactured or in the process of being manufactured, of any revenue as well as any illegally used copies.
3° The confiscation of any revenue stemming from any reproduction, display or distribution by whatever means of an original work if done contrary to the author’s rights.
4° The suspension, by any means, of the content of an online public communication service which infringes an element of copyright. This including prohibiting additional storage of the content, or prohibiting any access to that content. In this case, the delay set forth in article L 332-2 is reduced to 15 days.

The president of the tribunal de grande instance, can, in the same manner, order 1 through 4 by the demand of the holders of rights defined by livre II. The president of the tribunal de grande instance can, in these orders, order the “constitution préalable par le saisissant d'un cautionnement convenable.”

Article L332-2

(Loi n° 98-536 du 1 juillet 1998 art. 4 Journal Officiel du 2 juillet 1998)

In the 30 days following the confiscation proceedings of the first paragraph of article L 332-1 or the date of the order set forth in the same article, the target of the confiscation or the third party victim of the confiscation can ask the president of the tribunal de grande instance to lift the confiscation or contain its effects, or even authorize further manufacturing or public displays and performances, under the authority of an administrator who is appointed as receiver to keep the goods pending judicial decision.
(“sequester”), who will keep records of all the consequences of the manufacturing or other exploitation.

The president of the tribunal de grande instance adjudicating the summary proceeding can, if he gives right to the request of the target of the confiscation or of the third party victim of the confiscation, order the payment into court of a sum affected to the guarantee of damages and interest to which the author can lay claim.

**Article L332-3**

*(Loi n° 98-536 du 1 juillet 1998 art. 4 Journal Officiel du 2 juillet 1998)*

If the confiscator does not attach the competent jurisdiction within thirty days of the confiscation, the president of the tribunal, adjudicating the summary proceedings can at the request of the target of the confiscation or the third party victim to the confiscation order the withdrawal of the confiscation.

**Article L332-4**

*(Loi n° 98-536 du 1 juillet 1998 art. 4 et art. 7 Journal Officiel du 2 juillet 1998)*

In matter of databases and programs, the confiscation of infringing works is executed in virtue of an order given by the president of the tribunal de grande instance after motion. The president authorizes, if there is reason for it, the physical confiscation (“saisie reelle”).

The bailiff or sheriff can be assisted by an expert designated by the plaintiff.

If there is no writ of summons or subpoena in the fifteen days following the confiscation, the confiscation of infringing works is null.

Sheriffs are obligated, amongst other things, to produce a description of the confiscation of the program or database at the request of the rights holder of that program or database, which can be concretized by a copy.

To refresh our memory, we shall recall the applicable sanctions in penal processes for infringement.

**Article L335-1**

The competent judicial police officials can conduct, from the moment of the observations of the offenses set forth in article L 335-4 of the present code, the confiscation of the phonograms or video recordings illicitly reproduced, objects or copies illicitly manufactured or imported objects or material specifically installed for the illicit actions.

**Article L335-2**

All written editions, musical compositions, drawings, paintings and all other objects, printed or engraved in whole or in part, in disregard of the laws and regulations relating to copyright, are infringements and all infringement is a crime.
Infringement in France of works published in France or abroad is punished by three years of imprisonment and a fine of 300,000 euros. The sale, exportation and importation of infringing works will be punished by the same sanctions. When the offenses set forth in the present article have been committed by an organized group, the sanctions will be brought to five years of imprisonment and to a fine of 500,000 euros.

**Article L335-3**

Any reproduction, representation or distribution of whatever means, of a creative work in violation of copyright as defined and regulated by the law, is also infringement. The violation of one of the copyrights of a computer program defined in article L 122-6 is also infringement.

**Article L335-4**

[blank] years of imprisonment and a fine of 300,000 euros is any fixation, reproduction, communication or distribution to the public, commercial or non-commercial, or any broadcasting of a performance, a phonogram, a video recording or a computer program, done without the authorization when legally required, of the artist, the producer of the phonograms or video recordings or the audiovisual communication company. Punished by the same sanctions is any importation or exportation of phonograms or video recordings done without the authorization of the producer or the artist, when it is required.

Punished by the same fine set forth in the first paragraph is the default of payment of royalties to the author, the performer, or the producer of phonograms or video recordings for the private copying, or of the public communication as well as the broadcasting of phonograms.

Punished by the same fine set forth in the first paragraph is the default of the payment of the fee (“prélevement”) mentioned in the third paragraph of article L 133-3. When the offenses set forth in the present article were committed by an organized group, the sanctions will increase to five years of imprisonment and to a fine of 500,000 euros.

**B. Other Substantive Legal Areas:**

We aim to study the relevant legal areas which could impact a library or archives’ potential liability for failing to remove/continuing to make available offending material that is the subject of concern for legal reasons other than copyright infringement (e.g. defamation; material factual error leading to damage/harm; privacy; government censorship; national security; etc.). Please consider these areas of law while responding to the questions below.

1. Could you briefly summarize the bodies of law (other than copyright and related rights) that may be relevant to decisions by publishers or
libraries/archives to remove materials from archival collections or databases (e.g., libel/defamation, privacy, censorship/national security)?

This question will again require combining the rules of public and private rights of access to archives, and thus we must create a distinction based on the nature of the documents because the access to public archives is regulated by specific texts which take into account the protection of many types of private interests (privacy, health, career documents, statistical information) and public interests (national security, defense security).

I. The holding and access to private archives or documents
When making these documents available many substantive legal areas are implicated, in civil law, specialized private law (“droit spéciaux”) and penal law. We will describe the relevant substantive legal areas and the compensation methods.

1. Civil common law

1.1. The substantive legal areas of common law

1.1.1. Right of publicity
The invasion of privacy (“l’atteinte à la vie privée”) is sanctioned based on Article 9 of the Civil Code. There are many controversies surrounding the invasion of privacy, which are amplified by internet distribution.

Other rights of publicity can also be protected by tort law (“droit de la responsabilité”) (Article 1382 of the Civil Code states that “any act done that causes damages to another person obligates the person at fault to make compensation for those damages.”). Examples of breaches of the right to publicity are invasion of honor and reputation (“l’atteinte à l’honneur et à la réputation”) or the right to personal images (“le droit à l’image des personnes”). This right is a hybrid considered part of the right to publicity, normally a non-economic right, but may in certain cases also be an economic right so that people may negotiate for the use of their image. Jurisprudence is developing today as the judicial system is faced with the complaints of many people about the use of their image. The jurisprudence seems to privilege the right to information in a number of hypothetical situations: for example, when a person is photographed as part of a group of people or at a public event. Even in these cases, the person can criticize the context in which the image is exploited, for example if the person shows that the image hurts her reputation. Publishers are often faced with this type of problem.

For two recent examples in which the right to information prevailed:

1) The presentation in a school manual of a photograph of children afflicted with a neuromuscular disease, which was taken when the children participated in a television show “The Telethon.” Participating in this public event “necessarily implies the consent of the children and their father to broadcast their picture in the
broadest way in order to sensitize the public.” Cour d’appel de Nîmes, 10 May 2005, Legipresse, n223, July/August 2005, p. 103.

2) The photograph of a mother whose leg had been injured right after the explosion of the AZF factory in Toulouse, which was published in a magazine immediately after the catastrophe, the legal protection stemming from the respect of private life (Art. 9 of the Civil Code) “gives way to the necessities of legitimate information,” “by this theory, the necessity to obtain consent doesn’t exist except to deny this right to information.” Cour d’appel de Toulouse, 24 May 2005, Legipresse, n223, July/August 2005, I. p. 103.

In cases of unauthorized use of an image, notably a use that exceeds the limits of the right of information, the judges frequently repeat the fact that publishers or other organs of the press have the burden to present the proof that they have a right to the image (on the nature and evolution of the law in this area, see Agathe Lepager, Laure Marinot, Christophe Bigot, Droits de la personnalité, panorama 2004-2005, Dalloz 2005, n38, p. 2643).

**Interaction between common law of torts (“droit commun de la responsabilité”) and the rights of the press**

A question arises when tort actions are related to abuses of the freedom of expression under the law of 1881 on the press. In that case, jurisprudence does not allow one to found these actions on the common right of torts (Art. 1382 and 1383 of the Civil Code). Leading cases come from the full session (“assemblée plénière”) of the Cour de Cassation. (Cass. Ass. Plèn., 12 juillet 2000, 4 arrêts, JCP 2000, I, 280, n° 2 obs. G. Viney). This jurisprudence has led to subsequent decisions in the same vein. The solution implies that actions based on abuses of the rights of the press must follow the procedural obligations set forth by the law of 1881, which in slightly paradoxical fashion makes the tort action for the affected third party more complex (see E. Derrieux, droit de la communication, 4th ed. LGDJ, p. 556 et seq).

**1.1.2. Inaccurate information**

The publisher can be sued for inaccurate information in a work, based on Articles 1382 and 1383 of the Civil Code. Indeed, Article 1383 of the Civil Code states: “Every individual is responsible for the damages that he causes not only by his own actions but also due to his negligence or imprudence.”

Two publications, one about edible plants10 and the other a book “A How-To Guide to Suicide” caused the death of readers. In those cases the publisher can turn to the author for indemnification. We often find notes in books such as “The author and publisher disclaim all responsibility for the information in or absent from this work,” but there is serious doubt as to the validity of these clauses, which not applicable in tort law.

---

(“inopposables en matière délictuelle”). The only precaution that a publisher can take is to make the author indemnify him.

1.2 Common law sanctions.
We must distinguish the question of compensation for damages from the question of retraction (“retrait de l’acte illicite”). For compensation, like in matters of copyright infringement, the judge will evaluate the presence and extent of damages. There is an added difficulty in those cases where a non-economic right is affected. Sometimes this leads to the determination of very high damages (for example, the Estelle Halliday case).

People involved in an action to get the termination of the material may try to obtain summary proceedings according to the terms of the New Civil Procedure Code.

**Article 808**

In all emergency cases, the president of the tribunal de grande instance can order all measures which are not the subject of dispute or that provide proof of the existence of disagreement in summary proceedings.

**Article 809**

The president can always, even when faced with serious disputes, order conservatory measures or any restorative measures which are necessary to either prevent imminent damage or to stop a manifestly illicit alteration in summary proceedings. In cases where the existence of the obligation is not seriously contestable, the president may grant a retainer to the creditor or order the execution of the obligation even if it is a performance obligation (obligation to do).

**Article 810**

The powers of the president of the tribunal de grande instance described in the two preceding articles extend to all matters where there is no specific summary proceedings procedure.

The judge ruling in summary proceedings can also impose periodic penalty payments. Some parts of the civil code have specifically taken into account the types of offenses that are likely to be «portées du fait des excès de certains moyens de communication» (See, E. Derrieux, Le droit de la communication, 4ème ed., p. 572). This is the case of Article 9 of the Civil Code, paragraph 2 and 9-1.

**Article 9**

Each person has the right to the respect of their private life.
Judges may, without prejudice to the compensation of harms suffered, order any measures which are proper to prevent or stop any invasion of privacy: these measures can, if they are urgent, be ordered in summary proceedings.

**Article 9-1**

Each individual has a right to the presumption of innocence. When a person is presented publicly as a perpetrator before conviction, the judge can, even during summary proceedings, without prejudice to the compensation of harms suffered, order any measures, such as inserting a rectification or to issuing a press release that aim to end the breach of the presumption of innocence at the expense of the person who either physically or morally is responsible for that breach.

2. Specialized private law ("droits spéciaux")

2.1. Substantive Legal Areas in "droits spéciaux"

2.1.1. The rights of the press: the law of July 29 1881

The law of 1881 is a penal law text, which sets forth several offenses. But civil responsibility is also involved in this area (see above on the interactions between tort law and the right of the press).

2.1.2. Communication law ("le droit de la communication")

The law n 86-1067 modified on September 30, 1986 hosts a certain number of principles relevant to the liberty of communication and its limits.

"The liberty of communication is only limited, to the extent necessary, on one hand by the respect of human dignity, or the liberty of others, of the pluralistic character of the expression of current thoughts and opinions and on the other hand, by preserving public order, by the needs of national defense, by the requirements of public service, by technological obligations inherent to means of communication as well as by the necessity for audiovisual services to develop audiovisual production."

Issues of liability are not however explicitly addressed and involve common law from both civil and penal perspectives and the offenses described in the law of July 29, 1881 on the press. Indeed, the article of the law of 1881 applies all of its offenses to audiovisual communication. Audiovisual communication is considered a means of publication in the sense of the law of 1881.

**Article 41-1**

To apply paragraphs 4 and 5 of the current chapter, audiovisual communication shall be regarded as a means of publication.
2.1.3. The law on confidence in the digital economy ("La loi sur la confiance dans l'économie numérique")

This law lists the obligations of the different actors of the digital economy, specifically in regards to illicit content. The texts do not distinguish between different types of illicit content. Conduct could concern an infringement just as it could concern a justification for crimes against humanity (for a critique of this amalgam see, H-J and A Lucas, Traité de propriété littéraire et artistique). The law distinguishes between several types of actors, which are treated in the chapter on technical contractors. Simple intermediaries have a certain immunity when delivering illicit content whereas content providers, professional or nonprofessional publishers are more severely treated (see below on this difference in treatment in the penal texts).

a) Simple intermediaries

People who only assure the storage of data to be made available will not have their “civil liability implicated because of the activities or the information stored if they did not have knowledge of the illicit character or circumstances that led to the illicit character or if from the moment where they gained such knowledge they promptly started to remove that data or to make access to that data impossible.” Their penal liability is carved out according to the same terms.

They do have an obligation to conserve the data which allows for the “identification of anyone who contributed to the creation of the content or of the service for which they were contracted” as well as an obligation to quickly inform the competent authorities upon learning of the illicit content and an obligation to remove or filter such information. They do not have an obligation to control the information that they transmit or store or a general obligation to research the facts or circumstances revealing illicit activity. A specific text deals with the issues of justifications of crimes against humanity ("l’apologie des crimes contre l’humanité") [translator’s note: This refers to Holocaust denial and similar offenses.], incitement of racial hatred and child pornography. To compensate for the relative immunity of the access providers and hosts, the text indicates that the people in charge of storage must participate in the battle against the distribution of these offending actions, and does so using vague language. “To this end, they must put into place an easily accessible and visible mechanism which allows all people to bring to light this type of data.” They must also “make public the means that they dedicate to the battle against these illicit activities” without which they run the risk of criminal sanctions.

The text specifies what circumstances can make the people in charge of the transmission of content liable:

---

According to article L. 32-3-2 of the code of mail and telecommunications, article L. 32-3-3 is reestablished and article L. 32-3-4 is inserted as follows:
Art. L. 32-3-3: All persons providing transmission of content on a telecommunications network or providing access to a telecommunications network will not be subject to civil or penal liability as to the content except in the cases where that person is at the origin of a litigious transmission, where that person selected the destination of the transmission or where that person selected and modified the content of the transmission.

Art. L. 32-3-4: All persons in charge of automatic, intermediate or temporary storage of content for the sole end of making subsequent transmission more efficient will only be subject to civil and penal liability for that content in one of the following cases:

1. That person modified the content, did not comply with its access conditions and the user rules concerning its updates, or hindered the legitimate and common use of the technology used to obtain the data.

2. That person did not act promptly to remove or make inaccessible content that was stocked, once that person learned either by the fact that the initial transmitted content was removed from the network, or that access to the initial transmitted content was made impossible, or that judicial authorities ordered the removal from the network of the initially transmitted content or to make that content inaccessible.

b) People who publish an online communication service

For those who professionally engage in this type of publishing, there is an obligation to provide information permitting their identification, an obligation that does not weigh upon the non-professional publisher (on the difficulties of the implementation of the text see E. Dreyer, la responsabilité des internautes et éditeurs de sites a l’aube de la loi pour la confiance dans l’économie numérique, op. cit.)

The law explicitly extends the provisions of the law of the press of 1881 to online public communication services. The law of the press of 1881 already encompassed all forms of publication when setting out its field of application. The law of 2004 thus only recalls that online publishers must obey the laws set forth in the law of the press. The text also specifically sets forth a right to online response (“un droit de réponse en ligne”).

2.1.4. The protection of natural persons from personal data processing  (law n. 2004-801 of August 6, 2004)

Files containing personal data are subject to different rules and restrictions concerning storage, conservation and distribution.

In the sense of the law of August 6, 2004:

Art 2 “personal data is all information relating to a physical person, identified or who could be identified directly or indirectly by reference to an identification number or to one or several elements that are personal to them. To determine if a person is identifiable, one should consider the totality of means that those responsible for the data
processing or any other person either possesses or has access to for identification purposes.”

“Personal data processing is any operation or group of operations using such data, whatever the process used and in particular collection, recording, organization, conservation, modification or adaptation, extraction, consultation, use, the transmission, the diffusion or other means of distribution, interconnecting or narrowing, as well as locking, erasing or destruction.”

“A personal data file is any structured and stable collection of personal data accessible according to specific requirements.”

The law specifies the conditions in which files can legitimately be compiled when they contain personal data. The data must be collected and processed in a faithful and legitimate manner and for “determinate, explicit, and legitimate ends.” (Art. 6)

The conditions for their collection and processing are further detailed:

4. The data is accurate, complete and if necessary, updated; the appropriate means must be taken for inaccurate, incomplete data in regards to the ends for which that data is collected or processed be erased or corrected.

5. They are conserved in a form which allows the concerned individuals to be identified during a period that does not exceed the necessary period for the ends for which that data was collected and processed.

Art. 7: To proceed with personal data processing one must obtain the consent of the concerned individual or satisfy one of the following conditions:

1. It is respecting a legal obligation of the processing representative;
2. It is done for the end of saving the life of the concerned person;
3. It is the execution of a public service mission in which the processing or the addressee of the processing is involved;
4. It is the execution either of a contract to which the concerned individual is a party, or of pre-contractual measures taken at the request of that individual;
5. It is the realization of a legitimate interest sought by the processing representative or addressee, under the condition that the interest or fundamental rights and liberties of the concerned individual are not disregarded.

The text describes certain prohibited categories of information. One of these is data which “directly or indirectly makes apparent racial or ethnic origins, political, philosophical or religious opinions, union membership of individuals, or that relates to the health or sexual life of those individuals.” There are, however, exceptions to this prohibition, which are dictated by general interest (research, statistical studies of the INSEE, archival conservation) or personal protection (saving human life, health, the exercise or defense of a judicial right) or when the person gave their consent.
The issue as it relates to the activities of public archives is spelled out by specific language, as far as public archives have the mission:

a) either to collect this type of data in the context of a public activity. This is the case for statistical files collected by researchers in research bodies such as l’INSEE (National Institute of Statistical Studies) or by research departments within organizations such as CNRS, INSERM, etc. In this case, the law specifically frames how these documents must be entered in the name of public archives:

Article L212-4 du Code du patrimoine


When the documents targeted by article L. 211-4 contains personal data collected in automatic processing treatments regulated by law n 78-17 of the 6th of January 1978 pertaining to computers, files and liberties, the data will, at the end of the period described in section 5 of article 6 of said law, be sorted to determine which data should be conserved and which data, lacking scientific, statistical or historical interest, should be destroyed.

The categories of information to be destroyed as well as the means of their destruction will be fixed by agreement between the authority that produced or received the information and the archival administration.

b) or to organize themselves the data processing. For example certain services who want their archives to be valued build databases prone to containing this type of data. The law took into account on one hand the imperatives associated with the accomplishment of a public service mission for access to public archives, and on the other hand the necessity to build certain files (for example for research and medical ends, or even for those that deal with public safety).

2.1.5. Breach of industrial property rights

The use, in a novel, of a mark which can be found in common language can be criticized by the mark’s owner if that use “contributes to the genericization (making the mark generic) to the point at which the owner loses all rights on that particular name.” Many cases illustrate the publisher’s liability being put into play in this type of situation, for example Bic sued an author and his publisher, as did the mark “Caddie.”

2.2. The sanctions in special rights (“droits spéciaux”)

We must again distinguish between compensating for damages and ending a disturbance. From this point of view, the law sometimes prescribes specific procedures. This is the case of the law of August 6, 2004 on the treatment of personal data which includes a title on the right of people with respect to the processing of the personal data.
By the terms of article 40:

extract from art. 40: “any physical person who can prove his identity may demand of the head of processing that, depending on the circumstances, his or her relevant personal data that is inaccurate, incomplete, ambiguous, outdated or the collection, use, communication and conservation of which is prohibited, be rectified, completed, updated, locked or deleted”

“at the interested party’s request, the head of processing must demonstrate, without any fees for the person inquiring, that he accomplished the required operations from the preceding paragraph.”

The law on the confidence in the digital economy also describes specific procedures for the removal of illicit content by the host (legal obligation) and also for filtering, if you cannot paralyze the emission source of the illicit content, which are measures imposed on access providers independent of any fault of their own. Some decisions are already applying these laws (for a site that denied the Holocaust, the host domiciled in the US, ordonnance de référé du TGI Paris, June 13, 2005, Legipresse, n 225, Oct. 2005, III p.79, note Sandrine Albrieux). Types of penalties were also described.

When the abuse relates to a breach of the right of the press, the civil action must occur within the framework of the Law of 1881 regardless of whether it is joined to a penal action. The victim can obtain compensation for damages according to the principles and methods of the common law but only in accordance with the procedural rules of this special text. The affected person can obtain an injunction if they make an emergency motion for summary proceedings by applying Article 809 of the New Code of Civil Procedure (see above in the section on common law sanctions for this text). The Law of 1881 does not refer to summary proceedings, but nothing prevents one from being tried (see E. Derrieux, droit de communication, p. 568 et seq.). The end of the illegitimate activity will not be automatic, only ordered when it is causing exceptional harm, because of the importance of the principle behind the freedom of communication. Other measures can be ordered which are less burdensome for the distributor or publisher and more worrisome for the principle of freedom of communication: partial removal, corrections, insertion of warnings or press releases.

3. Penal law
Many procedures can affect publication of illicit content either in common law or in the special communication or press law applicable to publishers. Some specifically address placing minors in danger (access to illicit content or distribution of their image).

3.1. The Penal Code Procedures

a) Invasion of privacy

Articles L 226-1 and L 226-2 of the Penal Code:
Article 226-1


To voluntarily invade another’s privacy by any means is punished by a year of imprisonment and 45,000 euros of fine:
1. By capturing, recording or transmitting without consent of the author of words pronounced in private or confidential context;
2. By fixing, recording or transmitting without consent of the image of a person in a private space.

When the above acts have been accomplished in the sight and knowledge of the concerned individuals without any opposition when they were in a position to do so, the consent of those individuals will be implied.

Article 226-2

The same punishments apply to those that conserve, that bring or allow to be brought to the attention of a third party or the public at large, or that use in whatever manner, any recording or document obtained with the help of one of the acts described in Article 226-1.

When the offense described by the previous paragraph is committed by use of the written or audiovisual press, specific procedures of laws that regulate these matters are applicable in regards to determine the responsible parties.

The complaints concerning the breach of private life are more frequent in civil law.

b) Protection of minors

Distributing messages that are violent, pornographic or contrary to human dignity (the old procedure referenced breach of good mores in general).

It is Article 227-24 of the Penal Code which states that “the act of making, transporting, or distributing by whatever means messages that are violent, pornographic or contrary to human dignity, or of commercializing such a message is punishable by three years of imprisonment and a fine of 75,000 euros when this message might be seen or perceived by a minor.” The article further states: “When the offenses described by the present article are submitted by the written or audiovisual press, the specific procedures of the laws that regulate those matters are applicable in the determination of the people responsible.” Since 1994, the offense of breach of good mores is limited to content which might be seen or perceived by minors rather than by any person. Article L 227-24 lays out a procedure which concerns audiovisual communication services, internet services as well as telematic services. The law on confidence in the digital economy adopted the June 21, 2004 (law n 2004-575 of the 21st of June 2004 JO, 22nd June 2004, LCEN) refers to all of these services as electronic communication services.  

On this subject and on the issue of the liability of these services, see Nathalie Finet, dernières évolutiops [évolutions?] de la responsabilité des acteurs des services de communications electroniques en matière
When Article L 227-24 reserves certain procedures to specific services, some authors wondered whether the sphere of influence of penal law was made “partly inefficient” because of the variety of procedures. We have already observed that the treatment of a case varies with the actors. Website publishers remain heavily punished in the case of distribution of illicit content in the sense of article L 227-24 of the Penal Code, as opposed to access providers or hosts. In particular, the condition that the message cannot be seen or perceived by a minor and the measures that a publisher must take to prevent that access are very demanding. A warning at the moment of access to the site and specifying on the home page that the site is exclusively reserved to adults is not enough. (cour d’appel de paris, 2nd april 2002)

**Distributing a pornographic image or representation of a minor.**
The distribution and any other form of transmission, recording, etc. of these images is punished by fines and imprisonment when these images are pornographic. (Art L 227-23 of the Penal Code)

c) **Breach of authority or independence of justice**

Articles 434-16 and 434-25 of the Penal Code:

**Article 434-16**

*(Ordonnance n° 2000-916 du 19 septembre 2000 art. 3 Journal Officiel du 22 septembre 2000 en vigueur le 1er janvier 2002)*

The publication, before the definitive judicial decision, of commentaries tending to influence witness testimony or the final decision of the preliminary judicial investigation or of final judgment is punished by six months of imprisonment and a fine of 7,500 euros. When this offense is committed by the written or audiovisual press, specific provisions of the laws regulating those matters are applicable as to determining the responsible parties.

**Article 434-25**

*(Ordonnance n° 2000-916 du 19 septembre 2000 art. 3 Journal Officiel du 22 septembre 2000 en vigueur le 1er janvier 2002)*

Seeking to bring into disrepute, in a public manner by actions, words, written texts or any images a judicial action or decision, under conditions that might harm the judicial authority or independence is punished by six months of imprisonment and a fine of 7,500 euros.

---

pénale (recent evolutions of penal liability of actors in electronic communications services) Revue Lamy, droit de l’immatériel, avril 2005, n° 4, p. 130.
12 See, N. Finet, i.
Determining who is responsible, when the offense was committed by the press or electronic or audiovisual communication will be done according to the rules described by the law of the press with a cascading or “waterfall” system of responsibility (“en cascade”), which starts with the publisher or the person responsible for the publication (see below article 42 of the law of 1881 of the press).

3.2 Penal sanctions in the law of the press (modified law of July 29, 1881)

The law of the press dedicates its Chapter IV to “crimes and offenses committed by the press or any other means of publication.” The concept of publication must be considered very broadly and includes audiovisual communication processes. Law 2004-575 of June 21, 2004 extended the penal offenses which used to be applicable to audiovisual communication to any possible communication to the public by electronic means, a concept defined as: “any distribution to the public or to categories of the public by an electronic communication process, by signs, by signals, by written materials, by images, by sounds, or messages of any nature which are not private correspondence.”

Among these offenses, we find incitement to crime and offenses (Art. 24); the questioning of the existence of one or several crimes against humanity (Art. 24 bis); any offense to the President of the Republic (Art. 26); the publication, distribution and the reproduction of false news information (Art. 27); defamation (Art. 29); slander (Art. 33); breach of the presumption of innocence (Art. 35 ter, also more specifically targeted by Article 9-1 of the Civil Code); the distribution and reproduction of the details of a crime or offense when this distribution offends the dignity of the victim (art 35 quarter); contempt towards certain public figures (ambassadors, diplomatic agents, ministers etc.) (Art. 37). Defamation causes the most litigation of any of these offenses.

a) defamation

Defamation is defined as “any allegation or implication of a fact which undermines the honor or reputation of the person or body to whom the fact is defamation. The direct or indirect publication by means of reproduction of the allegation is punishable, even if it is done with expression of doubt or if it targets a person or body which is not expressly designated, but whose identification is possible by the terms of the incriminated speech, threat, and declarations whether written, printed or posted.”

The requirements for defamation are:
the allegation of a specific fact and its imputation to someone
  o This can be, for example, revealing a membership to an extreme right
    political group (Cour de cassation, June 10, 1999, cited in E. Derrieux,
    droit de communication, Jurisprudence, Recueil de decisions, Legipresse,
    2000, 4th edition, p. 134). For a recent example illustrating the condition
    of imputation of a specific fact, see, about a product relating to miracle
    diets, called “scams,” Cass. 1ere chambre civile, September 27, 2005,
- that offends the honor and reputation of a person or group of people
- the bad faith of the person who commits the defamation or who reproduces the
  defamation.

The existence of justifications:
- There is an exception in certain contexts for judicial and parliamentary officers
  for debates held in the courts or assemblies:

### Article 41

*Modified by the Law n. 82-506 of the 15th June 1982 ART 5 (JORF 16th June 1982)*

The discussions held within the national assembly or senate as well as the reports and any
printed piece by order of one of these two assemblies will not give rise to any action

The report of public sessions of assemblies targeted by the previous paragraph done in
good faith in the newspapers will not give rise to any action.

The good faith loyal recounting of judicial debates and the speeches and written products
done in front of the courts will not give rise to any defamation, slander or contempt
action.

Judges are nonetheless able, seized by the cause and ruling on the merits, to suppress
slanderous, contemptuous or defaming statements and sentence the person responsible for
those to damages.

Defamatory statements foreign to the case can give rise to either a public action or civil
action of the parties if these actions would have been allowed by the courts, and in all
cases to civil actions by the third parties.

- The good faith of the person defaming which reveals “the belief in the truth of the
defaming fact and the pursuit of a legitimate goal (the duty to inform).” The
  judges will for example check the rigor and care taken by the author of the
defamation when treating the subject and the serious nature of the verification of
  his sources. The judges will be interested in, for example, the tendentious nature
  of the defaming publication. (Cour de cassation, chambre criminelle, October 7,
  1997, E. Derrieux, op. cit., p. 137) Good faith is only a justification for the author

---

13 E. Pierrat, op. cit., p. 149.
of the defamation. This consideration will not enter in the favor of a publisher. (See, Cour de cassation, chambre criminelle, May 16, 1995, Dalloz, 1995, informations rapides, p. 181).

- Proof of the defaming fact. Judicial decisions are exacting when assessing this justification, which must notably be correlated with the imputed fact. “To produce the absolving effect described (in the Law of the July 29, 1881), the proof of the veracity of the defaming facts must be perfect, complete and correlate with the defaming imputations as much in their materiality as to the extent of their influence.” (Cour de cassation, chambre criminelle, April 29, 1997, E. Derrieux, Recueil de décisions, op. cit., p. 136).

The exception for truth faces some limits, notably the right to forget (“le droit à l’oubli”) for some prejudicial facts. The truth cannot be proved:

1) when the facts or statements are more than 10 years old. In this case, only the belief in the fact and the pursuit of a legitimate goal can exonerate the defamer.

2) “when the imputation refers to a fact constituting an offense that was given amnesty or ordered or that gave action to a condemnation erased by rehabilitation or revision”

3) when the defaming facts concern the private life of people.

DEFAMATION ON THE INTERNET

Defamation on the internet raises a delicate question regarding the application of the statute of limitations, which is three months from the commission of the offense. The issue is to know when to set the time of the commission of the offense. Judicial decisions have stated that the offense of defamation on the internet is continuous. The term would only start to run after the illegitimate information was removed. The revision project on the law for confidence in the digital economy had used this solution, but the constitutional court censured this disposition as it introduced an unjust distinction between the written press and the press on the internet (Decision of the Conseil constitutionnel n 2000-496, DC of June 10, 2004) and the means was disproportionate to the pursued goal.

In this question we must distinguish between the rules of limitation concerning content originally made accessible online and rules concerning content already published in another medium before being reproduced on the internet. In the first case the statute of limitation starts from the date of online distribution, a rule analogous to that of the published press. However, for the online publication of content already published elsewhere, the term starts from the moment of each new publication. Jurisprudence has already shown its opinion on the issue with a perspective that is interesting for this questionnaire. Indeed, the issues were how to qualify putting something online and how to know if it was an archiving function.

14 [Left blank in French report.]
The cour d’appel of Paris decided that: “One should not analyze putting text online as one would library archival operations. Rather one should analyze it as a new publication, even if the text has not undergone any modification… by choosing to place the text on a new type of support, the concerned individuals are not attempting to conduct a storage operation with the hopes of eventual consultation, they are seeking the opportunity for a new enlarged public, not limited to its members, to learn about the written materials, thanks to the access possibilities offered by the internet.”

This outcome had the statute of limitations running anew at each new publication. The Law for Confidence in the Digital Economy had designed a different solution by choosing not to dissociate the statute of limitations in the case of multiple publications of the same content. The idea was to protect journalistic archives from legal risk. But this solution could push online publishers towards fraud as their “interest would be to first distribute materials at risk as a written work as it is more likely to go unnoticed and then after three months, the publisher could publish on the internet with no fear of defamation.”

The Conseil constitutionnel censured this process. According to E. Dreyer, “by maintaining the principle of dissociation of the applicable limitations in the paper universe and the digital universe on the same discourse,” the Conseil constitutionnel implicitly recognizes that “putting something online is not a simple act of prolonging the initial communication.”

The Law on the Press determines what people to consider as responsible for the offense, by a so-called “waterfall” system (“en cascade”) so that when you cannot identify the authors other people may be pursued. Article 42 states that:

**Art 42, Law of July 29, 1881**

[The following persons] will be liable, as principle authors of the punishments that constitute the repression of crimes and offense committed by the press in the following order:

1. Directors of publications or publishers, whatever their profession or denomination and in the case described by the second paragraph of article 6, of the co-directors of publication;  
2. In their absence, then the authors;  
3. If the authors are absent, the printers;  
4. If the printers are absent, the sellers, distributors and posters.

---

15 See, E. Dreyer, La responsabilité des internautes et éditeurs de sites à l’aube de la loi pour la confiance et l’économie numérique (*the responsibility or internet users and website publishers at the dawn of the law of the confidence in the digital economy*) Légipresse n° 214, Sept. 2004, II. Chroniques et opinions, p. 91.
This system of responsibility applies to audiovisual works, except that the actors are not the same (at the end of the chain there are producers) and that the directors of publication’s liability will only be engaged if the message was recorded prior to its broadcasting distribution. In that case, we assume that the director of publication would have had the power to control the content. For live distribution, only the author of the offense will be personally responsible. (E. Derrieux, droit de la communication, LG.D.J. 2004, p. 395).

As with infringements, the author can indemnify the publisher in case of defamation. In the section of a contract on indemnification given by the author to the publisher, one can find this type of clause: The author “guarantees (…) that his manuscript does not contain anything that could fall under the law and other relevant procedures to defamation and slander, to the private life and the right of publicity, to the breach of good mores or to infringement…”

The author must also indemnify the editor in the case charges of defamation arise.

b) Slander (“l’injure”)
Slander is close to defamation but integrates an abusive dimension. Article 29 defines slander after defamation as such:

(Article 29 of the Law of July 29, 1881)

Any abusive expression, terms of contempt or insults which do not contain the imputation of a fact is slander.

II. Sensitive content in public archives

The system is structured by the Law of January 3, 1979 on Archives and the Law of July 17, 1978 on Administrative Documents.

(The Law of 1979 [on Archives])

The delay of access to public archives is currently thirty years after the creation of the document. This delay may, however, be extended due to considerations of the sensitive nature of some information:

Some documents are freely communicable, either because they have already been distributed or because they are relevant to another system of communication. This is the case of administrative documents (see above). For all other public archives, the common law delay is thirty years, except if the information is determined to be more sensitive. The laws lay out a series of special delays depending on the degree of sensitivity of the information. We have begun to realize that these delays can be very long (judged as excessive by some, notably in comparison to other countries).
All other documents in public archives may be freely consulted at the end of a delay of thirty years or of special delays described by article L. 213-2.

**Article L213-2**

The delay beyond which the documents in public archives may be freely consulted is extended to:

a) One hundred and fifty years from the date of birth for documents containing individual information of medical character;
b) One hundred and twenty years from the date of birth for personal files;
c) One hundred years from the date of the act or closure of the file for documents relating to cases brought before the courts, including clemency decisions (“décisions de grâce”), notaries’ catalogues or repertories as well as for the registers of births, marriages and deaths.
d) One hundred years of delay for the census or research of documents containing individual information that deals with personal and family life, and in a general manner, to facts and behavior of a private order, collected in the context of a statistical investigation by public services.
e) sixty years from the date of the act for documents containing information that implicates the private life or the nation’s security or national defense and the list of which is fixed by decree of the State Council.

Audiovisual recordings of legal trials obey certain specific rules:

**Article L222-1**

During the twenty years following the end of the trial, the total or partial consultation of the audiovisual or sound recording, for historical or scientific ends, can be authorized by the appropriate administrative authority.

At the end of this delay, the consultation is open. The reproduction or distribution, in its totality or in part, of the audiovisual or sound recording is conditioned by authorization received, after all those with an interest to take action have been presented with the opportunity to do so, by the President du Tribunal de Grande Instance de Paris or by the judge that he delegated to in that instance. Even so, the reproduction or distribution, in its totality and in part, of the recording of sessions of a trial for crime against humanity can be authorized once that trial has reached an end with an definitive opinion.

After fifty years the reproduction and distribution of the audiovisual and sound recordings is open.

**Article L222-2**

Trials of which the recording was authorized before July 13, 1990 can be reproduced and distributed according to the procedure described by article L. 222-1.

Determining and appreciating the sensitive character of information
It is those in charge of the archives who determine the sensitive nature of the information or lack thereof, sometimes in concert with the producing organization. This determination is not without difficulty and differing perspectives. On one hand, the access to documents on the premises is done by file or binder containing several documents. If one document in a binder is considered to breach the right of privacy, the practical difficulty is to remove the sensitive document during the consultation to allow access to the other documents. Another difficulty is in the determination of the breach of the right of privacy. Just because a document contains information concerning a private individual does not necessarily mean that it breaches that person’s privacy. The archive services will sometimes be tempted to interpret the notion of right of privacy more broadly to avoid all liability.

In this system, it is necessary again, to evoke the opportunity that users, notably researchers, have to access the documents before the end of the delay. In particular, contemporary historians have a need to consult archives that are not yet available to the public. They can ask for an exception from the archival administration even for sensitive documents. This is an individual process. It is not an absolute right, the administration retains the discretionary right to allow a researcher to access a document.

The question arises of what liability the archives incur if the researcher, having obtained the exception, reveals information or secrets contained in those documents. For example, if he publishes an article and invades the privacy of a third party. That person, if he is still alive, can implicate the researcher’s responsibility (see above on invasion of privacy that can be treated either on civil or penal grounds) but not that of the archive service which only used the prerogative it receives from the defined rights of archives.

The question of the archive’s liability arises, however, when the means of communication exceeds simple access to the document, for example if the archive digitalizes its collections and renders access easier on the internet. It is difficult to situate archives relative to the referenced actors in the matter of electronic communication services. Should we consider them as simple access providers to documents or as publishers? To the extent that these services retain the possession of these documents, for which they have a responsibility in terms of conservation and access, it would seem that they could possibly be considered as simple intermediaries. But the fact that they are content providers allows us to place them in the publisher’s category. But no analysis has been done on this question, to our knowledge.

For each of the areas identified above,

2. Are there judicial decisions in your country addressing publishers’ or archives’ liability with respect to allegedly offending material contained in the archives’ collections?
For archives or archival collections, to my knowledge, there are no judicial decisions that deal with this question, or rather they deal with it indirectly. See below.

a. What, if any, distinctions do courts in your country articulate between the roles of publishers and of archives?

We mentioned earlier (regarding the statute of limitations in matters of defamation on the internet) a case argued in front of the appeals court of Paris (“Cour d’appel de Paris”) in which the judges specified that the incriminating diffusion was more than a simple archival operation, saying that: “One should not analyze putting text online as one would library archival operations. Rather one should analyze it as a new publication, even if the text has not undergone any modification… by choosing to place the text on a new type of support, the concerned individuals are not attempting to conduct a storage operation with the hopes of eventual consultation, they are seeking the opportunity for a new enlarged public, not limited to its members, to learn about the written materials, thanks to the access possibilities offered by the internet.”

Should we then deduce to the contrary that the liability of a service which simply performs archival tasks cannot be implicated, once the statute of limitations has run out? That is the solution that the Law for Confidence in the Digital Economy wished for, in order to assure newspapers archiving their articles that they need not be worried about this new operation (the statute of limitations of three months starting from the first publication). The law spoke about the reproduction of the same content online. However, the constitutional court (“conseil constitutionnel”) censured that process.

One can thus suppose that whatever the end of the distribution, archiving or publication, liabilities will not, from that perspective, be treated differently.

One can still wonder, depending on the different actors identified by the Law for Confidence in the Digital Economy, if archives should not instead be considered as non-professional publishers whose obligations are implicated in matters of identification.

b. According to these decisions or other laws of your country, does the publisher’s liability depend on the extent to which the publisher exercises control over the contents and maintenance of the archive? Does the publisher’s liability depend on any other factors?

Without a doubt, this is a consideration that inspired the relative restrictions on liability for access providers and hosts in French law. But the solution cannot be extended to publishers.

c. According to these decisions or other laws of your country, does the archives’ liability depend on the extent to which it controls the acquisition and maintenance of the offending material? Does liability depend on the extent to which the
archives makes the material accessible to the public? Does the archives’ liability depend on any other factors?

Public archives
The liability of archives will be limited by the missions that are imparted to them, notably in matters of communication.

In the context of public archives, access is framed by the law. Only if archives go beyond this framework and the content of the distributed archives invades another’s privacy or goes against public interest can their liability be implicated. For example, if they communicate before the appropriate delay is over or communicate without authorization a document that invades someone’s privacy, they expose themselves to penalties: penal liability in several cases (invasion of privacy, violation of professional secrecy) and civil liability (breach of the right of privacy, see above).

As to professional liability, i.e. the duty of confidentiality, a question arose concerning documents relating to a pacifist demonstration organized by the Algerians at the time of the Algerian war, which was held in Paris in October 1961. Many demonstrators were killed by police repression. But the numbers were always underestimated. Archivists decided to reveal the number of deaths. However, the archives containing this information were not open access. Revealing this sensitive information was likely to engage their liability.

The Law of Archives includes a provision that must be combined with the rules in the Penal Code and that also concerns the duty of confidentiality.

Article L 211-3 of the Code du Patrimoine states:

Article L211

Any civil servant or agent in charge of the collection or conservation of archives in applying the provisions of this present title is held to a standard of confidentiality (“secret professionnel”) for any document that can not legally be made accessible to the public.

An archivist who breaks these rules is subject to penalties set forth in Articles 226-13 and 226-31 of the Penal Code (Art L 214-1 of the Penal Code. Article 226-13 punishes by a year of imprisonment and a fine of 15,000 euros any person that reveals secret information of which they are the depositary. Article 226-31 sets forth complementary punishments which are applicable to physical persons (prohibiting the exercise of a professional activity, taking away certain civic, civil and familial rights, etc.).

This text deals with public archives, but Article L 214-2 of the Code of Patrimony also punishes with the same sentences the act of communication information contained in private archives that would violate the will of the depositor or owner of the archives.
As to archives which contain documents in which illegitimate content may eventually engage their liability, the issues would be the same as to publishers who conserve and make archives accessible.

d. Have courts in your country imposed remedies against publishers who did not remove material containing allegedly offending material from archives over which they maintained control? If so, what types of remedies were imposed and under what circumstances?

e. Have courts in your country imposed remedies against archives that retain or make available this material? If so, what types of remedies were imposed and under what circumstances?

To my knowledge, there are no decisions that deal with this point.

In short, we are interested in knowing what bodies of law would motivate removal of documents from archival collections or databases and whether a library or archives could make available the offending material – assuming it has or could obtain a copy – when the publisher may not (or at least, the publisher prefers not to take the legal risk).

The issue can arise for public services that are charged with giving the public access to documents. In as far as it is a communication obligation; we do not see how their liability could be engaged. However, the content can still pose problems, for example if it contains defamatory content. As far as the law sets forth long communication delays, the problem has little chance of occurring.

Archivists have asked themselves some questions on this issue. For example, what happens when a public archive evokes people having collaborated under the Vichy regime? A certain number of these archives are now open and the concerned family members may believe that the access to this information is prejudicial to their reputation. This is also true for photographs of women who, due to the hate-filled, vindictive mood of the public, were being shaved in public, as they were suspected of having had relations with German men. Some museums or archives have important collections of this post-war period.

The problem is that archivists are guarantors of the integrity of the archives, which means conserving the documents from their creation. They cannot be judges or censors of content that could be deemed sensitive or illegitimate. In addition and in some ways paradoxically, they cannot guarantee the authenticity or the truth of the documents.

Here again we must reason based on the basic mission of the archives. The access in a reading room of a sensitive document cannot be criticized by those concerned once its communication is open (and the delays set forth by the law on archives have expired). However, another type of communication, for example on a database, would go beyond the mission and could be contested.
For legal basis for removal, see above for the different substantive legal areas.

3. Have litigants in your country agreed to settlements that would affect the contents, maintenance, or public accessibility of material contained in archives? If so, what types of settlements have been reached and under what circumstances?

It is difficult to gain knowledge of these practices.

4. Have publishers, aggregators or archives in your country sought to avoid potential liability by removing allegedly offending material, without waiting to be notified (or sued) by persons claiming to be injured by the material? If so, under what circumstances?

[Not answered by consultant.]

5. What is the potential liability in your country for publication of allegedly offending material?

In general, on this issue, see the different substantive legal areas and sanctions.

   a. Is there any statutory or case law authority in your country for reducing damages in the case of nonprofit libraries or archives acting in good faith?

In principle, good faith may exonerate a person from their penal liability (for example in infringement, but also for other acts giving rise to criminal proceedings, such as defamation). It does not vary the extent of the sentence in theory. It is not impossible that in practice a judge will take into consideration the behavior of the person distributing the illegal content to determine the amount of the fine as the Penal Code indicates maximum sentences.

As to civil liability, good faith in regards to infringement of a work does not matter in the determination of liability. Once infringement is established, proof of guilt/fault is not needed (Cass. 1ere civ, 10 mai 1995, RIDA 4. 1994, p. 291). The court may demand injunctive relief against not only the infringer and publisher, but also against intermediaries who did not directly contribute to the infringement. In the allocation of damages, judges will take into account the extent of the crime, without concern about the question of good faith.

As to the nature of the institution, the consideration of its cultural activities, and its nonprofit character are irrelevant elements.

   b. What factors do courts in your country use for assessing damages?

Courts take into consideration the extent of real damages (loss due to the illegal content, lost profits if it encroached upon an economic right), which implies taking into consideration the means of communication and the extent of the distribution.
6. Are there any industry standards or accepted practices in your country, other than withdrawal of an article, for addressing offending material contained in an archives or database? For example, are there any practices concerning legends or disclaimers to accompany offending material in order to continue to make it available?

Yes, on this point see the question of sanctions. Judges sometimes hesitate to order the removal of illegitimate content, but they may demand the inclusion of information to accompany the distribution of a message seen as breaching a right.

C. Contract Analysis:

1. Do contract provisions between archives and publishers in your country commonly address the issue of removing a work from the collection? If so, how do they do so? Do they address labeling, hyperlinking or any other means of dealing with the offending material other than removing it?

[Not answered by consultant.]

2. To what extent might a publisher avoid liability related to the offending material through its contractual arrangements with a library or archive in your country? Do publishers’ contracts commonly contain provisions aimed at limiting or avoiding liability for offending material?

Because clauses precluding liability are inadmissible in tort law, the publisher may call upon the author of illicit content for indemnification (“appeler en garantie”).

3. Have courts in your country enforced contractual obligations to remove or withdraw archived material? If so, under what circumstances?

Not to my knowledge.

4. To what extent do contracts in your country between publishers, databases, and libraries allow libraries to create their own archival or preservation copies of material to which libraries have access through databases? If contracts allow libraries or archives to make such copies, are there limitations as to when libraries or archives may create those preservation/archival copies? (E.g. may a library allow its users to use those copies or are they strictly for “back-up” purposes in the event the publisher no longer provides access)?

It is always difficult to gain access to these contracts, often considered as confidential documents by the concerned parties. It does seem as though those contracts must deal with that issue.

As for services with a mission of conservation of documents, we could consider that the public interest gives them the right to proceed with copying with the goal of conservation
of documents; this is a question that was dealt with in part by the project of the law transposing the [European] Directive on Copyright and Neighboring Rights in the Information Society (see above, first part).
MELLON PROJECT: INTEGRITY OF ARCHIVES (PHASE II)

Projet Mellon : L’intégrité des archives (Phase II)

Below is a questionnaire in connection with Phase II of our study. In Phase I, we focused on copyright infringement as a reason why someone might seek to remove material from archives. In the questionnaire we sent to you last time, we posed a number of questions related to copyright infringement. Most of our correspondents responded only to the first three questions of that questionnaire because of time constraints, so we have incorporated the other questions in the Phase II questionnaire below.

In Phase II, we focus also on other aspects of law and practice that might motivate a publisher, library/archive or other party to withdraw material from an archive or database. In addition to copyright infringement, the reasons for withdrawal of documents that we identified in our preliminary research include, for example: plagiarism, unsupported research, factual inaccuracies, defamation and libel, complaints or allegations of any of the foregoing, government censorship, national security, privacy, business disruptions, expiration or invalidation of a publisher/database owner’s rights, and author or customer request. For purposes of the questionnaire below, we refer to all material sought to be removed as “offending material.”

If you discover that some of the questions in this questionnaire are outside your area of expertise, we would appreciate your assistance in identifying experts in those areas, who might answer those questions.

Ci-dessous vous trouverez un questionnaire qui participe à la deuxième phase de notre étude. Dans la première phase, nous avons voulu savoir si la violation des droits d’auteur pouvait fournir une raison de retirer des documents des archives. Dans le questionnaire que nous vous avons envoyé la dernière fois, nous vous avons posé plusieurs questions sur la violation des droits d’auteur. La plupart de nos correspondants n’ont pu répondre, faute de temps, qu’aux trois premières questions, donc nous avons incorporé les autres questions dans cette partie du questionnaire.

Dans cette seconde phase, nous vous interrogeons sur des comportements illicites, autre que la méconnaissance du droit d’auteur, qui pourrait éventuellement motiver un éditeur, une bibliothèque/archives, ou une tierce personne de retirer des documents d’un archive ou d’une base de données. Les justifications que nous avons pu identifier dans notre recherche préliminaire incluent par exemple : le plagiat, une recherche non confirmé, la diffamation orale, la diffamation par écrit, des plaintes ou des plaintes alléguant l’existence de faits de ce type, la censure, des raisons de sécurité nationale, le respect de la vie intime, faillite ou d’autres perturbations commerciales, l’expiration ou l’invalidation des droits de l’éditeur ou du propriétaire de la base de données, ou
à la demande de l’auteur ou d’un client. Pour les besoins du questionnaire, nous faisons référence à tout matériel à retirer comme étant du « matériel offensif ».

Si vous découvrez que certaines des questions contenues dans ce questionnaire ne font pas partie de votre domaine d’expertise, nous vous saurons gré de bien vouloir identifier des experts qui pourraient répondre à ces questions.

A. Copyright Analysis: Please answer the following questions. If you have already responded to questions 1-3 below, please skip to question 4.

A) Analyse du droit d’auteur. Veuillez répondre aux questions suivantes. Si vous avez déjà répondu aux questions 1-3, veuillez commencer à la quatrième question.

1. Are there judicial decisions in your country addressing publishers’ or archives’ liability with respect to documents included in the archives’ collections that infringe copyright?

1. Existe-t-il de la jurisprudence en France traitant de la question de la responsabilité des éditeurs ou des archives par rapport aux documents contenus dans les collections d’archives qui violent des droits d’auteur ?

Il y a peu de jurisprudence concernant la violation de droits d’auteur dans les collections d’archives.

° Pour les éditeurs, l’essentiel des problèmes liés à la violation des droits d’auteur se manifestent lors de la publication des ouvrages ou articles (soit sur support papier soit en ligne) et non à propos d’opérations d’archivage. De ce point de vue on observe une tendance à la judiciarisation de l’activité éditoriale sur des fondements divers notamment le droit d’auteur.¹


Dans la mesure où l’auteur doit garantir à l’éditeur l’exercice paisible et, sauf convention contraire, exclusif du droit cédé » (art. L 132-8 du CPI), cela signifie que l’éditeur pourra se retourner vers son auteur et lui faire supporter les condamnations et frais afférents à la publication litigieuse (dommages et intérêts, frais de fabrication, de promotion, de procédure, etc.)

On peut aussi citer une jurisprudence concernant les éditeurs de journaux. Il y a eu pour la publication d’articles de journaux diffusés sur support papier puis diffusés en ligne, un certain nombre de décisions favorables aux auteurs. Les juges ont décidé que la cession des droits pour un article destiné à paraître dans un journal écrit ne comprenait pas l’exploitation en ligne, quelle que soit la qualification donnée au journal donc y compris en matière d’œuvre collective. Cette jurisprudence pourrait bien être transposée aux collections d’archives mises en ligne, reprenant les publications réalisées sur papier.

° Pour les services d’archives.

Il n’y a pas non plus de jurisprudence sur ces aspects. Il faudrait, quoi qu’il en soit distinguer selon la nature des archives car la responsabilité des services ne serait pas de même nature en cas de contentieux.

1° Les services détenant des archives publiques

Deux paramètres doivent être pris en considération pour cette question : le mode de communication : simple accès ou mise à disposition par l’intermédiaire d’un support (électronique ou copie) ainsi que le statut des documents du point de vue de la propriété intellectuelle. Certains d’entre eux, parce qu’ils sont produits par des fonctionnaires, sont considérés comme étant soit librement utilisables, soit propriété de l’État.

Pour les services détenant des archives publiques (documents produits ou reçus dans le cadre d’une activité publique (par exemple par les administrations, les collectivités locales, l’État, etc.))², l’accès est une exigence tirée d’un intérêt public et contenu dans le droit public des archives. La simple mise à disposition du document n’est donc pas contrefaisante pour autant qu’elle se limite au fait de laisser voir le document. En revanche, une mise en ligne du document ou autre mode de communication (photocopie par exemple) excède le droit d’accès et met alors en jeu les droits de l’auteur. Le fait que l’accès ne puisse se faire qu’à l’issue d’une période (30 ans minimum, c’est le délai de droit commun, et autres délais plus longs en cas d’informations sensibles) épuise en partie le risque de condamnation.

Pour les documents administratifs, catégorie particulière d’archives publiques immédiatement communicables. La loi du 17 juillet 1978 réserve expressément les droits d’auteur en cas de communication, opération qu’elle distingue du simple accès.

Lorsque les archives publiques sont créées par des fonctionnaires et peuvent être considérés comme des œuvres de l’esprit, on estime dans un certain nombre de cas que soit c’est l’État qui détient l’intégralité des droits, soit pour les archives publiques qu’elle sont inappropriales.³

² Sur cet aspect de la définition des archives publiques et privées, voir la première partie du questionnaire.
³ Cf. supra l’affaire Attali et voir les futures aménagements prévus par la loi de transposition sur les droits d’auteur et droits voisins dans la société de l’information.
2° Les services détenant des archives privées

A ma connaissance, il n’y pas de jurisprudence mettant en jeu la responsabilité de services d’archives privées sur le terrain de la contrefaçon. Dans le cas de ces archives que l’État acquiert ou reçoit en dépôt de personnes privées, la mission de conservation n’autorise pas l’État à rendre accessible le document sans avoir auparavant recueilli le consentement de l’auteur et respecté les éventuelles conditions d’accès posées par le propriétaire du support.

On peut citer une difficulté qui, semble-t-il, n’a pas été jusqu’au procès. Un service public avait mis en ligne une base de données recensant des fonds littéraires, en particulier constitués de correspondances. Cette base permettait non seulement de donner accès à des informations personnelles (lettre écrite par une personne destinée à telle autre, à telle période) et au document lui-même puisqu’un certain nombre d’entre eux avaient été numérisés. Dans un des fonds d’un écrivain célèbre, figurait une lettre reçue d’un tiers. Cette personne n’avait pas été consultée sur la divulgation de sa correspondance et en a demandé le retrait. Une lettre missive étant le plus souvent considérée comme une œuvre de l’esprit, la contrefaçon pouvait ici prospérer sur le double fondement de la violation des droits moraux (du fait de la divulgation) et des droits patrimoniaux (d’autres griefs pouvaient également être invoqués, par exemple atteinte aux droits de la personnalité, atteinte à la vie privée, protection des données personnelles, voir plus loin).

a. What, if any, distinctions do courts articulate between the roles of publishers and of archives in these cases?

Il n’y pas de jurisprudence en matière de droit d’auteur distinguant éditeur et service d’archives. On peut cependant considérer que la distinction peut venir de la fonction exercée et surtout de la nature des archives détenues. La mise à disposition d’archives publiques est une mission d’intérêt public et cette circonstance influence la question des droits d’auteur, et plus généralement la question des contenus illicites.

b. Does the publisher’s liability depend on the extent to which the publisher exercises control over the contents and maintenance of the archive?

C’est le fait de la contrefaçon qui constitue l’éditeur en faute. Il peut à partir de là appeler l’auteur en garantie, voir plus loin.

c. Does the archives’ liability depend on the extent to which it controls the acquisition and maintenance of the offending material? Does liability depend on the extent to which the archives makes the material accessible to the public? Does the archives’ liability depend on any other factors?

La responsabilité des archives dépend-elle de l’étendue du contrôle qu’elles exercent sur l’acquisition et l’entretien du matériel offensif ?
responsabilité des archives dépend-elle de l’ampleur de la mise à la disposition du public du matériel? Depend-elle d’autres facteurs?

Pour les archives publiques, la responsabilité des services d’archives dépend en effet de l’ampleur de la mise à disposition (voir plus haut) qui se limite en vertu du droit public sur les archives à l’accès. Si, à partir d’un simple accès aux documents, une personne utilise l’œuvre en violation des droits d’auteur, le service ne saurait être inquiété.

Pour les archives privées, l’ampleur de la mise à disposition, n’interfère pas sur la reconnaissance de la responsabilité dans son principe, dès lors qu’il y a violation du monopole de l’auteur. Dans la pratique, il est vrai, les potentialités de la numérisation et de l’accès en ligne aujourd’hui utilisées plus fréquemment par les services d’archives amplifient très sérieusement les risques de mise en jeu de leur responsabilité. J’ai cité l’exemple de cette personne ayant eu connaissance de la présence dans un fond d’une correspondance dont elle était l’auteur. Ce type de difficultés a de rares chances de se présenter lorsque l’accès se fait en salle de lecture dans un lieu identifié.

Si la responsabilité du service est reconnue, dans la mise en œuvre des sanctions, l’ampleur de la diffusion va évidemment interférer dans la mesure où le juge cherche à réparer le préjudice ce qui suppose de s’intéresser à l’étendue de la violation du droit d’auteur. Le préjudice ne sera pas évalué de la même façon s’il y a ou non diffusion massive (les juges prendront en compte la perte éprouvée et le manque à gagner, par exemple la perte d’une chance d’exploiter dans un autre média)⁴.

2. Have litigants in your country agreed to settlements in respect of claims of copyright infringement that would affect the contents, maintenance, or public accessibility of material contained in archives? Under what circumstances?

2. Est-ce que les parties aux litiges en France en matière de droit d’auteur ont accepté des règlements à l’amiable qui portaient sur le contenu, l’entretien ou l’accès du public au matériel contenu dans les archives ? Dans quelles circonstances ?

Très certainement, un grand nombre de litiges trouvent leur solution en amont des procès dans le cadre de transactions. Dans ce cas, il est difficile d’en connaître les termes.

3. Have publishers or archives in your country sought to avoid potential liability by removing material that may infringe copyright, without waiting to be notified (or sued) by persons claiming to be injured by the material?

3. Est-ce que les éditeurs ou les archives en France ont tenté d’éviter des responsabilités potentielles en retirant du matériel qui est susceptible de violer le droit d’auteur sans avoir attendu d’être poursuivi ou de recevoir une mise en

⁴ Sur quelques exemples de condamnations et sur la méthode, P-Y Gautier, Propriété littéraire et artistique, 5ème édition refondue, n° 439.
demeure des personnes qui prétendent avoir été victime de violation de leurs droits?

Pour les éditeurs
Oui, face au phénomène de judiciarisation de l’édition, les éditeurs sont assez attentifs, en amont. Par exemple sur la publication de couvertures d’ouvrages susceptibles de porter atteinte au droit d’auteur, un éditeur préfère renoncer à l’illustration contrefaisante ou négocier éventuellement avec le titulaire que de prendre le risque, compte tenu des sanctions éventuellement très lourdes (300 000 euros – sachant qu’il s’agit d’un montant maximum - d’amende pour le délit de contrefaçon, retrait de l’ouvrage de la circulation, etc.).

Les services publics d’archives, quant à eux, ne sont pas très alertés sur les problèmes de propriété intellectuelle et donc n’anticipent pas toujours sur d’éventuelles difficultés.

Les institutions privées chargées d’archives prennent sans doute plus de précautions de ce point de vue. Par exemple l’IMEC (Institut sur la mémoire de l’édition contemporaine), association recevant en dépôt des fonds privés littéraires d’écrivains ou de maisons d’édition qu’ils mettent à disposition des usagers, chercheurs, etc. prennent soin dans leurs contrats des questions de propriété intellectuelle.

4. Does your country’s copyright law, or other law (whether statutory or case law) provide any moral rights such as a “right of withdrawal” that could affect archives’ ability to retain an author’s work?

4. Est-ce que l’exercice par l’auteur de son « droit de repentir » pourrait nuire à la capacité de rétention des œuvres de l’auteur des archives?

Il faut combiner plusieurs paramètres, à nouveau la question de la nature des archives et la question de la distinction entre la propriété du support et les droits de propriété intellectuelle.

1° Sur la propriété du support : Le droit de repentir ou de retrait ne permet pas à l’auteur de reprendre le support matériel de son œuvre lorsqu’il n’en est plus propriétaire, car ce droit lui permet seulement de revenir sur la cession ou la concession de droits patrimoniaux ou encore de modifier l’œuvre remise au cessionnaire des droits. Le droit de repentir ou de retrait s’exerce vis-à-vis du cessionnaire selon les termes de l’article L 121-4 du Code de la propriété intellectuelle. On considère par exemple qu’un artiste ne peut retirer une œuvre à un musée ou entre les mains d’un propriétaire dès lors qu’il a transféré l’objet matériel. En revanche, en l’absence d’un support matériel (par exemple si l’œuvre est mise à disposition en ligne, ou encore si l’auteur a conservé la propriété du support, il peut alors

__________

5 Ils disposent par exemple du fonds Barthes
interdire la communication de l’œuvre au nom de son droit de repentir ou de retrait. Dans le second cas il peut aussi exiger la remise du support matériel.\(^6\)

2° L’exercice encadré du droit de repentir ou de retrait
Le droit de repentir ou de retrait s’exerce dans certaines conditions. Il s’agit d’un attribut du droit moral, l’auteur ne peut l’invoquer pour des motifs économiques, il y aurait alors détournement de finalité de ce droit et donc abus sanctionné par les tribunaux. Par ailleurs, en retirant son document, l’auteur cause un préjudice au cessionnaire des droits qu’il doit réparer (ex. pour l’éditeur, frais de fabrication, de promotion, etc.).

3° Le cas particulier des archives publiques
La logique d’accès aux documents publics peut contrarier le jeu du droit de repentir ou de retrait. L’auteur-fonctionnaire de documents d’archives publiques ne peut, à notre sens s’opposer à l’accès. Il n’y a aucune disposition dans les règles concernant les archives ou dans le Code de la propriété qui prévoient ce type de conflit, mais on peut bien supposer que l’intérêt général paralyse l’exercice de certains droits d’auteur. Les délais de communication des archives (trente ans en règle générale) sont de nature à réduire les problèmes de ce point de vue.

Mis à part l’accès à l’œuvre, l’auteur peut s’opposer à toute autre forme de communication et revenir sur un accord qu’il aurait donné, par exemple à la mise en ligne de son œuvre.

La future loi de transposition de la directive sur les droits d’auteur et droits voisins contient par ailleurs des dispositions concernant le droit de repentir des fonctionnaires sur leurs créations, disposition qui peut concerner des archives publiques.

L’article 17 prévoit que :

<table>
<thead>
<tr>
<th>Après l'article L. 121-7 du code de la propriété intellectuelle, il est inséré un article L. 121-7-1 ainsi rédigé :</th>
</tr>
</thead>
</table>
| « Art. L. 121-7-1. - Le droit de divulgation reconnu à l'agent mentionné au troisième alinéa de l'article L. 111-1, qui a créé une œuvre de l'esprit dans l'exercice de ses fonctions ou d'après les instructions reçues, s'exerce dans le respect des règles auxquelles il est soumis en sa qualité d'agent et de celles qui régissent l'organisation, le fonctionnement et l'activité de la collectivité publique qui l'emploie. 

« L'agent ne peut :

« 1° S'opposer à la modification de l'œuvre décidée dans l'intérêt du service par l'autorité investie du pouvoir hiérarchique, lorsque cette modification ne porte pas atteinte à son honneur et à sa réputation ;

« 2° Exercer son droit de repentir et de retrait, sauf accord de l'autorité investie du pouvoir hiérarchique. » |

\(^6\) La jurisprudence a eu notamment à statuer à propos des clichés photographiques détenus par les agences de photographies, dont les juges ont estimé que les agences les détenaient à titre de dépôt, qu’il devaient donc les restituer aux auteurs, à défaut de clauses contractuelles contraires.
Dans le cas des créations des agents publics, le droit de repentir ne pourra ainsi nuire à la détention des archives.

a. If so, are there any judicial decisions which address such moral rights in the context of an author or publisher wishing to remove offending material from a work contained in a library or archive’s collection?

   a. Si oui, existe-t-il de la jurisprudence traitant de l’exercice du droit de repentir afin d’obliger aux archives d’enlever du matériel offensif d’une œuvre contenue dans une bibliothèque ou dans des archives?

A ma connaissance, il n’y a pas de jurisprudence de cette nature.

b. Have there been any disputes between authors and publishers (or between authors and libraries/archives) regarding the author’s moral rights in which the author wishes to remove a work from the archives’ collection, to alter the way in which the work is displayed or accessed, or to alter the work itself? If so, how have the parties resolved such disputes?

c. Y a t il eu des litiges entre auteurs et éditeurs (ou entre auteurs et archives/bibliothèques) concernant les droits moraux de l’auteur où l’auteur souhaite soit faire retirer un œuvre de la collection, soit changer la façon dont l’œuvre est exposée, soit changer l’œuvre en lui-même ? Si oui, comment est ce que les parties ont résolu ces disputes ?

On peut citer des cas voisins. Le droit de retrait a notamment été invoqué par un artiste plasticien, au motif que les conditions d’exposition de l’œuvre n’étaient pas respectées par la galerie. Les juges n’ont pas admis son exercice dans cette espèce (voir les observations de A. Lucas, sous Cour d’appel de Paris, 6 juin 2000, Propriétés intellectuelles, octobre 2001, p. 61).

Dans d’autres hypothèses, ce n’est pas le droit de retrait ou de repentir qui est en jeu mais plutôt le droit au respect de l’œuvre qui permet le retrait de l’œuvre.

d. Can any such moral rights be contracted away?

Est-ce que l'auteur peut renoncer à ses droits moraux par contrat ?

L’auteur ne peut pas renoncer à ses droits moraux par contrat, car le droit moral est un droit extrapatrimonial inaliénable, imprescriptible. De ce point de vue, on peut être dubitatif sur les contrats de creative commons et sur le droit de modifier l’œuvre que l’auteur peut consentir par avance, formule contraire à la loi française.

La jurisprudence ne juge cependant pas toujours avec la plus grande rigueur les conventions abdicatives, en particulier en ce qui concerne le droit à l’intégrité de l’œuvre. On peut tout de même citer dans un sens très protecteur des intérêts de l’auteur l’arrêt de la cour de Cassation du 28 janvier 2003 qui juge sur le double fondement du droit commun des contrats (article 1174 du Code civil qui concerne la prohibition des conditions purement potestatives) et du droit de la propriété intellectuelle que : « toute obligation est nulle lorsqu’elle a été contractée sous une condition potestative de la part de celui qui s’oblige ». Cette règle d’ordre public a été utilisée en renfort des droits de l’auteur. La Cour de cassation « a suivi l’argumentation complémentaire développée à l’appui du pourvoi : la clause par laquelle l’auteur laisse à son cocontractant, de façon préalable et générale, l’appréciation exclusive des modifications auxquelles il plairait à ce dernier de procéder, traduit un comportement potestatif. Ainsi, l’autorisation litigieuse encourt la nullité tant en application des règles de droit d’auteur qu’en vertu des principes gouvernant le droit commun des contrats. Il n’est pas si fréquent que celui-ci vienne « au secours » de l’auteur en lui permettant de se dégager, plus facilement encore, d’un contrat manifestement conclu au mépris de ses prérogatives morales ».

Il faut encore souligner que l’article L 132-11 du CPI fait expressément interdiction à l’éditeur de modifier l’œuvre. “Il ne peut sans autorisation écrite de l’auteur, apporter à l’œuvre aucune modification” Il ne pourra donc modifier l’œuvre de sa propre initiative, même si celle-ci a un contenu illicite (diffamation, injures, contrefaçon, etc.) En ce cas, il doit soit revenir vers l’auteur soit refuser de publier l’œuvre ou la retirer de la circulation.

5. Please update the copyright analysis you did last year in connection with the Phase I questionnaire. In particular, have there been any new judicial decisions, legislation or regulations relevant to your earlier analysis?

5. Veuillez mettre à jour l’analyse du droit d’auteur que vous avez faite l’année dernière en répondant à la première phase du questionnaire. En particulier, veuillez noter si il y a eu des nouveautés jurisprudentielles, législatives, ou administratives ayantun rapport avec votre analyse précédente.

---

7 Légipresse n°201, III, p. 31, commentaire A. Maffre-Bauger
8 En ce sens, E. Pierrat, guide du droit d’auteur à l’usage des éditeurs, p. 87.
Sur les sanctions et procédures en matière de contrefaçon, on peut évoquer la saisie-contrefaçon qui consiste à retirer les exemplaires constituant une reproduction illicite de l’œuvre. Les conditions de l’infraction ont été modifiées par la loi du 21 juin 2004 pour la confiance dans l’économie numérique.

Article L.332-1 du Code de la propriété intellectuelle

(Loi n° 2004-575 du 21 juin 2004 art. 8 I Journal Officiel du 22 juin 2004)*

Les commissaires de police et, dans les lieux où il n'y a pas de commissaire de police, les juges d'instance, sont tenus, à la demande de tout auteur d'une oeuvre protégée par le livre Ier, de ses ayants droit ou de ses ayants cause, de saisir les exemplaires constituant une reproduction illicite de cette œuvre.

Si la saisie doit avoir pour effet de retarder ou de suspendre des représentations ou des exécutions publiques en cours ou déjà annoncées, une autorisation spéciale doit être obtenue du président du tribunal de grande instance, par ordonnance rendue sur requête.

Le président du tribunal de grande instance peut également, dans la même forme, ordonner :

1° La suspension de toute fabrication en cours tendant à la reproduction illicite d'une œuvre ;

2° La saisie, quels que soient le jour et l'heure, des exemplaires constituant une reproduction illicite de l'œuvre, déjà fabriqués ou en cours de fabrication, des recettes réalisées, ainsi que des exemplaires illicitemment utilisés ;

3° La saisie des recettes provenant de toute reproduction, représentation ou diffusion, par quelque moyen que ce soit, d'une œuvre de l'esprit, effectuée en violation des droits de l'auteur ;

4° La suspension, par tout moyen, du contenu d'un service de communication au public en ligne portant atteinte à l'un des droits de l'auteur, y compris en ordonnant de cesser de stocker ce contenu ou, à défaut, de cesser d'en permettre l'accès. Dans ce cas, le délai prévu à l'article L. 332-2 est réduit à quinze jours.

Le président du tribunal de grande instance peut, dans les mêmes formes, ordonner les mesures prévues aux 1° à 4° à la demande des titulaires de droits voisins définis au livre II.

Le président du tribunal de grande instance peut, dans les ordonnances prévues ci-dessus, ordonner la constitution préalable par le saisissant d'un cautionnement convenable.

Article L.332-2

*(Loi n° 98-536 du 1 juillet 1998 art. 4 Journal Officiel du 2 juillet 1998)*

Dans les trente jours de la date du procès-verbal de la saisie prévue à l'alinéa premier de l'article L. 332-1 ou de la date de l'ordonnance prévue au même article, le saisi ou le tiers saisi peuvent demander au président du tribunal de grande instance de prononcer la mainlevée de la saisie ou d'en cantonner les effets, ou encore d'autoriser la reprise de la
fabrication ou celle des représentations ou exécutions publiques, sous l'autorité d'un administrateur constitué séquestre, pour le compte de qui il appartiendra, des produits de cette fabrication ou de cette exploitation.

Le président du tribunal de grande instance statuant en référé peut, s'il fait droit à la demande du saisi ou du tiers saisi, ordonner à la charge du demandeur la consignation d'une somme affectée à la garantie des dommages et intérêts auxquels l'auteur pourrait prétendre.

**Article L332-3**

*(Loi n° 98-536 du 1 juillet 1998 art. 4 Journal Officiel du 2 juillet 1998)*

Faute par le saisissant de saisir la juridiction compétente dans les trente jours de la saisie, mainlevée de cette saisie pourra être ordonnée à la demande du saisi ou du tiers saisi par le président du tribunal, statuant en référé.

**Article L332-4**

*(Loi n° 98-536 du 1 juillet 1998 art. 4 et art. 7 Journal Officiel du 2 juillet 1998)*

En matière de logiciels et de bases de données, la saisie-contrefaçon est exécutée en vertu d'une ordonnance rendue sur requête par le président du tribunal de grande instance. Le président autorise, s'il y a lieu, la saisie réelle.

L'huissier instrumentaire ou le commissaire de police peut être assisté d'un expert désigné par le requérant.

A défaut d'assignation ou de citation dans la quinzaine de la saisie, la saisie-contrefaçon est nulle.

En outre, les commissaires de police sont tenus, à la demande de tout titulaire de droits sur un logiciel ou sur une base de données, d'opérer une saisie-description du logiciel ou de la base de données contrefaisants, saisie-description qui peut se concrétiser par une copie.

Pour mémoire on rappellera les sanctions applicables au titre des dispositions pénales.

**Article L335-1**

Les officiers de police judiciaire compétents peuvent procéder, dès la constatation des infractions prévues à l'article L. 335-4 du présent code, à la saisie des phonogrammes et vidéogrammes reproduits illicitement, des exemplaires et objets fabriqués ou importés illicitemment et des matériels spécialement installés en vue de tels agissements.

**Article L335-2**
Toute édition d'écrits, de composition musicale, de dessin, de peinture ou de toute autre production, imprimée ou gravée en entier ou en partie, au mépris des lois et règlements relatifs à la propriété des auteurs, est une contrefaçon et toute contrefaçon est un délit.

La contrefaçon en France d'ouvrages publiés en France ou à l'étranger est punie de trois ans d'emprisonnement et de 300 000 euros d'amende.

Seront punis des mêmes peines le débit, l'exportation et l'importation des ouvrages contrefaits.

Lorsque les délits prévus par le présent article ont été commis en bande organisée, les peines sont portées à cinq ans d'emprisonnement et à 500 000 euros d'amende.

**Article L335-3**

Est également un délit de contrefaçon toute reproduction, représentation ou diffusion, par quelque moyen que ce soit, d'une œuvre de l'esprit en violation des droits de l'auteur, tels qu'ils sont définis et réglementés par la loi.

Est également un délit de contrefaçon la violation de l'un des droits de l'auteur d'un logiciel défini à l'article L. 122-6.

**Article L335-4**

ans d'emprisonnement et de 300 000 euros d'amende toute fixation, reproduction, communication ou mise à disposition du public, à titre onéreux ou gratuit, ou toute télédiffusion d'une prestation, d'un phonogramme, d'un vidéogramme ou d'un programme, réalisée sans l'autorisation, lorsqu'elle est exigée, de l'artiste-interprète, du producteur de phonogrammes ou de vidéos, de l'entreprise de communication audiovisuelle.

Est punie des mêmes peines toute importation ou exportation de phonogrammes ou de vidéos réalisée sans l'autorisation du producteur ou de l'artiste-interprète, lorsqu'elle est exigée.

Est puni de la peine d'amende prévue au premier alinéa le défaut de versement de la rémunération due à l'auteur, à l'artiste-interprète, ou au producteur de phonogrammes ou de vidéos, au titre de la copie privée ou de la communication publique ainsi que de la télédiffusion des phonogrammes.

Lorsque les délits prévus au présent article ont été commis en bande organisée, les peines sont portées à cinq ans d'emprisonnement et à 500 000 euros d'amende.
We aim to study the relevant legal areas which could impact a library or archives’ potential liability for failing to remove/continuing to make available offending material that is the subject of concern for legal reasons other than copyright infringement (e.g. defamation; material factual error leading to damage/harm; privacy; government censorship; national security; etc.). Please consider these areas of law while responding to the questions below.

Nous voudrions savoir quelles sont les théories, en dehors du droit d’auteur, pouvant entraîner la responsabilité des archives pour non-retrait des documents. Par exemple, si les documents contiennent des propos diffamatoires ou qui ne respectent pas la vie privée, ou s’ils contiennent des erreurs pouvant causer un dommage, ou des informations nuisibles à la sécurité nationale, etc., y aurait-il une base légale pour obliger aux archives de bloquer l’accès à ces documents ? En répondant aux questions ci-dessous veuillez prendre en compte ces autres théories.

Il faut, dans cette question, à nouveau combiner les règles de droit public et de droit privé d’accès aux archives, donc distinguer selon la nature des documents détenus, l’accès aux archives publiques étant en effet régulé par des textes particuliers qui prennent en compte la défense de plusieurs séries d’intérêts privés (vie privée, santé, dossiers de carrière, informations statistiques) et publics (secret défense, sécurité nationale).

I. la détention et l’accès d’archives ou documents de nature privée.
Dans la mise à disposition de ces documents plusieurs chefs de responsabilité sont possibles, dans le droit civil, les droits spéciaux et dans le droit pénal. nous évoquerons les chefs de responsabilité et les modes de réparation

1. Dans le droit civil commun :
1.1. Les chefs de responsabilité du droit commun
1.1.1. L’atteinte aux droits de la personnalité

L’atteinte à la vie privée est sanctionnée sur le fondement de l’article 9 du Code civil. Il y a un grand nombre de contentieux qui concernent l’atteinte à la vie privée, phénomène qu’amplifie très sérieusement les modes de diffusion sur internet.

D’autres droits de la personnalité peuvent aussi être protégés, sur le terrain du droit de la responsabilité (article 1382 du Code civil selon lequel « tout fait quelconque de l’homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer »). Les atteintes aux droits de la personnalité sont par exemple l’atteinte à l’honneur et à la réputation ou encore le droit à l’image des personnes. Ce droit est hybride, considéré comme un droit de la personnalité donc un droit extrapatrimonial et dans certains cas comme pouvant aussi être un droit économique, qui permet aux personnes de négocier l’utilisation de leur image. La jurisprudence évolue aujourd’hui face aux multiples revendications des personnes sur leur image en faisant primer le droit à l’information dans un certain nombre d’hypothèses : Par exemple si la personne se trouve photographiée dans un groupe de personnes, ou à l’occasion d’un événement public.
Il reste que même dans ces conditions, la personne peut critiquer le contexte dans lequel son image est exploitée, par exemple si elle démontre qu’il est attentatoire à sa personnalité. Les éditeurs se heurtent fréquemment à ce type de problèmes.

Pour deux exemples récents dans lesquels le droit à l’information a primé :
° pour la reproduction dans un manuel scolaire de la photographie d’enfants atteints d’une maladie neuromusculaire, prise à l’occasion de la participation à une émission de télévision : « Le Téléthon ». Le fait de participer à cet événement public « incluait nécessairement la volonté des enfants et de leur père de diffuser leur image de la façon la plus large possible dans le but de sensibiliser l’opinion publique à cette cause », Cour d’appel de Nîmes, 10 mai 2005, Légipresse, n° 223, juillet/aout 2005, p. 103.


Interférences entre droit commun de la responsabilité et droit de la presse
Une question se pose en ce qui concerne les actions en responsabilité civile se rapportant à des abus de liberté d’expression prévues par la loi de 1881 sur la presse. Dans ce cas, la jurisprudence exclut de fonder ces actions sur le droit commun de la responsabilité (art. 1382 et 1383 du code civil). Les arrêts fondateurs émanent de l’assemblée plénière de la cour de cassation (Cass. Ass. Plèn., 12 juillet 2000, 4 arrêts, JCP 2000, I, 280, n° 2 obs. G. Viney). Cette jurisprudence a donné lieu à des décisions ultérieures dans le même sens. La solution implique que les actions ainsi fondées sur des abus tirés du droit de la presse doivent obligatoirement suivre les contraintes procédurales prévues par la loi de 1881, ce qui, d’une façon un peu paradoxale rend plus complexe l’action en responsabilité pour le tiers léssé (en ce sens, E. Derrieux, droit de la communication, 4ème ed. LGDJ, p. 556 et s.).

1.1.2. L’inexactitude des informations
L’éditeur peut être solidairement poursuivi en raison de l’inexactitude des informations contenues dans un ouvrage, sur le fondement de l’article 1382 ou 1383 du Code civil. En effet, l’article 1383 du code civil dispose :
« Chacun est responsable du dommage qu’il a causé non seulement par son fait, mais encore par sa négligence ou par son imprudence ». 

D-III-14
A propos d’un ouvrage sur les plantes comestibles⁹, ou encore suite à la publication du livre « Suicide mode d’emploi », ces deux publications ayant entraîné la mort de lecteurs. Dans ce cas, l’éditeur peut se retourner vers l’auteur qui lui doit garantie de ce fait. On rencontre parfois des mentions sur les ouvrages tels que :

« L’auteur et son éditeur déclinent toute responsabilité concernant les informations contenues ou omises dans cet ouvrage », mais on peut avoir les plus grands doutes sur la validité de ces clauses, qui sont inopposables en matière délictuelle. La seule précaution que peut prendre l’éditeur est dans l’appel en garantie vis-à-vis de l’auteur.

1.2. Les sanctions du droit commun
Il faut là distinguer la question de la réparation du préjudice de celle du retrait de l’acte illicite.
En ce qui concerne la réparation, comme en matière de contrefaçon, le juge appréciera l’étendue et la réalité du préjudice, la difficulté étant que l’atteinte est portée dans un certain nombre de cas non à un droit économique mais à un droit extra-patrimonial. L’allocation de dommages et intérêts atteint parfois des sommes très importantes (par exemple pour l’affaire Éstelle Halliday.
En ce qui concerne la cessation du trouble, les personnes concernées peuvent introduire une action en référé dans les termes prescrits par le Nouveau Code de procédure civile

---

**Article 808**

Dans tous les cas d'urgence, le président du tribunal de grande instance peut ordonner en référé toutes les mesures qui ne se heurtent à aucune contestation sérieuse ou que justifie l'existence d'un différend.

**Article 809**

Le président peut toujours, même en présence d'une contestation sérieuse, prescrire en référé les mesures conservatoires ou de remise en état qui s'imposent, soit pour prévenir un dommage imminent, soit pour faire cesser un trouble manifestement illicite.

Dans les cas où l'existence de l'obligation n'est pas sérieusement contestable, il peut accorder une provision au créancier, ou ordonner l'exécution de l'obligation même s'il s'agit d'une obligation de faire.

**Article 810**

Les pouvoirs du président du tribunal de grande instance prévus aux deux articles précédents s'étendent à toutes les matières où il n'existe pas de procédure particulière de référé.

Le juge statuant en référé peut également prononcer des mesures d’astreinte.

Certaines dispositions du code civil ont plus spécifiquement pris en compte les atteintes susceptibles d’être « portées du fait des excès de certains moyens de communication »

---

⁹ TGI, 28 mai 1986, RTDCiv. 1987, 552, obs. Huet
(En ce sens, E. Derrieux, Le droit de la communication, 4ème ed., p. 572). C’est le cas des 9 du Code civil, al. 2 et 9-1.

Article 9

Chacun a droit au respect de sa vie privée.

Les juges peuvent, sans préjudice de la réparation du dommage subi, prescrire toutes mesures, telles que séquestre, saisie et autres, propres à empêcher ou faire cesser une atteinte à l'intimité de la vie privée : ces mesures peuvent, s'il y a urgence, être ordonnées en référé.

Article 9-1

Chacun a droit au respect de la présomption d'innocence.

Lorsqu'une personne est, avant toute condamnation, présentée publiquement comme étant coupable de faits faisant l'objet d'une enquête ou d'une instruction judiciaire, le juge peut, même en référé, sans préjudice de la réparation du dommage subi, prescrire toutes mesures, telles que l'insertion d'une rectification ou la diffusion d'un communiqué, aux fins de faire cesser l'atteinte à la présomption d'innocence, et ce aux frais de la personne, physique ou morale, responsable de cette atteinte.

2. Dans les droits spéciaux
2.1. Les chefs de responsabilité dans les droits spéciaux
2.1.1. Le droit de la presse : la loi du 29 juillet 1881
La loi de 1881 est un texte de droit pénal, prévoyant un certain nombre d’infractions. Mais la question de la responsabilité civile se pose également dans ce cadre de la loi de 1881 (voir plus haut sur les interférences entre droit commun de la responsabilité et droit de la presse)

2.1.2. le droit de la communication
La loi n° 86-1067 du 30 septembre 1986 modifiée contient un certain nombre de principes relatifs à l’exercice de la liberté de communication et des limites dans lesquelles elle s’exerce.

« L’exercice de cette liberté ne peut être limité que, dans la mesure requise, d’une part, par le respect de la dignité de la personne humaine, de la liberté et de la propriété d’autrui, du caractère pluraliste de l’expression des courants de pensée et d’opinion, et, d’autre part, par la sauvegarde de l’ordre public, par les besoins de la défense nationale, par les exigences de service public, par les contraintes techniques inhérentes aux moyens de communication, ainsi que par la nécessité, pour les services audiovisuels, de développer la production audiovisuelle ».

Les questions de responsabilité ne sont cependant pas explicitement abordées et relèvent en matière civile et pénale du droit commun et pour les infractions prévues par le droit de la presse de la loi du 29 juillet 1881. En effet l’article de la loi de 1881 étend à la
communication audiovisuelle toutes les infractions qui y sont définies. La communication audiovisuelle est en effet considérée comme un mode de publication au sens de la loi de 1881.

**Article 41-1**

*Créé par Loi n°85-1317 du 13 décembre 1985 art. 18 II (JORF 24 décembre 1985).*

Pour l'application des dispositions des paragraphes 4 et 5 du présent chapitre, la communication audiovisuelle est regardée comme un mode de publication.

2.1.3. La loi sur la confiance dans l’économie numérique
Cette loi vient préciser les obligations des acteurs dans l’économie numérique en particulier en ce qui concerne la responsabilité du fait de contenus illicites. Le texte ne distingue pas selon le contenu illicite. Il peut s’agir aussi bien d’une contrefaçon que de l’apologie de crimes contre l’humanité (pour une critique de cet amalgame, H-J et A Lucas, Traité de propriété littéraire et artistique). La loi distingue plusieurs types d’acteurs dont elle traite au chapitre des prestataires techniques. Les simples intermédiaires ont une certaine irresponsabilité dans la délivrance de contenus illicites là où les fournisseurs de contenus, éditeurs professionnels ou non sont plus sévèrement traités (voir aussi plus loin sur l’incidence sur les textes pénaux de cette différence de traitement).

a) Les personnes qui assurent le seul stockage des données pour mise à disposition ne peuvent voir leur « responsabilité civile engagée du fait des activités ou des informations stockées (...)si elles n’avaient pas effectivement connaissance de leur caractère illicite ou de faits et de circonstances faisant apparaître ce caractère ou si, dès le moment où elles ont eu cette connaissance, elles ont agi promptement pour retirer ces données ou en rendre l’accès impossible ». Leur responsabilité pénale est écartée dans les mêmes termes.

Elles n’ont guère qu’une obligation de conservation des données permettant « l’identification de quiconque a contribué à la création du contenu ou de l’un des contenus des services dont ils sont prestataires », ainsi qu’une obligation d’information rapide des autorités compétentes lorsqu’elles ont connaissance d’un contenu illicite et une obligation de retrait ou de filtrage des informations illicites. Elles n’ont même pas une « obligation générale de surveiller les informations qu’elles transmettent ou stockent, ni une obligation générale de rechercher des faits ou des circonstances révélant des activités illicites.

Une disposition particulière concerne cependant la question de l’apologie des crimes contre l’humanité, l’incitation à la haine raciale et la pornographie enfantine. Comme pour compenser la relative irresponsabilité des fournisseurs d’accès et d’hébergement, le texte indique que les personnes chargées du stockage doivent concourir à la lutte contre la diffusion de ces infractions, et ce dans des termes assez vagues. « À ce titre, elles doivent mettre en place un dispositif facilement accessible et visible permettant à toute personne de porter à la connaissance ce type de données ». Elles doivent également « rendre
publics les moyens qu’elles consacrent à la lutte contre ces activités illicites », faut de quoi elles s’exposent à de sanctions pénales.

Le texte précise dans quelles conditions les personnes chargées de transmettre des contenus peuvent voir leur responsabilité engagée :

I. - Après l'article L. 32-3-2 du code des postes et télécommunications, il est rétabli un article L. 32-3-3 et il est inséré un article L. 32-3-4 ainsi rédigés :

« Art. L. 32-3-3. - Toute personne assurant une activité de transmission de contenus sur un réseau de télécommunications ou de fourniture d'accès à un réseau de télécommunications ne peut voir sa responsabilité civile ou pénale engagée à raison de ces contenus que dans les cas où soit elle est à l'origine de la demande de transmission litigieuse, soit elle sélectionne le destinataire de la transmission, soit elle sélectionne ou modifie les contenus faisant l'objet de la transmission.

« Art. L. 32-3-4. - Toute personne assurant dans le seul but de rendre plus efficace leur transmission ultérieure, une activité de stockage automatique, intermédiaire et temporaire des contenus qu'un prestataire transmet ne peut voir sa responsabilité civile ou pénale engagée à raison de ces contenus que dans l'un des cas suivants :

« 1° Elle a modifié ces contenus, ne s'est pas conformée à leurs conditions d'accès et aux règles usuelles concernant leur mise à jour ou a entravé l'utilisation licite et usuelle de la technologie utilisée pour obtenir des données ;

« 2° Elle n'a pas agi avec promptitude pour retirer les contenus qu'elle a stockés ou pour en rendre l'accès impossible, dès qu'elle a effectivement eu connaissance, soit du fait que les contenus transmis initialement ont été retirés du réseau, soit du fait que l'accès aux contenus transmis initialement a été rendu impossible, soit du fait que les autorités judiciaires ont ordonné de retirer du réseau les contenus transmis initialement ou d'en rendre l'accès impossible. »

b) Les personnes dont l’activité est d’éditer un service de communication en ligne

Pour celles qui exercent à titre professionnel cette activité d’édition, elles ont une obligation de fournir des informations permettant leur identification, obligation qui ne pèse pas sur l’éditeur non professionnel (sur les difficultés de mise en œuvre du texte, voir E. Dreyer, la responsabilité des internautes et éditeurs de sites à l’aune de la loi pour la confiance dans l’économie numérique, op. cit.).

La loi étend par ailleurs explicitement les dispositions de la loi sur la presse (loi de 1881) aux services de communication au public en ligne. La loi de la presse visait déjà toute forme de publication pour délimiter son champ d’application. la loi de 2004 ne fait donc que rappeler la soumission des éditeurs en ligne aux prescriptions du droit de la presse. Le texte encadre par ailleurs de façon spécifique un droit de réponse en ligne.

2.1.4. La protection des personnes physiques à l’égard du traitement des données à caractère personnel (loi n° 2004-801 du 6 aout 2004).
Les fichiers contenant des données à caractère personnel sont soumis à un certain nombre de règles et d’interdictions concernant leur stockage, leur conservation et leur diffusion.

Constitue au sens de la loi du 6 aout 2004

Art. 2 «une donnée à caractère personnel toute information relative à une personne physique identifiée ou qui peut être identifiée, directement ou indirectement, par référence à un numéro d'identification ou à un ou plusieurs éléments qui lui sont propres. Pour déterminer si une personne est identifiable, il convient de considérer l'ensemble des moyens en vue de permettre son identification dont dispose ou auxquels peut avoir accès le responsable du traitement ou toute autre personne.

« Constitue un traitement de données à caractère personnel toute opération ou tout ensemble d'opérations portant sur de telles données, quel que soit le procédé utilisé, et notamment la collecte, l'enregistrement, l'organisation, la conservation, l'adaptation ou la modification, l'extraction, la consultation, l'utilisation, la communication par transmission, diffusion ou toute autre forme de mise à disposition, le rapprochement ou l'interconnexion, ainsi que le verrouillage, l'effacement ou la destruction. »

« Constitue un fichier de données à caractère personnel tout ensemble structuré et stable de données à caractère personnel accessibles selon des critères déterminés.

La loi précise les conditions dans lesquelles les fichiers peuvent être licitement constitués lorsqu’ils contiennent des données à caractère personnel.
Les données doivent avoir été « collectées et traitées de manière loyale et licite » et pour des « finalités déterminées, explicites et légitimes » (art ; 6)

Les conditions de leur collecte et de leur traitement est détaillé :

« 4° Elles sont exactes, complètes et, si nécessaire, mises à jour ; les mesures appropriées doivent être prises pour que les données inexactes ou incomplètes au regard des finalités pour lesquelles elles sont collectées ou traitées soient effacées ou rectifiées ;

« 5° Elles sont conservées sous une forme permettant l'identification des personnes concernées pendant une durée qui n'excède pas la durée nécessaire aux finalités pour lesquelles elles sont collectées et traitées.

« Art. 7. - Un traitement de données à caractère personnel doit avoir reçu le consentement de la personne concernée ou satisfaire à l'une des conditions suivantes :

« 1° Le respect d'une obligation légale incombant au responsable du traitement ;

« 2° La sauvegarde de la vie de la personne concernée ;

« 3° L'exécution d'une mission de service public dont est investi le responsable ou le destinataire du traitement ;
« 4° L'exécution, soit d'un contrat auquel la personne concernée est partie, soit de mesures précontractuelles prises à la demande de celle-ci ;

« 5° La réalisation de l'intérêt légitime poursuivi par le responsable du traitement ou par le destinataire, sous réserve de ne pas méconnaître l'intérêt ou les droits et libertés fondamentaux de la personne concernée.

Le texte prévoit que certaines catégories de données sont interdites. C’est le cas des données qui « font apparaître directement ou indirectement, les origines raciales ou ethniques, les opinions politiques, philosophiques ou religieuses ou l'appartenance syndicale des personnes, ou qui sont relatives à la santé ou à la vie sexuelle de celles-ci. » L’interdiction souffre cependant un certain nombre d’exceptions dictées par l’intérêt général (recherche, études statistiques de l’INSEE, conservation d’archives) ou la protection des personnes (sauvegarde de la vie humaine, santé, constatation, exercice ou défense d’un droit en justice), ou encore lorsque la personne a donné son consentement.

La question se pose dans des termes particuliers pour les services d’archives publiques dans la mesure où les archives publiques ont vocation :
- soit à recueillir ce type de données en tant qu’elles ont été reçues ou produites dans le cadre d’une activité publique. C’est le cas par exemple des fichiers statistiques recueillis par l’INSEE (Institut national des études statistiques) ou encore des fichiers recueillis par des chercheurs dans le cadre d’organismes tels que le CNRS, l’INSERM, etc. Dans ce cas, la loi encadre de façon spécifique l’entrée de ces documents au titre d’archives publiques :

**Article L212-4 du Code du patrimoine**

Lorsque les documents visés à l'article L. 211-4 comportent des données à caractère personnel collectées dans le cadre de traitements automatisés régis par la loi n° 78-17 du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés, ces données font l'objet, à l'expiration de la durée prévue au 5° de l'article 6 de ladite loi, d'un tri pour déterminer les données destinées à être conservées et celles, dépouivues d'intérêt scientifique, statistique ou historique, destinées à être détruites.

Les catégories de données destinées à la destruction ainsi que les conditions de leur destruction sont fixées par accord entre l'autorité qui les a produites ou reçues et l'administration des archives.

- soit à organiser eux-mêmes des traitements de données. Par exemple certains services souhaitant valoriser leurs archives constituent des bases de données susceptibles de contenir ce type de données. La loi a pris en compte d’une part les impératifs liés à l’accomplissement de la mission de service public d’accès aux archives publiques, d’autre part à la nécessité de constitution de certains fichiers (par exemple à des fins de recherche, médicales, etc., ou encore qui ont trait à la sécurité publique).

2.1.5. L ‘atteinte à des droits de propriété industrielle
L’utilisation dans un roman d’une marque au titre du langage courant peut être critiquée par le titulaire de la marque lorsque que cette utilisation « contribue à la rendre générique (...) à un point tel que le titulaire perde tout droit sur cette dénomination. Plusieurs affaires illustrent la mise en jeu de la responsabilité des éditeurs à ce propos, par exemple « Bic » qui a poursuivi un auteur et son éditeur, ainsi que la marque « Caddie ».

2.2. Les sanctions dans les droits spéciaux.
Il faut à nouveau distinguer réparation du préjudice et cessation du trouble. De ce point de vue les textes prévoient parfois des dispositions spécifiques.
°C’est notamment le cas de la loi du 6 aout 2004 sur le traitement des données caractère personnel qui comprend un titre sur le droit des personnes à l’égard des traitement de données à caractère personnel :

Aux termes de l’article 40 :

"Art. 40.extrait - Toute personne physique justifiant de son identité peut exiger du responsable d'un traitement que soient, selon les cas, rectifiées, complétées, mises à jour, verrouillées ou effacées les données à caractère personnel la concernant, qui sont inexactes, incomplètes, équivoques, périmées, ou dont la collecte, l'utilisation, la communication ou la conservation est interdite.

Lorsque l'intéressé en fait la demande, le responsable du traitement doit justifier, sans frais pour le demandeur, qu'il a procédé aux opérations exigées en vertu de l'alinea précédent. … “

En l’espèce des mesures d’astreintes avaient également été prononcées.

° Lorsque l’abus se rapporte à une infraction prévue par le droit de la presse, l’action civile doit prospérer dans le cadre de la loi de 1881 qu’elle soit ou non jointe à une action pénale. La victime pourra obtenir réparation du préjudice selon les principes et méthodes du droit commun mais en se conformant aux règles de procédure de ce texte spécial. La personne lésée peut par ailleurs obtenir l’interruption du trouble si elle choisit d’intenter dans l’urgence une action en référé, en application de l’article 809 du Nouveau Code de procédure civile (voir plus haut dans les sanctions du droit commun sur ce texte). La loi de 1881 ne fait aucune référence à l’action en référé, mais rien ne fait obstacle à ce qu’elle puisse être intentée (en ce sens E. Derrieux, droit de la communication, p. 568 et s.). La cessation de l’acte illicite ne sera pas automatique, ordonnée lorsqu’elle cause un dommage d’une gravité exceptionnelle en raison de l’importance du principe de liberté de communication. D’autres moyens peuvent être ordonnés moins lourds pour le diffuseur

D-III-21
D-III-22

ou éditeur et plus soucieux du principe de liberté de communication : retrait partiel, corrections, insertion d’avertissements ou de communiqués.

3. Dans le droit pénal
Un grand nombre de dispositions peuvent concerner la publication de contenus illicites, soit dans le droit commun, soit dans le droit spécial de la communication ou de la presse applicable aux éditeurs. Certaines concernent spécifiquement la mise en péril des mineurs (accès à de contenus illicites ou diffusion de leur image).

3.1. les dispositions du Code pénal

a) L’atteinte à la vie privée
Les articles L 226-1 et L 226-2 du Code pénal

**Article 226-1**
Est puni d'un an d'emprisonnement et de 45000 euros d'amende le fait, au moyen d'un procédé quelconque, volontairement de porter atteinte à l'intimité de la vie privée d'autrui :

1° En captant, enregistrant ou transmettant, sans le consentement de leur auteur, des paroles prononcées à titre privé ou confidentiel ;
2° En fixant, enregistrant ou transmettant, sans le consentement de celle-ci, l'image d'une personne se trouvant dans un lieu privé.
Lorsque les actes mentionnés au présent article ont été accomplis au vu et au su des intéressés sans qu'ils s'y soient opposés, alors qu'ils étaient en mesure de le faire, le consentement de ceux-ci est présumé.

**Article 226-2**
Est puni des mêmes peines le fait de conserver, porter ou laisser porter à la connaissance du public ou d'un tiers ou d'utiliser de quelque manière que ce soit tout enregistrement ou document obtenu à l'aide de l'un des actes prévus par l'article 226-1.
Lorsque le délit prévu par l'alinéa précédent est commis par la voie de la presse écrite ou audiovisuelle, les dispositions particulières des lois qui régissent ces matières sont applicables en ce qui concerne la détermination des personnes responsables.
Les plaintes concernant les atteintes à la vie privée sont beaucoup plus fréquentes sur le terrain de la responsabilité civile.

b) La protection des mineurs

° Diffusion de messages à caractère violent, pornographique ou de nature à porter atteinte à la dignité humaine (ancienne disposition se rapportant très généralement à l’atteinte aux bonnes mœurs).
C’est l’article L 227-24 du Code pénal qui sanctionne :
« le fait soit de fabriquer, de transporter, de diffuser par quelque moyen que ce soit et quel qu’en soit le support un message à caractère violent ou pornographique ou de nature
à porter atteinte à la dignité humaine, soit de faire commerce d’un tel message, est puni de trois ans d’emprisonnement et de 75 000 euros d’amende lorsque ce message est susceptible d’être vu ou perçu par un mineur ».

Lorsque les infractions prévues au présent article sont soumises par la voie de la presse écrite ou audiovisuelle, les dispositions particulières des lois qui régissent ces matières sont applicables en ce qui concerne la détermination des personnes responsables ».

Depuis 1994, l’infraction d’atteintes aux bonnes mœurs se limite aux contenus susceptibles d’être vus ou perçus par des mineurs et non par toute personne.

Le dispositif de l’article L 227-24 du Code pénal concerne aussi bien les services de communication audiovisuelle que les services accessibles sur internet ainsi que les services de télématique. La loi pour la confiance dans l’économie numérique adoptée le 21 juin 2004 (loi n° 2004-575 du 21 juin 2004, JO, 22 juin 2004, LCEN) désigne l’ensemble de ces services sous le nom de services de communication électroniques.10 Dès lors que l’article L 227-24 réserve le jeu de dispositions propres à certains de ces services, certains auteurs se sont demandé si le champ d’application du droit pénal n’est pas « rendu partiellement inefficace » en raison de ces dispositions particulières. On observe en tout état de cause un traitement différencié selon les acteurs. Les éditeurs de site restent lourdement sanctionnés en cas de diffusion de contenus illicites au sens de l’article L 227-24 du code pénal, contrairement aux fournisseurs d’accès ou hébergeurs.11 En particulier, la condition que le message ne puisse être vu ou perçu par un mineur et les mesures que doit prendre l’éditeur pour empêcher cet accès sont très exigeantes. Il ne suffit pas de mettre en garde au moment de l’accès au site et de préciser dans une page d’accueil que le site est exclusivement réservé à l’adulte (Cour d’appel de paris, 2 avril 2002).

La diffusion de l’image ou de la représentation d’un mineur présentant un caractère pornographique

La diffusion de ces images et autres activités de transmission, d’enregistrement, etc. sont punies de peine d’amendes et d’emprisonnement lorsque ces images présentent un caractère pornographique (art ; L 227-23 du Code pénal).

c) l’atteinte à l’autorité ou l’indépendance de la justice

Les articles 434-16 et 434-25 du code pénal

**Article 434-16**


La publication, avant l’intervention de la décision juridictionnelle définitive, de commentaires tendant à exercer des pressions en vue d’influencer les déclarations des témoins ou la décision des juridictions d'instruction ou de jugement est punie de six mois d'emprisonnement et de 7500 euros d'amende.

---

10 Sur ce sujet et sur la question de la responsabilité de ces services, voir Nathalie Finet, dernières évolutuions de la responsabilité des acteurs des services de communications électroniques en matière pénale, Revue Lamy, droit de l’immatériel, avril 2005, n° 4, p. 130.

11 En ce sens, N. Finet, i
Lorsque l'infraction est commise par la voie de la presse écrite ou audiovisuelle, les dispositions particulières des lois qui régissent ces matières sont applicables en ce qui concerne la détermination des personnes responsables.

**Article 434-25**

*(Ordonnance n° 2000-916 du 19 septembre 2000 art. 3 Journal Officiel du 22 septembre 2000 en vigueur le 1er janvier 2002)*

Le fait de chercher à jeter le discrédit, publiquement par actes, paroles, écrits ou images de toute nature, sur un acte ou une décision juridictionnelle, dans des conditions de nature à porter atteinte à l'autorité de la justice ou à son indépendance est puni de six mois d'emprisonnement et de 7500 euros d'amende.

Les dispositions de l'alinéa précédent ne s'appliquent pas aux commentaires techniques ni aux actes, paroles, écrits ou images de toute nature tendant à la réformation, la cassation ou la révision d'une décision.

Lorsque l'infraction est commise par la voie de la presse écrite ou audiovisuelle, les dispositions particulières des lois qui régissent ces matières sont applicables en ce qui concerne la détermination des personnes responsables.

L'action publique se prescrit par trois mois révolus, à compter du jour où l'infraction définie au présent article a été commise, si dans cet intervalle il n'a été fait aucun acte d'instruction ou de poursuite...

3.2. Les sanctions pénales dans le droit de la presse (loi du 29 juillet 1881 modifiée)

Le droit de la presse consacre un chapitre IV aux « crimes et délits commis par la voie de la presse ou par tout autre moyen de publication ». La notion de publication doit être entendue au sens large et inclut par exemple les procédés de communication audiovisuelle. La loi 2004-575 du 21 juin 2004 a par ailleurs étendu les infractions pénales auparavant applicables à la communication audiovisuelle à toute hypothèse de communication au public par voie électronique, notion définie comme :

« toute mise à disposition du public ou de catégories de public, par un procédé de communication électronique, de signes, de signaux, d'écrits, d'images, de sons ou de messages de toute nature qui n'ont pas le caractère d'une correspondance privée.

Parmi les infractions, on trouve la provocation aux crimes et délits (art ; 24), la contestation de l’existence d’un ou plusieurs crimes contre l’humanité (art. 24 bis), l’offense au Président de la république (art. 26), la publication, la diffusion, la reproduction de fausses nouvelles (art ; 27), la diffamation (art. 29), l’injure (art ; 33), l’atteinte à la présomption d’innocence (art. 35 ter, elle est aussi plus spécifiquement visée à l’article 9-1 du code civil), la diffusion de la reproduction des circonstances d’un crime ou délit lorsque cette diffusion est attentatoire à la dignité d’une victime (art. 35
quater), l’outrage envers certains personnages publics (ambassadeurs, agents diplomatiques, ministres plénipotentaires, etc., art. 37). L’une d’entre elles ouvre un abondant contentieux, c’est le cas de la diffamation.

a) La diffamation

La diffamation se définit comme « toute allégation ou imputation d’un fait qui porte atteinte à l’honneur ou à la considération de la personne ou du corps auquel le fait imputé est une diffamation. La publication directe ou indirecte ou par voie de reproduction de cette allégation ou de cette imputation est punissable, même si elle est faite sous forme dubitative ou si elle vise une personne ou un corps non expressément nommés, mais dont l’identification est rendue possible par les termes des discours, cris, menaces, écrits ou imprimés, placards ou affiches incriminés. » à ver.

*Les conditions de la diffamation sont :


° portant atteinte à l’honneur et à la considération d’une personne ou d’un groupe de personnes

° La mauvaise foi de celui qui diffame ou qui reproduit des propos diffamatoires

*L’existence de faits justificatifs*

° Le contexte de la diffamation : dans certaines enceintes : judiciaires, parlementaires pour les débats tenus dans les prétoires ou dans les assemblées.

---

**Article 41**

*Modifié par Loi n°82-506 du 15 juin 1982 ART. 5 (JORF 16 juin 1982).*

Ne donneront ouverture à aucune action les discours tenus dans le sein de l’Assemblée nationale ou du Sénat ainsi que les rapports ou toute autre pièce imprimée par ordre de l’une de ces deux assemblées.

Ne donnera lieu à aucune action le compte rendu des séances publiques des assemblées visées à l’alinéa ci-dessus fait de bonne foi dans les journaux.

Ne donneront lieu à aucune action en diffamation, injure ou outrage, ni le compte rendu fidèle fait de bonne foi des débats judiciaires, ni les discours prononcés ou les écrits produits devant les tribunaux.
Pourront néanmoins les juges, saisis de la cause et statuant sur le fond, prononcer la suppression des discours injurieux, outrageants ou diffamatoires, et condamner qui il appartiendra à des dommages-intérêts.

Pourront toutefois les faits diffamatoires étrangers à la cause donner ouverture, soit à l'action publique, soit à l'action civile des parties, lorsque ces actions leur auront été réservées par les tribunaux, et, dans tous les cas, à l'action civile des tiers.


La preuve du fait diffamatoire. La jurisprudence est exigeante sur ce fait justificatif qui doit notamment être en corrélation avec le fait imputé. « pour produire l’effet absolu prévu (dans la loi du 29 juillet 1881), la preuve de la vérité des faits diffamatoires doit être parfaite, complète et correlative aux imputations diffamatoires tant dans leur matérielité que dans leur portée » (Cour de cassation, chambre criminelle, 29 avril 1997, E. Derrieux, Recueil de décisions, op. cit., p. 136).

L’exception de vérité se heurte cependant à certaines limites tirées notamment du droit à l’oubli pour certains faits préjudiciables à la personne.

La vérité ne peut être prouvée
1) lorsque les faits remontent à plus de dix ans. En ce cas, seule la croyance du fait et la poursuite d’un but légitime pourra exonérer le diffamateur,
2) « lorsque l’imputation se réfère à un fait constituant une infraction amnistiée ou prescrite, ou qui a donné lieu à une condamnation effacée par la réhabilitation ou la révision »,
3) lorsque les faits diffamatoires concernent la vie privée des personnes.

La diffamation sur internet

La diffamation sur internet pose une question délicate quant à l’application du délai de prescription, qui est de trois mois à compter de la commission du délit. La question est de savoir à quel moment placer ce moment de la commission. La jurisprudence avait pu estimer que le délit de diffamation sur internet est continu. Le délai ne commencerait à courir qu’à compter du retrait de l’information illicite. Le projet de loi LCEN avait repris cette solution, mais le conseil constitutionnel a censuré cette disposition en ce qu’elle introduisait une distinction inopportune entre presse écrite et presse sur le réseau internet.

---

12 E. Pierrat, op. cit., p. 149.
(Décision du Conseil constitutionnel n° 2000-496, DC du 10 juin 2004) et que le moyen était disproportionné relativement au but poursuivi.

Dans cette question, il faut cependant distinguer les règles de prescription concernant les contenus rendus pour la première fois accessibles en ligne de celles qui concernent la reprise en ligne de contenus déjà publiés sous une autre forme, par exemple dans un ouvrage. Dans le premier cas, le délai de prescription court à compter de la diffusion en ligne, solution analogue aux publications de presse. En revanche, pour la publication en ligne de contenus déjà publiés par ailleurs, le délai court à compter de chaque nouvelle publication. La jurisprudence s’était déjà prononcée sur la question d’un point de vue intéressant pour le sujet de ce questionnaire. En effet était en question la qualification de la mise en ligne et le point de savoir si l’on était en présence d’une simple opération d’archivage.

La cour d’appel de Paris décide que « La mise en ligne du texte ne s’analyse pas en une opération d’archivage dans une bibliothèque, mais en une nouvelle publication, même si le texte n’a subi aucune modification »… « en choisissant de placer le texte sur un nouveau support, les prévenus ne se bornent pas à effectuer une opération de stockage en vue d’une consultation éventuelle, il suscitent l’occasion pour un nouveau public élargi, qui ne se limite pas à ses adhérents, de prendre connaissance de leur écrit, grâce aux possibilités d’accessibilités offertes par internet ».

La solution avait pour effet de faire renaître la prescription à chaque nouvelle publication. La loi LCEN avait consacré une solution différente en ne dissociant pas les prescriptions en cas de pluralité de publications d’un même contenu. L’idée était de protéger les archives journalistiques d’un risque judiciaire. Mais cette solution pouvait pousser à la fraude “les éditeurs en ligne qui “auraient eu intérêt à faire précéder la mise en ligne d’un propos à risque d’une diffusion sous forme d’ouvrage ou d’opuscule”, celles-ci pouvant passer inaperçue. Après trois mois, l’éditeur aurait pu librement publier sur internet sans craindre la diffamation. Le conseil constitutionnel a censuré cette disposition. Selon E. Dreyer, « en maintenant le principe de dissociation des prescriptions applicables dans l’univers papier et dans l’univers numérique à des propos identiques », le conseil constitutionnel reconnaît implicitement « que la mise en ligne n’est pas un simple acte matériel prolongeant la communication initiale.

La loi sur la presse règle la question des personnes considérées comme responsables des infractions, système dit en cascade puisque à défaut d’identifier les auteurs, d’autres personnes peuvent être poursuivies ; l’article 42 énonce que

Art. 42, loi du 29 juillet 1881 « Seront passibles, comme auteurs principaux des peines qui constituent la répression des crimes et délits commis par la voie de la presse, dans l'ordre ci-après, savoir :

13 Voir sur ce point, E. Dreyer, La responsabilité des internautes et éditeurs de sites à l’aune de la loi pour la confiance et l’économie numérique Légipresse n° 214, septembre 2004, II. Chroniques et opinions, p. 91.

14 Voir sur ce point, E. Dreyer, La responsabilité des internautes et éditeurs de sites à l’aune de la loi pour la confiance et l’économie numérique Légipresse n° 214, septembre 2004, II. Chroniques et opinions, p. 91.
1° Les directeurs de publications ou éditeurs, quelles que soient leurs professions ou leurs
dénominations, et, dans les cas prévus au deuxième alinéa de l'article 6, de les
codirecteurs de la publication ;

2° A leur défaut, les auteurs ;

3° A défaut des auteurs, les imprimeurs ;

4° A défaut des imprimeurs, les vendeurs, les distributeurs et afficheurs. »

Ce régime de responsabilité s'applique en matière audiovisuelle, sinon que les acteurs ne
sont pas les mêmes (en fin de chaîne il y a également le producteur) et que la
responsabilité des directeurs de publication ne sera engagée que si le message a fait
l'objet d'une fixation préalable à sa diffusion audiovisuelle. Dans ce cas, on estime que le
directeur de publication a été en mesure de contrôler le contenu. Pour les diffusions en
direct, sera engagée la responsabilité personnelle de l’auteur de l’infraction (E. Derieux,

Comme en matière de contrefaçon, l’auteur garantit l’éditeur en cas de diffamation. Au
chapitre des garanties contractuelles données par l’auteur à l’éditeur, on trouve ce type de
clauses :
L’auteur « garantit (...) que son manuscrit ne contient rien qui puisse tomber sous le coup
des lois et autres dispositions relatives à la diffamation et à l’injure, à la vie privée et au
droit à l’image, à l’atteinte aux bonnes mœurs ou à la contrefaçon… ». 

L’auteur doit également garantie en cas de condamnation solidaire auteur-éditeur pour
diffamation.¹⁵

b) L’injure
L’injure est assez proche de la diffamation mais intègre par ailleurs une dimension
outrageante :
L’article 29 la définit à la suite de la diffamation comme telle :

| Art. 29 de la loi du 29 juillet 1881 Toute expression outrageante, termes de mépris
 ou invective qui ne renferme l'imputation d'aucun fait est une injure. |

II. Les contenus sensibles dans les archives publiques
Le système est encadré par la loi du 3 janvier 1979 sur les archives ainsi que dans la loi
du 17 juillet 1978 sur les documents administratifs.
° Dans la loi de 1979 :
Le délai d’accès aux archives publiques est actuellement de trente ans après la création du
document. Ce délai peut cependant être allongé en considération de la nature sensible de
certaine informations :

Certains documents sont librement communicables, soit parce qu’ils ont été déjà diffusés, soit parce qu’ils relèvent d’un autre système de communication. C’est le cas des documents administratifs (voir plus haut).

Pour toutes les autres archives publiques, le délai de droit commun est de trente ans, sauf si l’information est jugée plus sensible. Les textes organisent toute une série de délais spéciaux au regard du degré de sensibilité de l’information. On s’aperçoit que ces délais sont très longs (jugés excessifs par certains notamment au regard d’autres pays).

**Article L213-1**

(…)

Tous les autres documents d'archives publiques pourront être librement consultés à l'expiration d'un délai de trente ans ou des délais spéciaux prévus à l'article L. 213-2.

**Article L213-2**

Le délai au-delà duquel les documents d'archives publiques peuvent être librement consultés est porté à :

a) Cent cinquante ans à compter de la date de naissance pour les documents comportant des renseignements individuels de caractère médical ;

b) Cent vingt ans à compter de la date de naissance pour les dossiers de personnel ;

c) Cent ans à compter de la date de l'acte ou de la clôture du dossier pour les documents relatifs aux affaires portées devant les juridictions, y compris les décisions de grâce, pour les minutes et répertoires des notaires ainsi que pour les registres de l'état civil et de l'enregistrement ;

d) Cent ans à compter de la date de recensement ou de l'enquête, pour les documents contenant des renseignements individuels ayant trait à la vie personnelle et familiale et, d'une manière générale, aux faits et comportements d'ordre privé, collectés dans le cadre des enquêtes statistiques des services publics ;

e) Soixante ans à compter de la date de l'acte pour les documents qui contiennent des informations mettant en cause la vie privée ou intéressant la sûreté de l'Etat ou la défense nationale et dont la liste est fixée par décret en Conseil d'Etat.

Les enregistrements audiovisuels des procès obéissent cependant à des règles particulières :

**Article L222-1**

Pendant les vingt ans qui suivent la clôture du procès, la consultation intégrale ou partielle de l'enregistrement audiovisuel ou sonore, à des fins historiques ou scientifiques, peut être autorisée par l'autorité administrative.

A l'expiration de ce délai, la consultation est libre. La reproduction ou la diffusion, intégrale ou partielle, de l'enregistrement audiovisuel ou sonore est subordonnée à une autorisation accordée, après que toute personne justifiant d'un intérêt pour agir a été mise en mesure de faire valoir ses droits, par le président du tribunal de grande instance de Paris ou par le juge qu'il délègue à cet effet. Toutefois, la reproduction ou la diffusion, intégrale ou partielle, de l'enregistrement des audiences d'un procès pour crime contre
l'humanité peut être autorisée dès que ce procès a pris fin par une décision devenue définitive.

Après cinquante ans, la reproduction et la diffusion des enregistrements audiovisuels ou sonores sont libres.

Article L222-2
Les procès dont l'enregistrement a été autorisé avant le 13 juillet 1990 peuvent être reproduits ou diffusés en suivant la procédure prévue à l'article L. 222-1.

° Appréciation du caractère sensible des informations
Ce sont les archivistes qui apprécient la nature sensible ou non des informations, parfois en concertation avec l’organisme producteur. Cette appréciation n’est pas sans poser de difficultés et de plusieurs points de vue. D’une part, l’accès aux documents en salle se fait par liasse ou dossier qui contiennent plusieurs documents. Si l’un d’entre eux est considéré comme portant atteinte à la vie privée, la difficulté pratique est de retirer le document sensible lors de la consultation pour permettre l’accès aux autres documents. Une autre difficulté est dans l’appréciation de l’atteinte à la vie privée. Ce n’est pas parce qu’un document contient une information relative à une personne privée qu’il porte atteinte à cette personne. Et les services d’archives auront parfois la tentation d’interpréter plus largement la notion de vie privée pour éviter toute responsabilité.

Il faut encore, dans ce système évoquer la possibilité qu’ont les usagers, notamment les chercheurs d’accéder avant le terme prévu aux documents. En particulier, les historiens du contemporain ont besoin de consulter des archives qui ne sont pas encore disponibles. Ils peuvent demander une dérogation à l’administration des archives, même sur des documents sensibles. Cette démarche est individuelle. Il ne s’agit pas d’un droit, l’administration disposant d’un droit discrétionnaire pour laisser accéder un chercheur à un document.

La question peut se poser de savoir quelle responsabilité endosse le service si le chercheur ayant obtenu une dérogation dévoile des informations ou des secrets contenus dans ces documents. Il publie par exemple un article et porte atteinte à la vie privée d’une personne. Cette personne, si elle est toujours en vie, pourra engager la responsabilité de l’usager chercheur (voir plus haut sur l’atteinte à la vie privée qui peut être traitée soit sur le terrain pénal, soit sur le terrain civil), mais non celle du service qui n’a fait qu’utiliser d’une prérogative qu’il tire du droit des archives.

La question de la responsabilité des services d’archives se pose en revanche lorsque le mode de communication excède le simple accès au document, par exemple si le service d’archives valorise ses fonds en les numérisant et en en facilitant l’accès sur internet. Il est difficile de situer les services d’archives relativement aux acteurs répertoriés en matière de services de communication électronique. Doit-on les considérer comme simples fournisseurs d’accès à des documents ou encore comme éditeurs. Dans la mesure où ces services ont la garde des documents, qu’ils ont une responsabilité en matière de conservation et d’accès, il semble qu’ils ne puissent être considérés comme simples intermédiaires. En tant qu’ils fournissent des contenus, on peut sans doute les ranger dans
la catégorie des éditeurs. Mais aucune analyse n’a été, à notre connaissance effectuée sur cet aspect.

1. Could you briefly summarize the bodies of law (other than copyright and related rights) that may be relevant to decisions by publishers or libraries/archives to remove materials from archival collections or databases (e.g., libel/defamation, privacy, censorship/national security)?

1. Pouvez vous résumer d’une manière assez brève l’application des théories visées ci-dessus qui prendraient en compte les éditeurs ou les archives lorsqu’il s’agit d’un retrait éventuel de documents ?

Voir ci-dessus

For each of the areas identified above,

Pour chaque domaine décrit ci-dessus,

Voir ci-dessus

2. Are there judicial decisions in your country addressing publishers’ or archives’ liability with respect to allegedly offending material contained in the archives’ collections?

2. Existe-t-il de la jurisprudence en France s’adressant à la responsabilité des éditeurs ou des archives par rapport au matériel prétendument offensif contenu dans les collections d’archives?

En matière d’archives ou de collection d’archives, il n’existe pas, à ma connaissance de jurisprudence traitant de cette question, ou plutôt en traite t’elle d’une façon indirecte. Voir ci-dessous.

a. What, if any, distinctions do courts in your country articulate between the roles of publishers and of archives?

a. Quelles distinctions les tribunaux ont-ils faites entre le rôle de l’éditeur et celui des archives ?

Nous avons mentionné plus haut (à propos de la prescription en matière de diffamation sur internet) une affaire plaidée devant la Cour d’appel de Paris dans laquelle les juges ont précisé que la diffusion incriminée excédait une simple opération d’archivage. La cour d’appel de Paris décide que : « La mise en ligne du texte ne s’analyse pas en une opération d’archivage dans une bibliothèque, mais en une nouvelle publication, même si le texte n’a subi aucune modification »… « en choisissant de placer le texte sur un nouveau support, les prévenus ne se bornent pas à effectuer une opération de stockage en vue d’une consultation éventuelle, il suscitent l’occasion pour un nouveau public élargi, qui ne se limite pas à ses adhérents, de prendre connaissance de leur écrit, grâce aux possibilités d’accessibilités offertes par internet ».

Faut-il en déduire a contrario que la responsabilité du service procédant à une simple opération d’archivage ne pourrait être engagée, une fois le délai de prescription de l’infraction écoulé ? C’est la solution qu’avait retenu la loi pour la confiance dans l’économie numérique, soucieuse de ce que les journaux archivant leurs articles ne
puissent être inquiétés du fait de cette nouvelle opération (le délai de prescription de trois mois courant à comptant de la première publication). La loi évoquait la reproduction d’un même contenu en ligne. Mais le conseil constitutionnel a censuré cette disposition.

On peut donc estimer que quelle que soit la finalité de la diffusion, archivage ou publication, les responsabilités ne seront pas de ce point de vue traitées différemment. On peut tout de même se demander, relativement aux différents acteurs identifiés par la loi LCEN, si les services d’archives ne doivent pas plutôt être considérés comme des éditeurs non-professionnels auquel leurs obligations sont allégées en matière d’identification.

b. According to these decisions or other laws of your country, does the publisher’s liability depend on the extent to which the publisher exercises control over the contents and maintenance of the archive? Does the publisher’s liability depend on any other factors?

c. According to these decisions or other laws of your country, does the archives’ liability depend on the extent to which it controls the acquisition and maintenance of the offending material? Does liability depend on the extent to which the archives makes the material accessible to the public? Does the archives’ liability depend on any other factors?

°Les services publics d’archives

La responsabilité des services d’archives sera délimitée par les missions qui leur sont imparties, notamment en matière de communication.

En matière d’archives publiques, l’accès est encadré par la loi. Ce n’est que s’ils excèdent ce cadre et que le contenu des archives diffusées porte atteinte à un intérêt privé ou public que leur responsabilité peut être engageée. Par exemple, s’ils communiquent avant terme et en dehors de toute autorisation de dérogation un document portant atteinte à la vie privée d’une personne, ils s’exposent à des sanctions (sur le terrain pénal sur plusieurs fondements, atteinte à la vie privée, violation du secret professionnel) et sur le terrain civil (atteinte au respect de la vie privée, voir plus haut).

A propos de la responsabilité professionnelle : le devoir de secret, une question s’est posée à propos de documents relatifs à une manifestation pacifiste organisée par les
algériens au moment de la guerre d’Algérie, qui, à Paris, s’est tenue en octobre 1961. De nombreux manifestants y trouvèrent la mort suite à la répression policière. Mais les chiffres avaient toujours été sous-estimés. Des archivistes avaient décidé de dévoiler le nombre de morts. Or les archives contenant cette information n’étaient pas de libre consultation. La divulgation de ces informations sensibles était susceptible d’engager leur responsabilité.
Le droit des archives contient des dispositions qu’il faut combiner avec les règles prévues dans le Code pénal et qui concerne aussi le devoir de secret.

L’article L 211-3 du Code du patrimoine énonce :

| Article L.211 | Tout fonctionnaire ou agent chargé de la collecte ou de la conservation d'archives en application des dispositions du présent titre est tenu au secret professionnel en ce qui concerne tout document qui ne peut être légalement mis à la disposition du public. |

Un archiviste qui enfreint ces règles est passible des peines prévues aux articles 226-13 et 226-31 du code pénal (art ; L 214-1 du code pénal).
L’article 226-13 punit d’un an d’emprisonnement et de 15 000 euros d’amende toute personne qui révèle une information à caractère secret alors qu’elle en est dépositaire.
L’article 226-31 prévoit des peines complémentaires applicables aux personnes physiques (interdiction d’exercer une activité professionnelle, interdiction des droits civiques, civils et e famille, etc.).

Ce texte concerne les archives publiques, mais l’article L 214-2 du Code du patrimoine punit également des mêmes peines la communication d’informations contenues dans des archives privées qui violeraient la volonté du déposant ou propriétaire de ces archives.
En ce qui concerne les services d’archives qui détiennent des documents d’archives dans lesquels les contenus illicites peuvent éventuellement engager leur responsabilité, les questions ne se poseront pas dans des termes différents que pour les éditeurs conservant et mettant à disposition des archives.

d. Have courts in your country imposed remedies against publishers who did not remove material containing allegedly offending material from archives over which they maintained control? If so, what types of remedies were imposed and under what circumstances?

\textit{d. Est-ce que les tribunaux en France ont imposé des sanctions contre des éditeurs qui n’avaient pas retiré du matériel prétendu offensif de certaines archives sur lesquelles ils avaient le contrôle ? Si oui, quelles types de sanctions ont été imposés et dans quelles circonstances ?}

e. Have courts in your country imposed remedies against archives that retain or make available this material? If so, what types of remedies were imposed and under what circumstances?

\textit{e. Est ce que les tribunaux en France ont imposé des sanctions contre des archives qui ont retenu ou rendu accessible ce matériel ? Si ou,}
quels types de sanctions ont été imposés et dans quelles circonstances ?

Il n’y a pas, à ma connaissance de décision qui ait concerné ce point.

In short, we are interested in knowing what bodies of law would motivate removal of documents from archival collections or databases and whether a library or archives could make available the offending material – assuming it has or could obtain a copy – when the publisher may not (or at least, the publisher prefers not to take the legal risk).

En somme, nous voudrions savoir quelles sont les bases légales justifiant le retrait de documents des collections des archives ou des bases de données. Nous voudrions également savoir si une bibliothèque ou des archives pourraient rendre accessible le matériel offensif – en présumant qu’elles pourraient obtenir ou qu’elles possèdent déjà une copie – lorsque un éditeur ne le peut pas (ou qu’il préfère ne pas prendre le risque de mettre à disposition).

La question peut se poser pour les services publics ayant en charge de mettre des documents à disposition du public. Dans la mesure où il s’agit d’une obligation de communication, on ne voit pas que leur responsabilité puisse être engagée. Il reste que ces contenus peuvent parfois poser problème, par exemple contenir des propos diffamatoires. Dans la mesure où la loi prévoit des délais de communication longs, le problème a peu de chance de se poser.

Les archivistes se posent cependant des questions de ce point de vue. Par exemple, quid lorsqu’une archive publique évoque des personnes ayant collaboré sous Vichy ? Un certain nombre de ces archives sont ouvertes et la famille peut estimer que l’accès à cette information est préjudiciable à leur réputation. Quid encore des photographies des femmes qui sous la vindicte haineuse de la populace se sont fait tondre en public, soupçonnées d’avoir entretenue des relations avec des hommes allemands. Certains musées ou services d’archives ont des collections importantes de cette période de l’après guerre.

Le problème est que tout à la fois les archivistes doivent être garants de l’intégrité des archives, c’est à dire de la conservation en l’état d’un document à compter de sa création. Il ne peut être juge ou censeur d’un contenu qui pourrait être sensible ou illicite. Par ailleurs et d’une façon parfois paradoxale, il n’est pas garant de leur authenticité ou encore de la vérité qu’ils expriment.

A nouveau, il faut sans doute raisonner relativement à la mission de base de ces services d’archives. L’accès dans une salle de lecture d’un document sensible ne pourrait être critiqué par les intéressés, dès lors que sa communication est libre (que les délais prévus par la loi sur les archives sont expirés). En revanche, une communication autre, par exemple sur une base de donnée irait au delà de la mission impartie et pourrait alors être contestée.

Sur les bases légales justifiant le retrait, voir plus haut les différents chefs de responsabilité.
3. Have litigants in your country agreed to settlements that would affect the contents, maintenance, or public accessibility of material contained in archives? If so, what types of settlements have been reached and under what circumstances?16

4. Est-ce que les parties aux litiges en France en matière de droit d’auteur ont accepté des règlements à l’amiable qui portaient sur le contenu, l’entretien ou l’accès du public au matériel contenu dans les archives ? Quelles transactions, dans quelles circonstances ?
Il est difficile d’avoir connaissance de ces pratiques.

4. Have publishers, aggregators or archives in your country sought to avoid potential liability by removing allegedly offending material, without waiting to be notified (or sued) by persons claiming to be injured by the material? If so, under what circumstances?17

5. What is the potential liability in your country for publication of allegedly offending material?

5. Quelle est la responsabilité potentielle en France pour la publication de matériel prétendu offensif ?
D’une façon générale, sur cette question, voir les différents chefs de responsabilité et les sanctions.

a. Is there any statutory or case law authority in your country for reducing damages in the case of nonprofit libraries or archives acting in good faith?

a. Y a-t-il des lois ou des décisions de jurisprudence dans votre pays qui réduisent les dommages-intérêts que doivent verser une bibliothèque ou des archives à but non lucratif lorsque leur responsabilité est retenue, mais lorsqu’elle ont agi en bonne foi ?

° En principe, la bonne foi peut permettre d’exonérer une personne de sa responsabilité pénale (par exemple en matière de contrefaçon, mais aussi pour d’autres infractions comme la diffamation). Elle ne joue pas en principe pour faire varier le montant de la peine. Il n’est pas impossible qu’en pratique le juge prenne en

---

16 We recognize that this information may not be readily available, but any information you can provide, anecdotal or otherwise, would be helpful, as would suggestions for sources of such information.

Nous sommes conscients que cette information peut être difficile à trouver, mais toute information que vous pouvez nous offrir, voire une anecdote, peut être utile, autant que des suggestions d’autres sources pour cette information.

17 See note 1, above.

Voir note 1, ci-dessus.
considération le comportement de celui qui diffuse un contenu illicite pour moduler le montant de l’amende puisque le code pénal indique des montants maximum de peines.

En ce qui concerne la responsabilité civile, la bonne foi en matière de contrefaçon d’une œuvre est indifférente à la mise en jeu de la responsabilité. Dès lors qu’est établie la contrefaçon, il est inutile de prouver la faute (Cass. 1ère, civ., 10 mai 1995, RIDA.4.1995, p. 291. La cessation de l’acte illicite peut être alors exigée non seulement du contrefacteur, de l’éditeur, mais aussi des intermédiaires qui n’ont pas directement contribué à la contrefaçon. Dans l’allocation des dommages et intérêts, les juges prendront en compte la réalité du préjudice, sans égard à la question de la bonne foi.

° Quant à la nature de l’institution, la considération de son activité culturelle, son caractère non lucratif sont des éléments inopérants.

b. **What factors do courts in your country use in assessing damages?**

   1. **En allouant des dommages-intérêts, quels sont les éléments que le tribunal prendra en considération?**
   Les tribunaux prennent en considération la réalité du préjudice (perte éprouvée du fait du contenu illicite, gain manqué si l’atteinte est réalisée à l’encontre d’un droit économique), ce qui suppose de prendre en considération le mode de communication et l’ampleur de la diffusion.

6. **Are there any industry standards or accepted practices in your country, other than withdrawal of an article, for addressing offending material contained in an archives or database?** For example, are there any practices concerning legends or disclaimers to accompany offending material in order to continue to make it available?

   1. **Y a-t-il des pratiques dans votre pays, outre le retrait d’un document, pour confronter le problème de matériel offensif dont la présence dans des archives ou dans une base de données persiste? Par exemple, utilise-t-on des déclarations ou d’autres avis qui accompagnent le matériel offensif afin de maintenir l’accès ?**

Oui, voir sur ce point la question des sanctions. Les juges hésitent parfois à ordonner le retrait du contenu illicite, mais ils peuvent exiger la mention d’informations accompagnant la diffusion d’un message jugé attentatoire à un droit.

C. **Contract Analysis:**

   **C. Analyse Contractuelle**

1. **Do contract provisions between archives and publishers in your country commonly address the issue of removing a work from the collection?** If so, how do they do so? Do they address labeling, hyperlinking or any other means of dealing with the offending material other than removing it?
1. Existe-t-il entre les archives et les éditeurs en France des dispositions contractuelles qui sont fréquemment utilisées afin de confronter le problème du retrait d’un œuvre d’une collection ? Si oui, comment fonctionnent-elles ? Ces provisions s’adressent-elles étiquettant, hyperlink/faisant un link via le web, ou d’autres méthodes pour redresser le problème sans devoir retirer le matériel ?

2. To what extent might a publisher avoid liability related to the offending material through its contractual arrangements with a library or archive in your country? Do publishers’ contracts commonly contain provisions aimed at limiting or avoiding liability for offending material?

2. Dans quelle mesure un éditeur peut-il éviter toute responsabilité par moyen d’un contrat qui jeterait la responsabilité sur une bibliothèque ou des archives en France? Ces clauses, si elles existent, sont-elles souvent utilisées par les éditeurs ?

les clauses de non responsabilité étant inopposables en matière délictuelle, l’éditeur peut simplement appeler en garantie l’auteur du contenu illicite.

3. Have courts in your country enforced contractual obligations to remove or withdraw archived material? If so, under what circumstances?

3. Y a-t-il de la jurisprudence en France obligeant aux archives de respecter une obligation contractuelle de supprimer ou de bloquer l’accès aux documents ? Le cas échéant, dans quelles circonstances?

Pas à ma connaissance.

4. To what extent do contracts in your country between publishers, databases, and libraries allow libraries to create their own archival or preservation copies of material to which libraries have access through databases? If contracts allow libraries or archives to make such copies, are there limitations as to when libraries or archives may create those preservation/archival copies? (E.g. may a library allow its users to use those copies or are they strictly for “back-up” purposes in the event the publisher no longer provides access)?

4. En France, dans quelle mesure les contrats entre éditeurs, les producteurs de bases de données, et les bibliothèques permettent-ils aux bibliothèques de créer leurs propres archives ou de préserver des copies de documents auxquelles les bibliothèques ont accès à travers des bases de données ? Si les contrats autorisent ces copies, y a t il des limitations contractuelles par rapport aux conditions sous lesquelles les bibliothèques ou archives peuvent créer ces copies de conservation ? (par exemple : une bibliothèque peut-elle permettre à ses utilisateurs d’utiliser ces copies ou sont-elles strictement réservées à des hypothèses de sauvegarde au cas où l’éditeur n’autoriserait plus d’accès ?

5. En France, dans quelle mesure les contrats entre éditeurs, les producteurs de bases de données, et les bibliothèques permettent-ils aux bibliothèques de créer leurs propres archives ou de préserver des copies de documents auxquelles les bibliothèques ont accès à travers des bases de données ? Si les contrats autorisent ces copies, y a t il des limitations contractuelles par rapport aux conditions sous lesquelles les bibliothèques ou archives peuvent créer ces copies de conservation ? (par exemple : une bibliothèque peut-elle permettre à ses utilisateurs d’utiliser ces copies ou sont-elles strictement réservées à des hypothèses de sauvegarde au cas où l’éditeur n’autoriserait plus d’accès ?

D-III-37
Il est toujours difficile d’avoir accès à ces contrats, souvent considéré par les intéressés comme des documents confidentiels. Il me semble effectivement que ces contrats doivent aborder cette question.
Pour les services investis d’une mission de conservation des documents, on pourrait considérer que l’intérêt public leur reconnaît le droit de procéder à des copies en vue de la conservation des documents ; c’est un point qu’aborde en outre le projet de loi de transposition de la directive sur les droits d’auteur et droits voisins dans la société de l’information (voir plus haut, la première partie).
A. Copyright Analysis

1. Judicial decisions

1.1. Archival operations
An archival operation consists of classifying documents using a specific method in order to ensure inventory, preservation and access to the documents. For archival services, the procedures and methods for series classification are very specifically defined and governed by archival practice and science. Public access to the documents occurs only after this archiving operation has taken place.

° The reasons disputes arise at the time of publication are factual and not related to a difference in legal status between publishers and archive services. Publishers and archive services have the same liabilities in terms of infringement. That being the case, it is more often at the time a work is published that infringement will be invoked, for example by the author or the holders of rights to the work. This is due to the fact that the distribution of the work is more discrete in the archiving operation. The purpose of archiving is preservation and access to the documents in reading rooms. Therefore, an author will not necessarily be aware of the infringement. This is where archiving and Internet accessibility, in particular, may change things because, in this case, the unauthorized distribution of the work will be more visible.

Archival services are beginning to face difficulties, for example, when they place collections of private correspondence online. Authors of such correspondence have protested (without legal action).

1.2. Concerning plagiarism
This should read: those ghost writers who plagiarize badly (there are typos).
Plagiarism is a specific form of copyright violation. It is, for example, the act of copying a work, in whole or in part, and giving authorship to oneself. The sanction, therefore, is infringement.

No, cases of plagiarism remain a minority of the disputes concerning personal rights, particularly in their application to the right to information according to the analysis of the White Paper cited in note 1.

B. Other Substantive Legal Areas

2. Summary of Relevant Bodies of Law

1.1. Question concerning the right to information
In reality, the right to information is related more to the exercise of a freedom than to the existence of a true subjective right. This related particularly to the principle of freedom of the press set forth in the Law of 1881:
Art. 1: "Printing and book stores are free."
But it can also be related to the freedom of expression established in the constitution or even the freedom of commerce (an argument which was cited, for example, by the photographers in conflict with the right to the image of owners' property).

In the same spirit, we can cite the freedom of communication, which has a new expression in the provisions introduced by the law for confidence in the digital economy. This law amends, in particular, the Law of September 30, 1986 governing the freedom of communication, the first article of which reads as follows:

Excerpt from Article 1 of the Law of September 30, 1986
Electronic communication to the public is free.

The exercise of this freedom may be limited only to the extent required, first, by respect for the dignity of the human person, freedom and the property of others, the pluralistic nature of the expression of trends of thought and opinion and, second, by the protection of children and teenagers, the safeguarding of the public order, the needs of national defense, the requirements of public services, the technical constraints inherent in communications resources and by the need for audiovisual services to develop audiovisual production.

Freedom of information also has a useful foundation in the European Convention on Human Rights (ECHR).
Thus, the right to information does not have a very precise content. In addition, it has several facets, with the right to provide information for the media outlets and the public's right to receive information. The notion of a right to information is based on the idea that information is a common and available good, which cannot be appropriated. However, there are some exceptions to this idea (See Nathalie Mallet Poujol, Appropriation of Information, the eternal dream, Dalloz, feature, p. 330, which describes the reflexes for
appropriation of information, and writes: "the imperative for access to information combines an approach that could be described has humanist (a variety of consideration of cultural and scientific policy, the right to culture, the progress of science and society, freedom of expression and communication) with a liberal approach (inspired by the requirements of freedom of trade and competition." I believe that this is a very good synthesis of the right to information, which gives a good idea of the different bases for this "right").

Judges arbitrate in some manner a kind of conflict of interests between the holders of personal rights (or copyright holders) on the one hand and the right to information on the other. In a way, the right to information can be considered an external limit on personal rights (and other rights to content).

Archival services could cite the freedom to inform. But, more directly, with regard to access to documents, they may argue the arrangements inherent in the archives, the purpose of which includes, among other things, the consultation of public documents. And, in this case, the right to information is reinforced by the existence of a public interest.

1.2.
This remark relates to the right of persons to their image. Therefore, it is not a copyright. Publishers or other media outlets that publish images of persons under conditions that exceed the right to information must prove that they have acquired the rights to distribute the image through a contract or, more simply, that the person has given them authorization to publish.

Certain circumstances may suggest that the person in question agrees for his image to be distributed (for example, in the context of an interview or a person posing for a portrait). But there may be debate over the scope of the agreement and the type of uses authorized. The question may also arise in the relations between a researcher and a person interviewed. Concerning the need to provide for a contract that defines the future uses of an interview, see Nathalie Mallet-Poujol, _Recherche et vie privée, du droit du citoyen au droit du chercheur_ [Research and private life, from the citizen's right to the researcher's right], _Archives en sciences sociales, enjeux juridiques et pratiques de coopérations scientifiques_, to be published, L’harmattan, _collection droit du patrimoine culturel et naturel_, 2007 and in the Archive Gazette, No. 198, 2006, p.157, see in particular contracts and private life, p. 163.

1.3.
*Question concerning the right of the press based on the Law of July 29, 1881*

Nathalie

The law of the press was intended, first, to proclaim the freedom of the press but, at the very same time, to stipulate the limits of the press. The press law sets forth in the first article the principle of the freedom of publication and book selling.

Press violations are then specified, i.e., the criminal offenses related to the dissemination of information. In addition, the right to respond and correct is also framed. Therefore, these are not rights held by journalists and media outlets which are equivalent to
copyright rights, but a system of rules that frames the activity of the press and sets the limits. This is a special criminal law text.

The offenses classified as special include: defamation, insult, etc. (see details in the study).

Any person disseminating information under illegal conditions is guilty of these offenses. Case law has always accepted that the right of the press applies very broadly to all processes for the expression of thought, including the new media.

Concerning the application of the law of the press to archival services
Press law is enforceable against persons who disclose or publish illegal content. In the business of archival services, two types of activities must be distinguished: the act of making the documents accessible and the act of using them.

1° Concerning access to the archives
The difficulty may be preserving and making defamatory documents available. In this case, if we follow the logic of public archives law, the integrity of these documents, and access to them, must be ensured (failing which, there would be distortion or falsification of public historical documents). If we consider this issue from the standpoint of the law of the press, we can question whether the act of showing or making defamatory documents available is also defamatory in and of itself. As long as the access to the documents is in the public interest, one can reasonably believe that the archival services are not responsible for this illegal content.

Two elements can reduce the assumptions of a conflict.

However, when a third party accesses those documents and uses them (by publishing them, for example), or when the archival service exceeds the framework of its mission (preservation, access), by distributing the document, for example, these persons incur the risk of an action for defamation. They will benefit from a discharge in the context of an exception of truth or proof of good faith.

2° Concerning the use of the archives
The archival services create value for their holdings by publishing guides for example, or by organizing exhibits, etc. These activities exceed the strict framework of the public mission with which they are vested and are, then, more exposed to disputes if sensitive content is disclosed. An archive guide could be sanctioned on the grounds of defamation if the presentation of the documents can be deemed defamatory.

Do journalists (or newspaper publishers) and authors share these rights equally?
What happens when the authors and publishers are in conflict?
This question does not really arise once press law is imposed on the various players, publishers and journalists. The questions that may arise concern the responsibility of the different players (question discussed in the study). The publication director will be convicted of defamation as the principal author under the system of downward responsibility (Article 42 of the Law of July 29, 1881). As for the author, if he is prosecuted, which is not automatic, it is as an accomplice and separate from the
publisher. In this system, it is the publishers that assume the risk of publication. It is assumed they have read the text they are publishing.

In general, judges issue a joint conviction. When the publisher alone is prosecuted, there is not in fact any recourse against the author. In the French system, there is a strong tradition of the liability of the directors of publication. Civil damages are most often reduced to a symbolic amount.

Moreover, publication directors guarantee the payment of civil damages under Article 44 of the Law of 1881:
"The owners of newspapers or periodicals are responsible for the financial judgments made in favor of third parties against the persons designated in the preceding two articles, pursuant to Articles 1382, 1383, 1384 of the Civil Code (…)."

Concerning guarantee clauses.
In the same way that the authors guarantee the peaceful enjoyment of the rights assigned, there may be clauses under which the author guarantees the publisher that he is proposing a text that is not likely to be attacked for defamation. These clauses do not release the publishers from their responsibilities.

Can the archives invoke these rights to prevent the withdrawal of modification of the documents? The archival services will invoke the archive law to resist a request for withdrawal or modification of the documents and not press law.

Or can these laws prevent an archival service from opposing a change in these documents? There is no case law, but I don't believe so.

What type of action can be brought on the basis of the Law of 1881, which would be different from the Civil Code?
Actions for defamation are specifically governed by press law. Once the conditions of this law are met, it must necessarily be based on this text. A liability action on the basis of Article 1382 of the Civil Code is not admissible in this case. Case law is completely established in this regard (see 1.1.1, interferences between ordinary liability law and press law).
The action for civil liability based on Article 1382 of the Civil Code is secondary, and may be initiated "only if the facts used in support of the action are separate from those that constitute the violations stipulated and punished by the Law of 1881" (Note under Article 1 of the Law of July 29, 1881, Code Dalloz, ed. 2005). For example, judges have decided that "independently of the special provisions concerning the press and publishing, and with regard to the public's right to information, the author of a work relating historical facts incurs liability with regard to the persons in question when the presentation of the theses argued manifests, through distortion, falsification or gross negligence, a flagrant disdain for the search for truth (Court of cassation, Civ. 1st, June 15, 1994, Bull. Civ. I. No. 218)
1.4. What is the relationship between Article 9-1 of the Civil Code and personal and privacy rights?

I have mentioned Article 9-1 and the presumption of innocence, because the second paragraph sanctions the act of publicly presenting a person as guilty of acts when that person has not yet been convicted. This accusation is primarily directed at media outlets and newscasts. The act of presenting a person as guilty under these conditions could infringe upon the rights of the person. Article 9 of the Civil Code is placed …

1.5. Right to respond and law on the digital economy?

This right to response is framed in the press law, but it has been stipulated in specific terms in the law for confidence in the digital economy (the LEN law), particularly with respect to the terms and conditions (including the three-day insertion period and the amount of the fine).

That being the case, the conditions for inserting the response are the same as in the press law. The LEN law specifies, in fact, that they are those stipulated by Article 13 of the Law of July 29, 1881.

1.6. Can you indicate the citations from the Code concerning the provisions on personal digital data which you cite as being the Law of August 6, 2004; is this Article L 211-4 of the Heritage Code? p. 17 and 18

Article L 211-4 of the Heritage Code defines public archives. The exception that allows the preservation of personal data therefore concerns, pursuant to Article L 212-4 of the Heritage Code, only public archives (generated by a public person in the conduct of its activity) and this provision of the Heritage Code (Article L 211-4 of the Code) was introduced by the Law of August 6, 2004, which amended a number of provisions of the Law of January 6, 1978 concerning information technologies, files and freedoms. This is why I mentioned it parenthetically under Article L 211-4, but this mention was informative only and concerns the origin of the rule. When you consult the Heritage Code on the Légifrance site, you see that this reference has disappeared.

1.7. What provision creates an exception for the preservation of archives in a case where it is normally prohibited because of race or religion?

The rules for preservation of public archives should allow this type of data to be kept, even if no provision covers the question.

1.8. In the law on personal data, is the correction or removal of data contrary to the law the only sanction? can damages be allocated?

The sanctions of the law on personal data are criminal sanctions, but there is nothing to prevent the victim of an illegal use of personal data from seeking civil remedies in addition to the criminal action, when a violation has generated an injury.

1.9. Discuss the specific procedures for remedy in the law on confidence in the digital economy? Particularly the filtering procedures and the outcome of the case of the

The LEN law defines obligations that vary depending on the technical service providers (see the report). Failure to meet those obligations makes the actors criminally liable (see below, Article VI of the law).

Moreover, depending on the illegal content, other sanctions will be incurred (infringement, in the event of copyright violation, criminal sanctions for defamation, for example).

Article 8 of the LEN law indicates that the judicial authority may order, in an emergency hearing or on a petition, the persons who make content available to the public online through communications services, all measures needed to prevent injury or to end an injury caused by the content as distributed. Those measures include either withdrawal or the act of making access impossible.

However, persons who abuse this option of withdrawal are subject to a penalty of one year in prison and a 15,000 euro fine. This will be the case if they improperly claim that content is illegal knowing that the information is inaccurate, for the purpose of having the information withdrawn or having its distribution discontinued.

1.10. Events dating back more than ten years. Limiting framework of defamation. Protection from defamation.

It is facts set forth in a declaration or a disclosure that must date back less than ten years to claim the exception of truth. In contrast, when a journalist or researcher discusses an affair that could damage the honor or respect of a person, which dates back more than ten years, the argument of truth alone is not sufficient. At this point, the notion of the right to forget for the person in question intervenes. In order to be exonerated, the journalist or researcher may invoke belief in the defamatory event and the pursuit of a legitimate purpose. Clearly, without this rule, historians could not practice their craft. This provision is related to the duty of information (on these questions, Nathalie Mallet-Poujol, Privacy and right to the image, the exemptions of history, Légicom, No. 20, 1999/4, p.51).

1.11. From what rules concerning archival operations does the defendant hope to draw an advantage? The outcome of this case, and the implications in terms of liability for archives and the law in terms of limits applicable for internet service providers are not clear for us.

In this case, the question was the starting point for the statute of limitations, which is three months for defamation. In this instance, the publisher argued that placing the text online was a simple operation to archive a work published in paper format. More than three months had elapsed since the paper publication, and by attaching the placement online to this first publication, he hoped to prevent the judgment. But the judges did not agree on this issue and decided that the placement online launched a new deadline.
This decision precedes the LCEN law. I cited it because the legislature has correctly asked the question about newspaper archives. The law as adopted by the Parliament opted in this case for the principle of non-separation of the statutes of limitations between paper and digital, thus eliminating the judicial risk for journalistic archives. However, this option was censured by the constitutional council. Placement online may not be considered to be the simple extension of the paper publication, which means that it launches a new useful statute of limitations for the person claiming illegal content.

1.12 *You note that only the authors are responsible for their defamatory declarations made live during live audiovisual broadcasts. Does this rule also apply to direct broadcasts on the Internet?*

There is no case law in this area, but we can assume that the solution would be the same.

1.13. *In your description about sensitive content in public archives, you say that certain documents, like those relating to another communications system, may be freely communicated immediately. A clarification is requested.*

All public documents, as defined in Article L 211-4 of the Heritage Code, are intended to be placed in archives. Some of these documents may be freely communicable. We can cite two examples.

The first example: documents that may have been communicated to the public. For example, a city hall publishes a municipal bulletin and distributes it to residents. This is a public archive document if it is kept in the city hall. After the period of use, it is placed in an archival service. Since it has been distributed, it will remain freely communicable. There is no reason to apply the communications periods stipulated by the law on archives.

Second example: certain documents are governed by specific communication rules. I am referring here to administrative documents, which are a specific category of public archives, which the legislature considers to be freely communicable under certain conditions. The fact that these documents are placed in an archival service does not change the communication rules. They remain freely communicable.

This rule is summarized in Article L 213-1 of the Heritage Code

To be inserted

1.14. *Starting point for the thirty-year period for communication of public archives: filing date in the archival service or other?*

In determining the time periods, the starting point is most often the creation of the document (the date of the instrument) and not the date it is placed in an archival service. This is the case of the time period under ordinary law, or the period of 60 years concerning private life or the security of the State or national defense. Some periods begin with the birth of the party in question (personnel files, medical information) or the date of the census or survey (for statistical archives).

For certain documents, the criterion is different and may be either the date of the legal document or the closing date of the file (judicial cases).
1.15. *When a researcher wants to access archives by exception, must he contact a central government department responsible for the public archives or simply the authority responsible for those specific archives?*

Concerning the exceptions granted on an individual basis:

° Generally, researchers contact the archive administration (Article L 213-3 of the Heritage Code). Under Article 2 of Decree 79-1038 of December 3, 1979, "any request for an exception to the communicability of public archive documents shall be submitted to the Minister of Culture (Department of French archives) which rules, after approval from the authority which has archived or preserves the archives." The authorization for an exception may contain specific conditions concerning the ability to reproduce the documents. Therefore, a decision on an exception requires the agreement of the service that produces the archives, a solution whose legitimacy is debated by some parties. A proposed reform of the law on archives proposed requiring only a simple opinion from the service that submitted the documents to the archives.

With respect to general exceptions (granted to the public in general and not to an individual researcher), the rule is the same. Agreement from the service providing the document is required. What is different is that the documents governed by this type of exception must be thirty years old.

° As an exception, some administrations manage their own archives and grant exceptions: the Ministry of Foreign Affairs and the Ministry of the Interior are governed by specific texts.

2. **Court decisions or other laws concerning the liability of publishers or archival services for offensive material.**

p. 3.4 To question B.2.

p. 30

2.1. *Is it true that editorial control influences or affects the liability of publishers for offensive material under French law, or can publishers be convicted on the basis of a strict liability that does not take editorial control into consideration?*

In press law, publication directors are considered to be the principal authors in the case of distribution of illegal content (see Art. 42 above). They are presumed to control the articles they publish and the system of liability flows from that assumption.

*Do the restrictions on liability that you mention fall under the law on confidence in the digital economy?*

Can you explain that question?
2.2. Under French law, is it the activity (archiving versus traditional publishing) which counts more than the professional (or the designated actor); i.e., the archival service versus the publisher, when it comes to determining liability.

In reality, in this discussion, I was talking about services that hold private archives. In this case, the availability of the content is more important than the persons in determining liability.

4. Preemptive Removal

Question B.4 not answered

I think that the case must arise, but I have no specific examples. It seems to me that, taking into account the legal risks in publishing, certain publishers will be prudent and will anticipate potential disputes by withdrawing material which they suspect may be illegal.

6. Disclaimers and Legend

For example, the judge can order that information indicating the sensitive content be attached to the work (using a band or inserting an insert). In order to protect minors, the work can also be presented in packaging so that the young public cannot leaf through it or access it easily. Measures for publication in newspapers to provide information about the nature of the work can also be required. Or again, the deletion of certain excerpts can be ordered, which requires the publisher to refabricate the work (for a series of proposals from the National Publishing Union to adjust the various penalties, see the SNE White Paper, 2003; these proposals are described on the Internet).

Are there cases where this affects archives?
Not to my knowledge.

C. Contract analysis


I am not in a position to answer (see the email sent to Jane).

3. Contracts- Limiting Liability

Are the clauses in a contract that limit the publisher's liability for offensive material unenforceable?
Yes.
A. Copyright Analysis

1. Judicial décisions

1.1. Archival opérations
L’opération d’archivage consiste à classer des documents selon une méthode déterminée de façon à en assurer l’inventaire, la conservation et l’accès. Pour les services d’archives, les modes et méthodes de classement en séries sont très précisément délimités et relèvent de la pratique et de la science archivistique. L’accès du public aux documents n’est réalisé qu’à partir du moment où cette opération d’archivage eu lieu.

Les raisons pour lesquelles les litiges surviennent au moment de la publication sont des raisons factuelles et non des raisons liées à une différence de régime juridique entre éditeurs et services d’archives. Les éditeurs et les services d’archives endossent les mêmes responsabilités en matière de contrefaçon. Cela étant, dans les faits, c’est davantage au moment où l’œuvre est publiée que la contrefaçon sera invoquée, par exemple par l’auteur ou les titulaires de droits sur l’oeuvre. Cela est dû au fait que dans l’opération d’archivage, la diffusion de l’œuvre est plus discrète. La finalité est la conservation et l’accès aux documents dans les salles de lecture. Donc l’auteur ne va pas nécessairement avoir connaissance de la contrefaçon. C’est là où l’archivage et surtout l’accessibilité sur internet peuvent changer les choses car dans ce cas, la diffusion contrefaisante de l’œuvre sera plus visible. Les services d’archives commencent à être confrontés à des difficultés par exemple lorsqu’ils mettent en ligne des fonds de correspondances privées. Il est arrivé que des auteurs de ces correspondances protestent (sans qu’il y ait eu procès).

1.2. Sur le plagiat
Il faut lire : ces nègres qui plagient mal (il y a des fautes de frappe).

Le plagiat est une forme particulière de violation du droit d’auteur. C’est par exemple le fait de copier en tout ou partie un ouvrage et de s’en attribuer la paternité. La sanction est donc la contrefaçon.

Non, les affaires de plagiat restent minoritaires relativement aux contentieux concernant les droits de la personnalité et notamment dans leur opposition au droit à l’information, selon l’analyse du Livre blanc cité en note 1.

B. Other Substantive Legal Areas

1. Summary of Relevant Bodies of Law

1.1. Question sur le droit à l’information
Le droit à l’information en réalité se rattache davantage à l’exercice d’une liberté qu’à l’existence d’un véritable droit subjectif. Il s’agit notamment du principe de la liberté de la presse énoncé dans la loi du 1881 :
Art. 1er : « L’imprimerie et la librairie sont libres ».
Mais on peut aussi le relier à la liberté d’expression consacrée par la constitution ou encore la liberté du commerce (argument qui a par exemple été invoqué par les photographes se heurtant au droit à l’image des biens des propriétaires).
Dans le même esprit, on peut citer la liberté de communication, qui trouve une nouvelle expression avec les dispositions introduites par la loi pour la confiance dans l’économie numérique. Cette loi modifie notamment la loi du 30 septembre 1986 relative à la liberté de communication, dont l’article premier est ainsi rédigé :

**Extrait de l'Art. premier de la loi du 30 septembre 1986**
La communication au public par voie électronique est libre.

L’exercice de cette liberté ne peut être limité que dans la mesure requise, d’une part, par le respect de la dignité de la personne humaine, de la liberté et de la propriété d’autrui, du caractère pluraliste de l’expression des courants de pensée et d’opinion et, d’autre part, par la protection de l’enfance et de l’adolescence, par la sauvegarde de l’ordre public, par les besoins de la défense nationale, par les exigences de service public, par les contraintes techniques inhérentes aux moyens de communication, ainsi que par la nécessité, pour les services audiovisuels, de développer la production audiovisuelle.

La liberté d’information trouve également un fondement utile dans la Convention européenne des droits de l’homme (CEDH).
Le droit à l’information n’a donc pas un contenu très précis. En outre, il a plusieurs facettes, le droit d’informer du côté des organes de presse et le droit du public à recevoir une information. La notion de droit à l’information repose sur l’idée que l’information est un bien commun, disponible, qu’il ne peut être approprié. Cette idée souffre cependant
Les exceptions (sur cette question voir Nathalie Mallet Poujol, appropriation de l’information, l’éternelle chimère, Dalloz, chronique, p. 330 qui décrit les réflexes d’appropriation sur l’information et écrit notamment : « l’impératif d’accès à l’information conjuge une approche que l’on pourrait qualifier d’humaniste (matinée de considérations de politique culturelle et scientifique, droit à la culture, progrès de la science et de la société, liberté d’expression et de communication) avec une approche libérale (inspirée par les impératifs de liberté du commerce et de la concurrence ». Je pense que c’est une très bonne synthèse du droit à l’information qui donne un bonne idée des différents ressorts de ce « droit à »).

Les juges arbitrent en quelque sorte un conflit d’intérêts entre d’un côté les titulaires de droits de la personnalité (ou encore les titulaires de droit d’auteur) et le droit à l’information. On peut considérer d’une certaine façon que le droit à l’information constitue une limite externe des droits de la personnalité (et autres droits sur les contenus).

Les services d’archives pourraient invoquer la liberté d’informer. Mais plus directement, en ce qui concerne l’accès aux documents, ils peuvent se fonder sur les dispositions propres aux archives, dont les finalités sont entre autres la consultation des documents publics. Et dans ce cas, le droit à l’information est renforcé par l’existence d’un intérêt public.

1.2.  

1.3.  
*Question sur le droit de la presse fondé sur la loi du 29 juillet 1881*  
Nathalie
Le droit de la presse avait pour vocation d'une part de proclamer la liberté de la presse mais tout en même temps d'en indiquer les limites. Le droit de la presse affirme dès le premier article le principe de la liberté de l'imprimerie et de la librairie. Sont ensuite précisés quels sont les délits de presse, c'est-à-dire les délits pénaux liés à la diffusion d'information. Est également encadré le droit de réponse et de rectification. Ce ne sont donc pas des droits dont seraient titulaires les journalistes et organes de presse, équivalents aux droits de l’auteur mais un régime qui encadre l’activité de la presse qui en pose les limites. C’est un texte de droit pénal spécial.

Ces délits dits spéciaux sont notamment : la diffamation, l’injure, etc. (voir le détail dans l’étude).

Sont passibles de ces délits toute personne diffusant dans des conditions illégales des informations. La jurisprudence a toujours admis que le droit de la presse s’applique très largement à tous les procédés d’expression de la pensée, y compris les nouveaux supports.

Sur l’application du droit de la presse aux services d’archives
Le droit de la presse est opposable aux personnes qui divulguent ou éditent des contenus illicites. Dans l’activité des services d’archives, il faut distinguer deux types d’activités : le fait de rendre accessibles les documents et le fait de les exploiter.

1° Sur l’accès aux archives
La difficulté peut être de conserver et de rendre accessibles des documents diffamatoires. Dans ce cas, si l’on suit la logique du droit des archives publiques, il faut assurer l’intégrité de ces documents (à défaut de quoi il y aurait dénaturation ou falsification des documents publics l’histoire) et leur accès. Si l’on se place sur le terrain du droit de la presse, on peut se demander si le fait de montrer ou de rendre accessible des documents diffamatoires est aussi en soi diffamatoire. Dès lors que l’accès aux documents est d’intérêt public, on peut raisonnablement penser que les services d’archives ne sont pas responsables de ce contenu illicite. Deux éléments sont de nature à réduire les hypothèses de conflit.

Lorsqu’un tiers en revanche accède à ces documents et les exploite (en les publiant par exemple) ou encore lorsque le service d’archives excède le cadre de sa mission (conservation, accès) en assurant par exemple une diffusion du document, ces personnes encourtent le risque d’être poursuivie en diffamation. Elles bénéficieront d’une relaxe dans le cadre de l’exception de vérité et ou de la preuve de bonne foi.

2° Sur l’exploitation des archives
Les services d’archives valorisent leurs fonds en éditant par exemple des guides, en organisant des expositions, etc. Ces activités excèdent le strict cadre de la mission de service public dont ils sont investis et sont alors plus exposés à des litiges en cas de divulgation de contenus sensibles. Un guide d’archives pourrait être sanctionné sur le terrain de la diffamation, si la présentation des documents peut être jugée diffamatoire.

Ces droits appartiennent ils de façon équivalente aux journalistes (ou aux éditeurs de journaux ?) et aux auteurs,
Qu’arrive t’il quand les auteurs et les éditeurs sont en conflit ?
Cette question ne se pose pas véritablement dès lors que le droit de la presse s’impose aux différents acteurs, éditeurs, journalistes. Les questions qui peuvent éventuellement se poser concernent la responsabilité des différents acteurs (question traitée dans l’étude).
Le directeur de publication sera condamné pour diffamation comme auteur principal selon le système de responsabilité en cascade (article 42 de la loi du 29 juillet 1881). Quant à l’auteur, s’il est poursuivi, ce qui n’est pas automatique, c’est en tant que complice et distinctement de l’éditeur. Dans ce système, il ressort que ce sont les éditeurs qui assument le risque de publication. Il est censé avoir lu le texte qu’il publie.

En général les juges prononcent une condamnation solidaire. Lorsque l’éditeur est seul poursuivi, il n’y a pas, dans les faits d’action récursoire contre l’auteur. Il y a dans le système français une forte tradition de la responsabilité des directeurs de publication. Les intérêts civils se résument le plus souvent au franc symbolique.

Par ailleurs, les directeurs de publication garantissent le paiement des intérêts civils en vertu de l’article 44 de la loi de 1881 « Les propriétaires de journaux ou écrits périodiques sont responsables des condamnations pécuniaires prononcées au profit des tiers contre les personnes désignées dans les deux articles précédents, conformément aux articles 1382, 1383, 1384 du Code civil (…) ».

Sur les clauses de garantie.
De la même façon que les auteurs garantissent la jouissance paisible des droits cédés, il peut arriver que figurent des clauses par lesquelles l’auteur garantit l’éditeur qu’il lui propose un texte non susceptible d’être attaqué en diffamation. Mais ces clauses ne soulagent pas les éditeurs de leurs responsabilités.

Les archives peuvent-ils invoquer ces droits pour empêcher le retrait ou la modification des documents ? Les services d’archives invoqueront le droit des archives pour résister à une demande de retrait ou de modification des documents et non le droit de la presse.

Ou ces droits peuvent-il s’empêcher un service d’archives de s’opposer à un changement dans ces documents ? Il n’y a pas de jurisprudence mais je ne pense pas.

Quel type d’action peut être intentée sur le fondement de la loi de 1881 qui serait différente du Code civil ?
L’action en diffamation est spécialement régie par le droit de la presse. Dès lors que les conditions en sont réunies, elle doit nécessairement se fonder sur ce texte. Une action en responsabilité sur le fondement de l’article 1382 du Code civil n’est pas recevable en ce cas. La jurisprudence est tout à fait fixée en ce sens (voir 1.1.1 , interférences entre droit commun de la responsabilité et droit de la presse).
L’action en responsabilité civile fondée sur l’article 1382 du Code civil est subsidiaire et ne peut être engagée « qu’à la condition que les faits engagés à l’appui de l’action soient distincts de ceux qui constituent les infractions prévues et réprimées par la loi de 1881 »

Par exemple, les juges ont pu décider que « indépendamment des dispositions spéciales concernant la presse et l’édition, et eu égard au droit du public à l’information, l’auteur d’une œuvre relatant des faits historiques engage sa responsabilité à l’égard des personnes concernées lorsque la présentation des thèses soutenues manifeste, par dénaturation, falsification ou négligence grave, un mépris flagrant pour le recherche de vérité, (Cour de cassation, Civ. 1ère, 15 juin 1994, Bull. Civ. I. n° 218)

1.4. Quelle est la relation entre l’article 9-1 du Code civil et les droits de la vie privée et de la personnalité ?

J’ai mentionné l’article 9-1 et la présomption d’innocence car le deuxième paragraphe sanctionne le fait de présenter publiquement une personne comme coupable de faits alors même qu’elle n’a pas encore été condamnée. Cette incrimination vise en premier lieu les organes de presse ou les journaux télévisés. Le fait de présenter une personne comme coupable dans ces conditions est de nature à porter atteinte aux droits de la personne. L’article 9 dans le code civil est placé …

1.5. Droit de réponse et loi sur l’économie numérique ?

Ce droit de réponse est encadré dans la loi sur la presse mais il a été prévu dans des termes spécifiques dans la loi pour la confiance en l’économie numérique (dit loi LEN), particulièrement en ce qui concerne ses modalités (notamment pour le délai d’insertion de trois jours ainsi que le montant de l’amende).

Cela étant, les conditions d’insertion de la réponse sont les mêmes que dans le droit de la presse. La loi LEN précise en effet qu’elles sont celles prévues par l’article 13 de la loi du 29 juillet 1881.


L’article L 211-4 du Code du patrimoine définit les archives publiques. L’exception qui permet la conservation des données personnelles ne concerne donc, en application de l’article L 212-4 du Code du patrimoine que les archives publiques (générées par une personne publique dans l’exercice de son activité) et cette disposition du Code du patrimoine (l’article L 211-4 du CP) a été introduite par la loi du 6 aout 2004 qui est venue modifier un certain nombre de dispositions de la loi du 6 janvier 1978 relative à l’informatique, aux fichiers et aux libertés. C’est la raison pour laquelle je l’ai mentionnée entre parenthèses sous l’article L 211-4, mais cette mention est simplement informative et concerne l’origine de la règle. Lorsqu’on consulte le Code du patrimoine sur le site Légifrance, on voit que cette mention a disparu.

1.7. Quelle disposition crée une exception pour la conservation des archives dans le cas où elle est normalement prohibée en raison de la race et la religion ?
Le régime de conservation des archives publiques devrait permettre de conserver ce type de données même si aucune disposition n’aborde la question.

1.8. *Dans la loi sur les données personnelles, la correction ou le retrait de données contraires à la loi est-elle la seule sanction ? des dommages et intérêts peuvent-ils être alloués ?*

Les sanctions de la loi sur les données personnelles sont des sanctions pénales mais rien n’exclut qu’il y ait en corollaire de l’action pénale des intérêts civils pour la victime de l’utilisation illicite de données personnelles, dès lors que l’infraction a entraîné un préjudice.


La loi LEN fixe des obligations de nature variable selon les prestataires techniques (voir le rapport). Le non respect de ces obligations engage la responsabilité pénale de ses acteurs (voir ci-dessous article VI de la loi. En outre, selon le contenu illicite, d’autres sanctions seront encourues (la contrefaçon en cas de violation du droit d’auteur, les sanctions pénales de la diffamation par exemple).

L’article 8 de la loi LEN indique que l’autorité judiciaire peut prescrire en référé ou sur requête aux personnes qui mettent à disposition du public par des services de communication au public en ligne des contenus, toutes mesures propres à prévenir un dommage ou à faire cesser un dommage occasionné par les contenus ainsi diffusés. Parmi ces mesures, il faut citer soit le retrait, soit le fait de rendre l’accès impossible.

Toutefois, les personnes qui abuseraient de cette faculté de retrait sont passibles d’une peine de un an d’emprisonnement et de 15 000 euros d’amende. ce sera le cas si elles soutiennent à tort qu’un contenu est illicite sachant que cette information est inexacte, dans le but d’en obtenir le retrait ou d’en faire cesser la diffusion.

1.10. *Faits datant de plus de dix ans Cadre limitatif de la diffamation. Protection de la diffamation.*

Ce sont les faits qui font l’objet d’une déclaration ou d’une divulgation qui doivent dater de moins de dix ans pour que joue l’exception de vérité. Au contraire, lorsqu’un journaliste ou un chercheur évoque une affaire susceptible de porter atteinte à l’honneur et à la considération d’une personne, qui date de plus de dix ans, le seul argument de la vérité ne suffit pas. Intervient à ce moment là la notion de droit à l’oubli pour la personne concernée. Pour être exonéré, le journaliste ou le chercheur peut invoquer la croyance

1.11. De quelles règles concernant les opérations d’archives le défendeur espérait tirer avantage. L’issue de ce cas et les implications en termes de responsabilité pour les archives et la loi applicable en matière de limitation pour les fournisseurs de service sur internet ne sont pas clairs pour nous.

Dans cette affaire, la question concernait le point de départ du délai de prescription qui est de trois mois en matière de diffamation. En l’espèce, l’éditeur soutenait que la mise en ligne du texte constituait une simple opération d’archivage d’un ouvrage édité sur support papier. Plus de trois mois s’étaient écoulés depuis la publication papier et en rattachant la mise en ligne à cette première publication, il espérait ainsi éviter la condamnation. Mais les juges ne le suivent pas sur ce terrain et décident que la mise en ligne fait courir un nouveau délai.

Cette décision précède la loi LCEN. Je l’ai citée là, car le législateur s’est justement posé la question à propos des archives de journaux. La loi telles qu’adoptée par le Parlement avait opté dans ce cas pour un principe de non dissociation des délais de prescriptions entre le papier et le numérique, faisant échapper ces archives journalistiques au risque judiciaire. Cette option a cependant été censurée par le conseil constitutionnel. La mise en ligne ne peut être considérée comme un simple prolongement de la publication papier ce qui signifie qu’elle fait courir un nouveau délai de prescription utile pour la personne qui se plaindrait d’un contenu illicite.

1.12 Vous notez que seuls les auteurs sont responsables de leurs déclarations diffamatoires faites en direct lors d’émissions audiovisuelles en direct. Cette règle s’applique-t-elle également aux émissions en direct sur internet ?

Il n’y a pas de jurisprudence en la matière mais on peut supposer que la solution serait la même.

1.13. Dans votre description relative aux contenus sensibles des archives publiques, vous dites que certains documents comme ceux relatifs à un autre système de communication peuvent être librement communiqués sans délai. Eclaircissement demandé.


Premier exemple : des documents peuvent avoir été communiqués au public. Par exemple, une mairie édite un bulletin municipal et le distribue à ses habitants. Il s’agit d’un document d’archives publiques s’il est conservé en mairie. Il va rejoindre, après sa période d’utilisation, un service d’archives. Dès lors qu’il a été diffusé, il restera
librement communicable. Il n’y a pas lieu de lui appliquer les délais de communication prévus par la loi sur les archives.

Deuxième exemple : certains documents sont soumis à un régime de communication particulier. Là je fais référence aux documents administratifs qui sont une catégorie particulière d’archives publiques que le législateur considère, sous certaines conditions, comme librement communicables. Le fait que ces documents rejoignent un service d’archives ne change pas leur régime de communication. Ils demeurent librement communicables.

Cette règle est résumée à l’article L 213-1 du Code du patrimoine
A insérer

1.14. Point de départ du délai des trente ans pour la communication des archives publiques : date du dépôt dans le service d’archives ou autre ?
Dans la mise en œuvre des délais le point de départ est le plus souvent la création du document (la date de l’acte) et non son entrée dans un service d’archives.
C’est le cas du délai de droit commun ou encore du délai de 60 ans concernant la vie privée ou la sûreté de l’État ou la défense nationale.
Certains délais ont pour point de départ la naissance de l’intéressé (dossiers de personnel, les renseignements de caractère médical) ou encore la date du recensement ou de l’enquête (pour les archives statistiques).

Pour certains documents, le critère est alternatif et peut être soit la date de l’acte soit la clôture du dossier (affaires judiciaires).

1.15. Quand un chercheur souhaite accéder à des archives par dérogation, doit-il s’adresser à un service central d’administration en charge des archives publiques ou simplement auprès de l’autorité en charge de ces archives particulières ?

En ce qui concerne les dérogations consenties à titre individuel,
° d’une façon générale, les chercheurs s’adressent à l’administration des archives (art. L 213-3 du Code du patrimoine). En vertu de l’article 2 du décret n° 79-1038 du 3 décembre 1979, « toute demande de dérogation aux conditions de communicabilité des documents d’archives publiques est soumise au ministre chargé de la culture (direction des archives de France) qui statue, après accord de l’autorité qui a effectué le versement ou qui assure la conservation des archives ». L’autorisation de dérogation peut contenir des précisions quant à la possibilité de reproduire les documents.
La décision de dérogation nécessite donc l’accord du service producteur d’archives, solution dont certains discutent le bien-fondé. Dans un projet de réforme de la loi sur les archives, il avait été proposé de ne requérir qu’un simple avis du service versant.

En ce qui concerne les dérogations générales (consenties au public en général et non à un chercheur en particulier), la règle est la même. Il faut un accord du service versant. Ce
qui change est que les documents soumis à ce type de dérogation doivent avoir trente ans d’âge.

° Par exception certaines administrations gèrent leurs propres archives et accordent les dérogations : le ministère des affaires étrangères et le ministère de l’intérieur, régis par des textes spécifiques.

2. Décisions de justice ou autres lois concernant la responsabilité des éditeurs ou des services d’archives du fait de matériel offensif.

p. 3.4 A la question B.2.

p. 30

2.1. Est-ce que cela est vrai que le contrôle éditorial influence ou affecte la responsabilité des éditeurs pour du matériel offensant dans la loi française ou est-ce que les éditeurs sont condamnables sur une base stricte de responsabilité qui ne tient pas compte du contrôle éditorial.

Dans le droit de la presse, les directeurs de publication sont considérés comme auteurs principaux en cas de diffusion de contenus illicites (voir plus haut art. 42). On peut dire qu’ils sont supposés contrôler les articles qu’ils publient et en découle ce système de responsabilité.

Les restrictions de responsabilité dont vous parlez tombent-elles sous la loi dans la confiance dans l’économie numérique ?
Pouvez vous préciser cette question ?

2.2. Dans la loi française est-ce que c’est l’activité (archivage par opposition à édition classique) qui compte plus que le professionnel (ou l’acteur désigné ) c’est à dire le service d’archives, par opposition à l’éditeur quand il s’agit de déterminer la responsabilité.

En réalité, dans ce développement, je parais des services qui détiennent des archives privées. C’est dans ce cas davantage la mise à disposition des contenus qui importe que les personnes dans la détermination de la responsabilité.

4. Preemptive Removal

Question B.4 non répondu

Je pense que le cas doit se présenter mais je n’ai pas d’exemples précis. Il me semble que, compte tenu des risques judiciaires dans l’édition, certains éditeurs seront prudents et anticiperons un éventuel litige en retirant un matériel dont ils redoutent le caractère illicite.

6. Disclaimers and Legend
Par exemple, le juge peut ordonner qu’une information signalant le contenu sensible soit apposé sur l’ouvrage (au moyen d’un bandeau ou insertion d’un encart). L’ouvrage peut aussi, dans le but de protéger les mineurs, être présenté dans un emballage de sorte que le jeune public ne puisse le feuilleter ou y accéder facilement. Des mesures de publication dans des journaux informant sur la nature de l’ouvrage peuvent aussi être prescrites. Plus encore, la suppression de certains extraits peuvent être ordonnés ce qui oblige l’éditeur à refabriquer l’ouvrage (pour une série de proposition du Syndicat national de l’édition en vue d’aménager les différentes peines, voir le Livre blanc du SNE, 2003, ces propositions sont décrites sur Internet).

*Existe t-il des cas où cela concerne des archives ?*

Pas à ma connaissance.

**C. Contract analysis**


Je ne suis pas en mesure de répondre (voir le mail adressé à Jane).

2. Contracts- Limiting Liability

Les clauses qui limiteraient dans un contrat la responsabilité de l’éditeur en matière délictuelle sont-elles inopposables ?
Oui
1. Do copyrights in France contain specific provisions for archives?

At the time of the answer to this question, the project of transportation law only had specific provisions for the benefit of the institutions in charge of the legal deposit. But the text has evolved.

In the law #2006-961 of the 1st of August 2006 relating to copyright and related rights in the information society, other exceptions have been introduced in favor of archives.

Article L.122-5 of CPI was completed with several paragraphs among which there are some dealing with archival services and the assignment of content, either in favor of handicapped individuals or in favor of the general public for the needs to consult on location or for the needs of conservation.

1° Exception in favor of handicapped individuals

**text of article L. 122-5, 7° of the CPI**

7. The reproduction and representation by moral people and institutions open to the public such as libraries, archives, documentation centers and multimedia cultural centers, in view of a strictly personal consultation of the work by individuals suffering from one or many deficiencies of motor, physical, sensory, mental, cognitive or psychological orders whose incapacity levels is equal or superior to that which was set by decree by the Conseil D'Etat, and recognized by the departmental commission of specialized education, the technical commission of professional orientation and reclassification, or the commission for the rights and autonomy of handicapped people mentioned in article L 146-9 of the code for social action and of families, or recognized by medical certificate as prevented from reading after correction. This reproduction and representation will be assured, for non commercial purposes and by the means necessary for the handicap at issue, by moral individuals and the institutions mentioned in the first line, a list of which is held by the administrative authority.

The moral people and institutions mentioned in the first line of this 7. paragraph must show proof of their professional activity effective for the conception, realization and communication of supports for the benefit of the physical people mentioned in the previous paragraph by reference to their social objective, the importance of their members or users, to the material and human means that they dispose of for the service which they render.

At the request of the moral people and the institutions mentioned in the first line of the 7. article, which was formulated in the two years following the legal deposit of the printed works, the digital files that served for the publication of these works will be deposited at the Centre national du livre or with an institution designated by a decree that
puts them at their disposition in an open standard (in the sense of article 4 of law n° 2004-575 of 21 June 2004 for trust in the digital economy. Le Centre national du livre or the designated institution will guarantee the confidentiality of these files and the security for access.

2° The reproduction of a work for the ends of conservation or onsite consultation. This exploitation is subject to the condition that the targeted services (libraries, archival services) are not seeking an economic or commercial benefit.

Art. L 122-5, 8° of the CPI

8° The reproduction of a work for the ends of conservation or onsite consultation. This exploitation is subject to the condition that the targeted services (libraries, archival services) are not seeking an economic or commercial benefit.

These two exceptions are subject to a three prong test which was integrated in article L 122-5 of the CPI which puts the appreciation of the conforming to the exceptions to the conditions of the test in the hands of the judges (absence of targeting the normal exploitation of the work, absence of unjustified prejudice to the legitimate interest of the author).

Art. L 122-5, 9° du CPI

The exceptions listed in the present article cannot inhibit the normal exploitation of the work or cause an unjustified injustice to the legitimate interests of the author.

We have stated that copyright does not define « archives », which is still the case.

D.4

The definition of documents subject to the legal deposit obligation was modified by the law of the 1st of August 2006 (I mentioned the possibility) which extends to Internet websites under certain conditions.

As of now the documents subject to the legal deposit obligation are :

ARTICLE L131-2 DU CODE DU PATRIMOINE


The printed, graphic, photographic, audio, audiovisual, multimedia documents, whatever the technical procedure of production, publication or distribution may be, are the object of an obligatory deposit, named legal deposit, once there are put to the disposition of a public.
The databases and software are subject to the legal deposit obligation once they are put at the disposition of a public by diffusion of material support, whatever the nature of that support may be.

Also subject to the legal deposit are the signs, signals, written works, images, sounds or messages of all nature that are the object of a communication to the public by electronic means.

D.6
See the text of the law below for all the exceptions as they were modified by the law of the 1st of August 2006. We may note one exception which will concern archives to the extent that they are collected and conserved for the purpose of research which is the exception for the use for the pedagogical and research purposes. The text which mentions the use « for the exclusive purposes of illustration in the context of teaching or research, outside of all commercial exploitation. We note that it is a paying exception, giving to the author a right to remuneration. Some works are still excluded from benefiting from the exception : the works created for pedagogical purposes, musical sheet music and works created for a digital version of a written work.
Art. L 122-5, 3°
The author cannot prohibit

e) The representation or reproduction of extracts of works, under the condition that the works were conceived for pedagogical ends, of sheet music or works made for a digital publication of the written work, for exclusively illustrative ends in the context of teaching and research, except for all recreational or lucrative activity, as long as the public to which this representation or reproduction is meant for is composed mostly of students, teachers or researchers that are directly relative, that the use of this representation or reproduction does not give way to any commercial exploitation and that it is compensated for by a negotiated remuneration for the forfeiture without prejudice of the right to reproduction mentioned in article L 122-10.

D.7
The law #2004-575 for the trust in the digital economy was adopted on June 21, 2004 and modified by the law # 2006-64 on January 23rd 2006. In what relates to the responsibility of people distributing content online the text mentioned in the study has not changed in the definitive text. But article 6 in which it takes place was modified by the law of January 23, 2006.

Current Legislative Developments on the Law of Archives was
The new project of law on archives was deposited the 28th of August in front of the Senate. This text changes substantively the question of statute of limitations and the perimeter of exceptions which extends the communication prescriptions. The idea is to
lay down a principle of free communication assorted to a series of exceptions when the documents are « sensitive ». The difference with the previous system is that the current law, the prescription delay is 30 years and the special prescription is between 60 and 150 years. In the new text, the rule of common law is that free communication and special statute of limitations would be reduced.

D. 13 The law on administrative documents was modified by Ordinance n 2005-650 of the 6th of June 2005 and decree n° 2005-1755 of the 31st of December 2005 relating to the freedom of access to administrative documents and reuse of public information for the application of the law n° 78-753 of the 17 July 1978.

This law introduces several new rules relating to:

-the notion of administrative document

Law n° 78-753 of the 17th of July 1978

Law holding that several measures of amelioration of the relationship between the administration and the public and diverse provisions of administrative, social, and fiscal order.

Consolidated version on 14th June 2006.

Title 1: From freedom of access to administrative documents to the reuse of public information.

Chapter 1: Freedom of access to administrative documents.

Article 1

Modified by Ordinance n° 2005-650 du 6 June 2005 art. 2, art. 3, art. 4 (JORF 7 June 2005).

The right of every person to information is specified and guaranteed by the provisions of chapters 1, 3 and 4 of the present title in what concerns freedom of access to administrative documents.

All support used for the stocking, seizure, or transmission of information that compose the content, the documents elaborated or detained by the State, the territorial collectivities as well as other people of public law or people of private law charged with the management of a public service in the context of their public service mission will be considered as administrative documents in the sense of chapters I, III and IV of the present title. Such documents will include files, reports, studies, statistics, directives, instructions, fliers, notes, provisions and decisions.

Not considered to be administrative documents in the sense of the present title are parliamentary assembly acts, opinions of Conseil d'Etat and administrative judgments, documents of the Cour des comptes mentioned in article L. 140-9 of the code des
financial jurisdictions and the documents of the regional chambers of the counts mentioned in article L. 241-6 of the same code, the documents of instructions of requests addressed to the Republic’s Mediator, the documents for the elaboration of an accreditation of health institutes report set forth in article L. 6113-6 du code de la santé publique and audit reports of the health institutions mentioned in article 40 of the law of financing social security for 2001 (n 2000-1257 of the 23 December 2000).

The conditions of communication of the documents were also modified to integrate transmission by electronic means.

Article 4
Modified by Ordinance n2005-650 du 6 June 2005 art. 2, art. 3, art. 6 (JORF 7 June 2005).

Access to administrative documents can be granted, by choice of the individual making the request and limited by the technical abilities of the administration

a) by free onsite consultation, except if the preservation of the document does not allow for it
b) under the condition that the reproduction will not affect the conservation of the document, by delivery of a copy on an identical support as that used by the administration or compatible with it at the cost of the person making the request, as long as that cost does not exceed the cost of the reproduction, in conditions set forth by a decree
c) by electronic mail and without cost when the document is available under electronic form

- A new window frames the right of use of public facts. This only concerns cultural services. Thus, archival services, as well as museum collections and libraries are not included in the text.

D. 16
The system describes how the ownership of rights of public agents has evolved. In the law of the 1st of August 2006, two elements have changed.

1° On one side the public agents whose intellectual creations are not submitted for divulgation to a hierarchical control conserve all of their patrimonial and moral rights. The state or public services must thus negotiate the rights of exploitation with their civil servants to exploit their works including for non commercial purposes. This reserves the agents that benefit from independent status when creating the work. Its the case for researchers, for teacher-researchers or for museum curators. In the elaboration of
instruments for the research of archives (guides or inventories) the agent is not in that position and is subject to another system (automatic cession of the State for the productions not strictly necessary for the completion of the public service for non commercial exploitation, right of preference for the benefit of the public collectivity in the case of commercial exploitation).

2° For all other public agents, the system is the one that was indicated with one nuance.
- For works created by a public agent in the exercise of his functions or while following instructions, the rights of exploitation will be waived fully to the state to the extent necessary to the accomplishment of the public service mission.
- In the case of commercial exploitation, the state only has a preference right. This means that the agent must first turn to his public employer if he wishes to exploit his work.
- A new development is that the right of preference is not applicable to partnership contracts between public and private sectors for the purposes of research.
- This condition is not however generally applicable.

On one side among the research personnel, some benefit from great independence in their creations and article L 111-1 indicates that the article L 131-3-1 is not applicable. This exception should thus not affect this category of people and thus only relates to agents in subordinated situation when they are creating (technical agents for example). This exception aside, the formulation of the article signifies that the right of preference aside, the rule of waiver of full rights will apply to dependent personnel.

**The constitutional counsel spoke on the law relating to copyright and related rights in the information society, the law was thus adopted on the 1st of August 2006.**

<table>
<thead>
<tr>
<th>The constitutional counsel in its 27th of July 2006 decision, invalidated article 24 of the law that set forth less heavy penalties against people using the works for personal ends:</th>
</tr>
</thead>
<tbody>
<tr>
<td>On article 24:</td>
</tr>
</tbody>
</table>

63. Given that article 24 of the deferred law inserts in the intellectual property code an article L 335-11 which removed some actions of applicable provisions from counterfeiting in literary and artistic property, that it sets forth that they will constitute contraventions and not crimes, on one hand "the unauthorized reproduction for personal ends of a work, interpretation, sound recording, video gram or a program protected by copyright or related right" when they were "distributed by means of a peer to peer sharing software" and on the other side "the public communication for non commercial purposes" of such objects "by means of a public online communication service when it automatically results in its reproduction by means of a peer to peer sharing software."

64. Considering that those making the requests state that this provisions does not recognize the principle of equality in front of penal law by instating a different and
unjustified treatment between the people who reproduce or communicate objects protected by copyright or related rights, according to whether they use software of par to pair or another means of electronic communication; they also state that the legislature did not recognize the principle of legality of crimes and penalties; they also believe that the law does not contain any relative provision to the means of proof of these infractions and that it is stained by negative incompetence.

3 August 2006 JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE Text 2 sur 123

65. Considering that the with respect to the infringement to copyright or related rights, the people who participate, for personal ends, in the unauthorized reproduction or public communication of objects protected by these rights are placed in the same situation, that they use a peer to peer software exchange or other public online communication services; that the particularities of the peer to peer network do not permit the justification the different treatment that the contested provision instates, and that article 24 is contrary to the principle of equality in front of penal law;

Principal innovations of the law of the 1st of August 2006

The new law changes a certain number of things, particularly on the following points:
- laying out exceptions with the introduction of new exceptions explicitly subject to the three prong test (exceptions for patrimonial purposes, exceptions for pedagogical and research purposes, exception for handicapped individuals, temporary reproduction, reproduction of a graphic, plastic or architectural arts work for the purposes of immediate information)
- sanctions reinforced for the issues of file and downloading exchanges
- admission and regulation of technical measures of protection, with the creation of a regulation of technical measures authority, independent administrative authority, charged with the control of the implementation of these measures and to arbitrate the conflicts between users and rights holders, particularly in what concerns the benefits of private copies.
- The institution of a new regime for the creations of public agents (system described above)
- New provisions relating to perception societies and of rights repartition.

See in particular:
The codified exceptions in article L 122-5 of CPI
The technical measures codified in the article L 331-5 to L 331-22 of CPI.
Penal sanctions L 33105 et seq. Of the CPI
See the Intellectual Property Code, on the Legifrance website
1.a Les droits d’auteur en France contiennent-ils des dispositions concernant les archives.

Au moment de la réponse à cette question, le projet de loi de transposition ne contenait que des dispositions spécifiques au bénéfice des institutions en charge du dépôt légal. Mais le texte a évolué.

Dans la loi n° 2006-961 du 1er aout 2006 relative au droit d’auteur et aux droits voisins dans la société de l’information, d’autres exceptions ont été introduites notamment en faveur des archives.

L’article L.122-5 du CPI s’enrichit de plusieurs alinéas parmi lesquels certains concernent les services d’archives et la mise à disposition de contenus, soit en faveur des personnes handicapées (al. 7º) soit en faveur du public en général pour les besoins de la consultation sur place ou pour les nécessités de la conservation.

1° L’exception en faveur des handicapés

texte de l’article L. 122-5, 7º du CPI

7º La reproduction et la représentation par des personnes morales et par les établissements ouverts au public, tels que bibliothèques, archives, centres de documentation et espaces culturels multimédia, en vue d'une consultation strictement personnelle de l'œuvre par des personnes atteintes d'une ou de plusieurs déficiences des fonctions motrices, physiques, sensorielles, mentales, cognitives ou psychiques, dont le niveau d'incapacité est égal ou supérieur à un taux fixé par décret en Conseil d'État, et reconnues par la commission départementale de l'éducation spécialisée, la commission technique d'orientation et de reclassement professionnel ou la commission des droits et de l'autonomie des personnes handicapées mentionnée à l'article L. 146-9 du code de l'action sociale et des familles, ou reconnues par certificat médical comme empêchées de lire après correction. Cette reproduction et cette représentation sont assurées, à des fins non lucratives et dans la mesure requise par le handicap, par les personnes morales et les établissements mentionnés au présent alinéa, dont la liste est arrêtée par l'autorité administrative. Les personnes morales et établissements mentionnés au premier alinéa du présent 7º doivent apporter la preuve de leur activité professionnelle effective de conception, de réalisation et de communication de supports au bénéfice des personnes physiques mentionnées au même alinéa par référence à leur objet social, à l'importance de leurs membres ou usagers, aux moyens matériels et humains dont ils disposent et aux services
qu’ils rendent.

A la demande des personnes morales et des établissements mentionnés au premier alinéa du présent 7ᵉ, formulée dans les deux ans suivant le dépôt légal des œuvres imprimées, les fichiers numériques ayant servi à l’édition de ces œuvres sont déposés au Centre national du livre ou auprès d’un organisme désigné par décret qui les met à leur disposition dans un standard ouvert au sens de l’article 4 de la loi n° 2004-575 du 21 juin 2004 pour la confiance dans l’économie numérique. Le Centre national du livre ou l’organisme désigné par décret garantit la confidentialité de ces fichiers et la sécurisation de leur accès ;

2° La reproduction d’une œuvre aux fins de conservation et de consultation sur place. Cette exploitation doit se faire sous réserve que les services visés (bibliothèques, services d’archives) ne recherchent aucun avantage économique ou commercial.

Art. L 122-5, 8° du CPI

8° La reproduction d’une œuvre, effectuée à des fins de conservation ou destinée à préserver les conditions de sa consultation sur place par des bibliothèques accessibles au public, par des musées ou par des services d’archives, sous réserve que ceux-ci ne recherchent aucun avantage économique ou commercial ;

Ces deux exceptions sont soumises au test en trois étapes qui a été intégré dans l’article L 122-5 du CPI ce qui a pour effet de mettre en les mains des juges l’appréciation de la conformité des exceptions qui s’y trouvent contenues aux conditions que pose le test (absence d’atteinte à l’exploitation normale de l’œuvre, absence de préjudice injustifié aux intérêts légitimes de l’auteur).

Art. L 122-5, 9° du CPI

Les exceptions énumérées par le présent article ne peuvent porter atteinte à l’exploitation normale de l’œuvre ni causer un préjudice injustifié aux intérêts légitimes de l’auteur.

Nous avons signalé que le droit d’auteur ne définit pas le terme d’archives, ce qui continue d’être exact.

D.4

La définition des documents qui sont soumis à l’obligation de dépôt légal a été modifiée par la loi du 1ᵉʳ aout 2006 (j’en indiquais la possibilité) qui l’étend aux sites internet sous certaines conditions.

Désormais les documents soumis à l’obligation de dépôt légal sont :

D-VII-2
Les documents imprimés, graphiques, photographiques, sonores, audiovisuels, multimédias, quel que soit leur procédé technique de production, d'édition ou de diffusion, font l'objet d'un dépôt obligatoire, dénommé dépôt légal, dès lors qu'ils sont mis à la disposition d'un public.

Les logiciels et les bases de données sont soumis à l'obligation de dépôt légal dès lors qu'ils sont mis à disposition d'un public par la diffusion d'un support matériel, quelle que soit la nature de ce support.

Sont également soumis au dépôt légal les signes, signaux, écrits, images, sons ou messages de toute nature faisant l'objet d'une communication au public par voie électronique.

D.6 Sur l'ensemble des exceptions telles qu'elles ont été modifiées par la loi du 1er août 2006, voir texte de loi ci-dessous. On peut noter une exception qui concernera notamment les archives dans la mesure ou celles-ci sont collectées et conservées pour les besoins de la recherche qui est l'exception d'utilisation à des fins pédagogiques et de recherche. Le texte parle d'utilisation « à des fins exclusives d'illustration dans le cadre de l'enseignement et de la recherche, en dehors de toute exploitation commerciale. On note qu'il s'agit d'une exception payante, ouvrant au bénéfice de l'auteur un droit à rémunération. Certaines œuvres sont cependant exclues du bénéfice de l’exception : les œuvres conçues à des fins pédagogiques, les partitions de musique et les œuvres réalisées pour une édition numérique de l’écrit.

Art. L 122-5, 3°
L’auteur ne peut interdire

| e) La représentation ou la reproduction d'extraits d'œuvres, sous réserve des œuvres conçues à des fins pédagogiques, des partitions de musique et des œuvres réalisées pour une édition numérique de l'écrit, à des fins exclusives d'illustration dans le cadre de l'enseignement et de la recherche, à l'exclusion de toute activité ludique ou récréative, dès lors que le public auquel cette représentation ou cette reproduction est destinée est composé majoritairement d'élèves, d'étudiants, d'enseignants ou de chercheurs directement concernés, que l'utilisation de cette représentation ou cette reproduction ne donne lieu à aucune exploitation commerciale et qu'elle est compensée par une rémunération négociée sur une base forfaitaire sans préjudice de la cession du droit de reproduction par reprographie mentionnée à l'article L. 122-10 ; |

Actualité législative sur le droit des archives
Le nouveau projet de loi sur les archives a été déposé le 28 août devant le Sénat. Ce texte change notamment en substance la question des délais et le périmètre des exceptions de nature à allonger les délais de communication. L’idée serait de poser un principe de libre communication assorti d’une série d’exceptions lorsque les documents sont sensibles. La différence avec le système précédent est que dans la loi actuelle, le délai de droit commun est de trente ans et les délais spéciaux se situent entre 60 et 150 ans. Dans le nouveau texte, la règle de droit commun est la libre communication et les délais spéciaux seraient réduits.


Cette loi introduit plusieurs règles nouvelles concernant :

-la notion de document administratif

Loi n78-753 du 17 juillet 1978

Loi portant diverses mesures d'amélioration des relations entre l'administration et le public et diverses dispositions d'ordre administratif, social et fiscal

version consolidée au 14 juin 2006 - version JO initiale

Titre Ier : De la liberté d'accès aux documents administratifs et de la réutilisation des informations publiques.
Chapitre Ier : De la liberté d'accès aux documents administratifs.
Article 1

Le droit de toute personne l'information est précisé et garanti par les dispositions des chapitres Ier, III et IV du présent titre en ce qui concerne la liberté d'accès aux documents administratifs.

Sont considérés comme documents administratifs, au sens des chapitres Ier, III et IV du présent titre, quel que soit le support utilisé pour la saisie, le stockage ou la transmission des informations qui en composent le contenu, les documents élaborés ou détenus par l'Etat, les collectivités territoriales ainsi que par les autres personnes de droit public ou les personnes de droit privé chargées de la gestion d'un service public, dans le cadre de leur mission de service public. Constituent de tels documents notamment les dossiers, rapports, études, comptes rendus, procès-verbaux, statistiques, directives, instructions, circulaires, notes et réponses ministérielles, correspondances, avis, prévisions et décisions.

Ne sont pas considérés comme documents administratifs, au sens du présent titre, les actes des assemblées parlementaires, les avis du Conseil d'État et des juridictions administratives, les documents de la Cour des comptes mentionnés l'article L. 140-9 du code des juridictions financières et les documents des chambres régionales des comptes mentionnés l'article L. 241-6 du même code, les documents d'instruction des réclamations adressées au Médiateur de la République, les documents préalables à l'élaboration du rapport d'accréditation des établissements de santé prévu à l'article L. 6113-6 du code de la santé publique et les rapports d'audit des établissements de santé mentionnés l'article 40 de la loi de financement de la sécurité sociale pour 2001 (n° 2000-1257 du 23 décembre 2000).

Les conditions de communication des documents ont par ailleurs été modifiées, intégrant la transmission par voie électronique.

Article 4

Modifié par Ordonnance n°2005-650 du 6 juin 2005 art. 2, art. 3, art. 6 (JORF 7 juin 2005).

L'accès aux documents administratifs s'exerce, au choix du demandeur et dans la limite des possibilités techniques de l'administration :

a) Par consultation gratuite sur place, sauf si la préservation du document ne le permet pas ;

b) Sous réserve que la reproduction ne nuise pas la conservation du document, par la délivrance d'une copie sur un support identique celui utilisé par l'administration ou
compatible avec celui-ci et aux frais du demandeur, sans que ces frais puissent excéder le coût de cette reproduction, dans des conditions prévues par décret ;

c) Par courrier électronique et sans frais lorsque le document est disponible sous forme électronique.

-Un volet nouveau encadrant un droit d’utilisation des données publiques. Mais cette faculté ne concerne pas les services culturels. Donc les services d’archives, comme les collections des musées ou des bibliothèques ne sont pas concernés par le texte.

D. 16
Le système décrit pour la titularité des droits des agents publics a évolué.
Dans la loi du 1er aout 2006, deux éléments ont changé.

1° D’une part les agents publics dont les productions intellectuelles ne sont pas soumises pour leur divulgation à un contrôle hiérarchique, conservent la plénitude de leurs droits patrimoniaux et moraux. L’État ou les services publics doivent donc négocier les droits d’exploitation avec leurs fonctionnaires pour pouvoir exploiter leurs œuvres y compris à des fins non lucratives. Cette réserve concerne les agents qui jouissent d’un statut d’indépendance lorsqu’ils créent. C’est le cas des chercheurs, des enseignants-chercheurs ou des conservateurs de musées. Dans l’élaboration des instruments de recherche des archives (guides, inventaires), l’agent n’est pas placé dans cette situation et relève d’un autre système (cession automatique à l’État dans pour les productions strictement nécessaires à l’accomplissement du service public pour les exploitations non commerciales, droit de préférence au bénéfice de la collectivité publique en cas d’exploitation commerciale).

2° Pour tous les autres agents publics, le système est celui qui a été indiqué avec cependant une nuance.

- Pour les œuvres créées par un agent public dans l’exercice de ses fonctions ou d’après les instructions reçues, les droits d’exploitation sont cédés de plein droit à l’État dans la mesure strictement nécessaires à l’accomplissement de la mission de service public. (art. L 131-3-1 du CPI).
  - En cas d’exploitation commerciale, l’État ne dispose que d’un droit de préférence. Cela signifie que l’agent doit en premier lieu, s’il souhaite exploiter son œuvre se tourner vers l’employeur public.
  - La nouveauté est que le droit de préférence est écarté en ce qui concerne les contrats de partenariats public privés conclu dans le cadre de la recherche.
  - Cette réserve n’est cependant pas applicable de façon générale.
D’une part parmi les personnels de la recherche, certains jouissent d’une grande indépendance dans leurs productions et l’article L 111-1 indique que l’article L 131-3-1 n’est pas applicable. Donc cette réserve ne devrait pas jouer pour cette catégorie de personnels et ne concernerait que les agents en situation de subordination lorsqu’ils créent (agents techniques par exemple). Cette réserve mise de côté, la formulation de l’article signifie que le droit de préférence, ne jouant pas, c’est la règle de cession de plein droit qui a vocation à s’appliquer pour les seuls personnels sous dépendance.

Le conseil constitutionnel s’est prononcé sur la loi relative au droit d’auteur et aux droits voisins dans la société de l’information, la loi a donc été adoptée et promulguée le 1er aout 2006.

Le conseil constitutionnel dans sa décision du 27 juillet 2006 a invalidé l’article 24 de la loi qui prévoyait des sanctions moins lourdes contre les personnes utilisant les œuvres à des fins personnelles :

Sur l’article 24 :
63. Considérant que l’article 24 de la loi déférée insère dans le code de la propriété intellectuelle un article L.335-11 qui a pour objet de soustraire certains agissements aux dispositions applicables aux délits de contrefaçon en matière de propriété littéraire et artistique; qu’il prévoit que seront désormais constitutives de contraventions, et non plus de délits, d’une part, «la reproduction non autorisée, à des fins personnelles, d’une œuvre, d’une interprétation, d’un phonogramme, d’un vidéogramme ou d’un programme protégés par un droit d’auteur ou un droit voisin» lorsqu’ils auront été «mis à disposition au moyen d’un logiciel d’échange de pair à pair», d’autre part, «la communication au public, à des fins non commerciales», de tels objets «au moyen d’un service de communication au public en ligne, lorsqu’elle résulte automatiquement et à titre accessoire de leur reproduction» au moyen d’un logiciel d’échange de pair à pair;
64. Considérant que les requérants soutiennent que cette disposition méconnaît le principe d’égalité devant la loi pénale en instituant une différence de traitement injustifiée entre les personnes qui reproduisent ou communiquent des objets protégés au titre du droit d’auteur ou des droits voisins, selon qu’elles utilisent un logiciel de pair à pair ou un autre moyen de communication électronique; qu’ils reprochent également au législateur d’avoir méconnu le principe de légalité des délits et des peines; qu’ils estiment enfin que la loi ne contient aucune disposition relative aux modes de preuve de ces infractions et qu’elle est entachée d’incompétence négative;
3 août 2006 JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE Texte 2 sur 123

65. Considérant qu’au regard de l’atteinte portée au droit d’auteur ou aux droits voisins, les personnes qui se livrent, à des fins personnelles, à la reproduction non autorisée ou à la communication au public d’objets protégés au titre de ces droits sont placées dans la même situation, qu’elles utilisent un logiciel d’échange de pair à pair ou d’autres services de communication au public en ligne; que les particularités des réseaux d’échange de pair à pair ne permettent pas de justifier la différence de traitement qu’instaure la disposition contestée; que, dès lors, l’article 24 de la loi déférée est contraire au principe de l’égalité devant la loi pénale;

Les principales innovations de la loi du 1er aout 2006

La loi nouvelle change un certain nombre de choses, en particulier sur les points suivants:
° mise en forme des exceptions avec notamment l’introduction de nouvelles exceptions soumises explicitement au test des trois étapes (exceptions à finalité patrimoniale, exceptions à des fins pédagogiques et de recherches, exception en faveur des handicapés, reproduction provisoire de caractère transitoire ou accessoire, reproduction d’œuvre d’art graphique, plastique et architecturale à des fins d’information immédiate.
° sanctions renforcées en matière d’échanges de fichiers et de téléchargement
° admission et réglementation des mesures technique de protection, avec la création d’une autorité de régulation des mesures techniques, autorité administrative indépendante, chargée notamment de contrôler la mise en œuvre de ces mesures et entre autres d’arbitrer les conflits entre usagers et détenteurs de droits, particulièrement en ce qui concerne le bénéfice de la copie privée.
° L’institution d’un régime propre à la création émanant d’agents publics (système décrit plus haut).
° Des dispositions concernant les sociétés de perception et de répartition des droits

**voir notamment**
les exceptions codifiées à l’article L 122-5 du CPI
les mesures techniques codifiées aux articles L 331-5 à L 331-22 du CPI
Les sanctions pénales, L 331-5 et s. du CPI
Voir le Code de la propriété intellectuelle, site Légifrance à la rubrique des codes.
France:
1. On page 34 of your report, you note that libraries can be ordered to attach disclaimers to material that a court has considered offensive (allowing them to keep it in their collections). Would they ever do this preemptively? Would a court order a publisher to do it, or is it a remedy reserved for archives and libraries?

A la page 34 de votre rapport, vous observez qu’on peut ordonner aux bibliothèques « la mention d’informations accompagnant la diffusion d’un message jugé attentatoire à un droit ». Est-ce qu’une bibliothèque apporterait de telles mentions de son propre chef, afin de prévenir une ordonnance éventuelle ? Est-ce qu’un tribunal peut ordonner à un éditeur d’apposer ces informations, ou bien, cette démarche est-elle limitée aux bibliothèques ?

For published works (whatever the method of publication, including postings on the Internet), the issue is up to the judge’s discretion. A library cannot preemptively act as a censor for works it deems illicit.

It is actually the publisher that the court will order to withdraw the work (this rarely occurs, especially when the work is already in circulation) or to delete certain passages or to attach a warning to readers. A library, in this sense, is merely a depository for the work.

2. Some questions regarding the statute of limitations of materials posted on the Web (p. 24 of your report): Is this a law? A ruling, and if so, by which court? And what is encompassed by the term ‘each new publication’?

Quelques questions à propos de la prescription d’une action en diffamation par voie de l’Internet (p. 24 de votre rapport). Quand vous dites, « En revanche, pour la publication en ligne de contenus déjà publiés par ailleurs, le délai court à compter de chaque nouvelle publication. » est-ce que ceci résulte d’une loi ? D’une décision de jurisprudence ? Laquelle (référence, SVP) ? Et que veut dire “chaque nouvelle publication”? S’agit-il de chaque mise sur un site web?

Legal rulings are what determine the starting point for the statute of limitations for each new publication. This is the initial date of publication, in other words, the date on which the message was made available to network users for the first time. This means that posting a work previously published in paper form on the Web is equivalent to a new publication (Cass. Crim, 30 janvier, 2001, Bull., Crim, No. 28; other legal decisions have followed along the same lines, so there is a long line of precedents on the issue and the different technical hypotheses for new publication on the Web: see N. Mallet-Poujol, la notion de publication sur l’internet [The Notion of Internet Publication], Legicom, 2006).
3. What happened in the case of the man who objected to his private letter being in an on-line collection (cited in your report, page 4)? He claimed it was a violation of his moral rights (through the disclosure of the letter) and his economic rights. Was it removed? Had it been in a different, traditional (i.e. not on-line) collection before without dispute?

Page 4: Qu’est-ce qui s’est passé enfin à propos de la personne qui s’est plaint de la divulgation et la reproduction de la lettre qu’il vait écrite à un écrivain dont les correspondences ont été recensées dans une banque de données ? Si le fonds littéraire n’avait pas été numérisé et mis en ligne, est-ce que l’auteur de la lettre se serait plaint ? Est-ce qu’il aurait obtenu gain de cause, notamment en ce qui concerne la divulgation ?

This is an anecdote that was relayed to me by someone from the Ministry of Culture. I even saw the complaint letter from the author of the correspondence, but to my knowledge, there was no lawsuit. It’s possible that the administration was forced to remove the letters in question.

If these letters had been made available to the public, for example in a reading room, their author could also have complained about this method of disclosure inasmuch as these were private documents (private documents whose ownership was transferred to the State). The fact is that the risk is amplified in this case by the Web posting.

4. Can you please briefly summarize what the elements of a claim in France (1) for a violation of one’s right to privacy and (2) for an author’s/publisher’s mistake of fact in a publication?

Pourriez-vous résumer quels sont les éléments à prouver pour établir (1) la méconnaissance de son droit à la vie privée, et (2) une erreur sur les faits commise par un auteur ou un éditeur ?

Infringement of privacy is a complex and very casuistic concept. There is no legal definition of privacy; it’s a purely judicial construct. We can attribute a number of things to it: family life, romantic life, health, recreation, moral conduct, circumstances of death, and philosophical and religious convictions (except for public figures). There are two main exceptions to the restrictions on privacy infringement (excluding, quite obviously, the case of the person’s consent): the area of public life and the area of news events, both are bound by the idea of the right to information (for the scholarly commentaries on these issues, see Nathalie Mallet-Poujol, les archives orales et le respect de la vie privée in Archives et Sciences sociales, aspects juridiques et coopérations scientifiques, [Oral Archives and Respect for Privacy in Archives and Social Sciences, Legal Aspects and Scientific Partnerships], L’Harmattan, Nov. 2006, p. 115 and following).

5. Has France adopted laws concerning laws concerning limitations of service provider liability pursuant to the E-commerce directive? If so, could you tell us what they provide?

Pourriez-vous fournir la référence et un résumé des solutions prévues par la loi portant transposition de la directive Européenne sur le commerce électronique,
concernant la responsabilité des services en ligne ?

6. You cite a Cour d’Appel ruling that said that libraries placing materials online are attempting to attract patrons and not merely using the Internet as a means of preservation. What case was this? Can you please give us the correct citation?

Aux pages 24-25, vous citez une décision de la Cour d’appel de paris, mais la référence y manque. Pourriez-vous la fournir ?

7. We also are having problems with the correct citation for the Law on the Freedom of the press of July 29, 1881 as modified by Law no. 2004-575. Can you please give us as much information as you can for this?

Nous cherchons également la bonne référence à la loi sur la liberté de la presse du 29 juillet 1881, telle que modifiée par la loi No. 2004-575.

It’s a law that has no number and that has been amended numerous times (see the légifrance site).

8. How does one cite Law n.2004-801 which describes when data can be collected and retained?

Quelle est la bonne référence pour la loi No. 2004-801, sur le traitement des données à caractère personnel ?

Law No. 2004-801 of August 6, 2004 on the protection of individuals with respect to the processing of personal information and amending law No. 78-17 of January 6, 1978 on data processing, files and freedoms.

CHAPTER II: Technical service providers.

Article 5

the following provisions were amended:
Article 6
Amended by Law No. 2007-297 of March 5, 2007 art. 40 I (JORF March 7, 2007).

I. - 1. Persons whose business is to offer public access to on-line communication services shall inform their subscribers of the existence of technical means making it possible to restrict access to certain services or to select and offer them at least one of these means.

2. Individuals or legal entities who store signals, writings, images, sounds or messages of any kind provided by recipients of these services for public availability through these online public communication services, even free of charge, may not be held civilly liable for the activities or information stored at the request of a recipient of these services if they were effectively unaware of their unlawful nature or of facts and circumstances revealing this nature or if, as soon as they learned of their unlawful nature, they acted promptly to remove this information or make it impossible to access it.

The preceding paragraph does not apply if the recipient of the service is acting under the authority or the control of the person mentioned in said paragraph.

3. The persons cited in 2 may not be held criminally liable due to information stored at the request of a recipient of these services if they were effectively unaware of the illicit activity or information or if, as soon as they learned of this illicit nature they acted promptly to remove this information or to make it impossible to access it.

The preceding paragraph does not apply if the recipient of the service is acting under the authority or the control of the person mentioned in said paragraph.

4. Anyone who claims to the persons mentioned in 2 that content or an activity is illicit in order to have it removed or to stop its publication, even though he knows this information is inaccurate, will be punished by a term of imprisonment of one year and a fine of EUR 15,000.

5. The persons indicated in 2 are presumed to be aware of the facts at issue if they have been notified of the following:
- the date of notification;

- if the notifier is an individual: his last name, first name(s), occupation, address, nationality, date and place of birth; if the requester is a legal entity: its form, its company name, its head office and the body that legally represents it;

- the name and address of the recipient or, if this is a legal entity, its company name and the address of its head office;

- the description of the facts at issue and their precise location;

- the reasons why the content must be removed, including mention of the legal provisions and proof of the facts;

- a copy of the correspondence sent to the author or the publisher of the information or activities at issue requesting their suspension, their removal or their modification or proof that the author or the publisher could not be contacted.

6. The persons mentioned in 1 and 2 are not producers as per article 93-3 of law No. 82-652 of July 29, 1982 on audiovisual communication.

7. The persons mentioned in 1 and 2 are not subject to a general obligation to monitor the information they transmit or store or to a general obligation to ascertain facts or circumstances revealing unlawful activities.

The preceding paragraph is without prejudice to any targeted and temporary monitoring activity requested by the judicial authority.

Given the general interest attached to suppressing the apology of crimes against
humanity, incitement to racial hatred and child pornography, incitement to violence and to attacks on human dignity, the persons mentioned above must take part in the fight against the publication of the violations cited in the fifth and eight paragraphs of article 24 of the law of July 29, 1881, on freedom of the press and in articles 227-23 and 227-24 of the penal code.

Therefore, they must set up an easily accessible and visible mechanism allowing any person to notify them of this type of information. They are also obligated to inform the competent public authorities of all illicit activities mentioned in the preceding paragraph indicated to them and carried out by the recipients of their services and, on the other hand, to make public the means they devote to fighting these illicit activities.

Given the general interest attached to suppressing illegal gambling activities, the persons mentioned in 1 and 2 set up, in accordance with the conditions set by decree, an easily accessible and visible mechanism making it possible to indicate to their subscribers the on-line public communication services considered unacceptable by the competent public authorities in the matter. They also inform their subscribers of the risks they run as a result of illegal gambling.

All failures to comply with the obligations defined in the fourth and fifth paragraphs are punished by the penalties set forth in 1 of VI.;

8. During urgent or ex parte proceedings, the judicial authority may order any person mentioned in 2 or, if there are none, any person mentioned in 1 to take all measures likely to prevent damage or to stop damage caused by the content of an on-line public communication service.

II. - The persons mentioned in 1 and 2 of I hold and keep data making it possible to identify anyone who has contributed to the creation of the content or of one of the contents of the services they provide.

They provide persons who publish an on-line public communication service with the technical means allowing them to satisfy the identification conditions set forth in III.
The judicial authority may request communication of the data mentioned in the first paragraph from the service providers mentioned in 1 and 2 of I.

The provisions of articles 226-17, 226-21 and 226-22 of the penal code are applicable to the processing of this data.

A Council of State decree enacted following the recommendation of the National Data Processing and Freedoms Commission defines the data mentioned in the first paragraph and determines how long and how they are to be kept.

II bis (1). - In order to prevent [Provisions declared non conform to the Constitution by Constitutional Council decision No. 2005-532 DC of January 19, 2006] acts of terrorism, the individually indicated and duly authorized police and national police officers specially assigned to these missions may demand from the service providers mentioned in 1 and 2 of I communication of the information kept and processed by these service providers pursuant to this article.

The agents’ requests are justified and subject to the decision of the qualified individual established by article L. 34-1-1 of the electronic mail and communications code according to the terms and conditions set forth by the same article. The National Commission for the control of security interceptions exercises its control in accordance with the terms and conditions set forth by this same article.

The terms and conditions for applying the provisions of this II bis are set by Council of State decree enacted following the recommendation of the National Commission on data processing and freedoms and the National Commission for the control of security interceptions, which specifies in particular the procedure for monitoring requests and how and how long transmitted data are kept.

III. - 1. Persons whose business is to publish an on-line public communication service make available to the public, in an open standard:
a) For individuals, their last name, first name(s), address and telephone number and, if they are subject to registration in the register of commerce and companies or in the trade index, their registration number;

b) For legal entities, their company or corporate name and the location of their head office, their telephone number and, for companies subject to registration in the register of commerce and companies or in the trade index, their registration number, the amount of capital stock and the address of their head office;

c) The name of the director or of the co-director and, where applicable, the name of the editor as per article 93-2 of the above-mentioned law No. 82-652 of July 29, 1982;

d) The name, company or corporate name and address and phone number of the service provider mentioned in 2 of I.

2. Non-professionals who publish an on-line public communication service may, in order to preserve their anonymity, make available to the public only the name, company or corporate name, and address of the service provider mentioned in 2 of I, provided that they have made the personal identification information set forth in 1 available to the public.

The persons mentioned in 2 of I are subject to professional privilege in accordance with the conditions set forth in articles 226-13 and 226-14 of the penal code when disclosing this personal identification information or any information making it possible to identify the person concerned. This professional privilege is not enforceable against the judicial authority.

IV. - Any person named or indicated in an on-line public communication service has a right of response, without prejudice to requests for correction or the suppression of the message this person may send to the service, [Provisions declared non-compliant to the Constitution by Constitutional Council decision No. 2004-496 DC of June 10, 2004].
The request to exercise the right of response is sent to the director of the publication or, if the non-professional publisher has retained his anonymity, the person mentioned in 2 of I who transmits it immediately to the director of the publication. It is presented no later than three months following [Provisions declared non-compliant to the Constitution by Constitutional Council decision No. 2004-496 DC of June 10, 2004] the public availability of the message justifying this request.

The director of the publication is required, within three days of receipt, to insert the responses of any person named or indicated in the on-line public communication service under penalty of a fine of EUR 3,750, without prejudice to other penalties and damages to which the article might give rise.

The conditions for inserting the response are those set forth by article 13 of the above-mentioned law of July 29, 1881. Responses will always be free of charge.

A Council of State decree sets the terms and conditions for applying this IV.

V. - The provisions of chapters IV and V of the above-mentioned law of July 29, 1881, are applicable to on-line public communication services, and the statute of limitations acquired in accordance with the conditions set forth by article 65 of said law [Provisions declared non-compliant to the Constitution by Constitutional Council decision No. 2004-496 DC of June 10, 2004].

VI. - 1. An individual or the de jure or de facto manager of a legal entity carrying out one of the activities defined in 1 and 2 of I who does not satisfy the obligations defined in the fourth and fifth paragraphs of 7 of I, who has not kept the information mentioned in II or who has not deferred to the request of a judicial authority to obtain this information will be punished with a one-year term of imprisonment and a fine of EUR 75,000.

Legal entities may be declared criminally liable for these violations
under the conditions set forth in article 121-2 of the penal code. They incur a fine, in accordance with the terms and conditions set forth by article 131-38 of the same code, as well as the penalties mentioned in No. 2 and No. 9 of article 131-39 of this code. The prohibition mentioned in No. 2 of this article is ordered for a maximum of five years and concerns the professional activity through the execution of which or the occasion of which led to the committing of the violation.

2. An individual or the de jure or de facto manager of a legal entity carrying out the activity defined in III and who has not complied with the provisions of this same article will be punished by a term of imprisonment of one year and a fine of EUR 75,000.

Legal entities may be declared criminally liable for these violations under the conditions set forth in article 121-2 of the penal code. They incur a fine according to the terms and conditions set forth by article 131-38 of the same code, as well as the penalties mentioned in No. 2 and No. 9 of article 131-39 of this code. The prohibition mentioned in No. 2 of this article is ordered for a maximum of five years and concerns the professional activity through the execution of which or the occasion of which led to the committing of the violation.

France:

9. On page 34 of your report, you note that libraries can be ordered to attach disclaimers to material that a court has considered offensive (allowing them to keep it in their collections). Would they ever do this preemptively? Would a court order a publisher to do it, or is it a remedy reserved for archives and libraries?

A la page 34 de votre rapport, vous observez qu’on peut ordonner aux bibliothèques « la mention d’informations accompagnant la diffusion d’un message jugé attentatoire à un droit ». Est-ce qu’une bibliothèque apporterait de telles mentions de son propre chef, afin de prévenir une ordonnance éventuelle? Est-ce qu’un tribunal peut ordonner à un éditeur d’apposer ces informations, ou bien, cette démarche est-elle limitée aux bibliothèques?

Sur des ouvrages édités (quelle soit le mode d’édition y compris la diffusion sur internet), la question est du ressort du juge. Une bibliothèque ne pourrait, par précaution, s’ériger en censeur d’un ouvrage qu’elle jugerait illicite. C’est effectivement à l’éditeur que le tribunal ordonnera le cas échéant soit le retrait de l’ouvrage (c’est rarissime notamment lorsque les ouvrages sont déjà en circulation), soit encore la suppression de certains passages, soit encore l’apposition d’avertissement au lecteur. La bibliothèque en ce sens n’est que le dépositaire de l’ouvrage.

10. Some questions regarding the statute of limitations of materials posted on the Web (p. 24 of your report): Is this a law? A ruling, and if so, by which court? And what is encompassed by the term ‘each new publication’?

Quelques questions à propos de la prescription d’une action en diffamation par voie de l’Internet (p. 24 de votre rapport). Quand vous dites, « En revanche, pour la publication en ligne de contenus déjà publiés par ailleurs, le délai court à compter de chaque nouvelle publication. » est-ce que ceci résulte d’une loi ? D’une décision de jurisprudence ? Laquelle (référence, SVP) ? Et que veut dire “chaque nouvelle publication”? S’agit-il de chaque mise sur un site web?

C’est la jurisprudence qui détermine le point de départ du délai de prescription de chaque nouvelle publication. Il s’agit de la date du premier acte de publication soit la date à laquelle le message a été mis pour la première fois à la disposition des utilisateurs du réseau. Cela signifie que la mise sur l’internet d’un ouvrage édité su support papier précédemment, vaut nouvelle publication (Cass. Crim, 30 janvier 2001, Bull., Crim, n° 28 ; d’autres arrêts ont suivi dans le même sens, c’est donc une jurisprudence constante sur la question et les différentes hypothèse techniques de nouvelle publication sur internet : voir N. Mallet-Poujol, la notion de publication sur l’internet, Legicom, 2006).
11. What happened in the case of the man who objected to his private letter being in an on-line collection (cited in your report, page 4)? He claimed it was a violation of his moral rights (through the disclosure of the letter) and his economic rights. Was it removed? Had it been in a different, traditional (i.e. not on-line) collection before without dispute?

Page 4: Qu’est-ce qui s’est passé enfin à propos de la personne qui s’est plaint de la divulgation et la reproduction de la lettre qu’il vait écrite à un écrivain dont les correspondences ont été recensées dans une banque de données ? Si le fonds littéraire n’avait pas été numérisé et mis en ligne, est-ce que l’auteur de la lettre se serait plaint ? Est-ce qu’il aurait obtenu gain de cause, notamment en ce qui concerne la divulgation ?
C’est une anecdote qui m’a été rapportée par une personne du ministère de la culture. J’ai même pu voir la lettre de protestation de l’auteur des correspondances, mais à ma connaissance, il n’y a pas eu procès. Il est possible que l’administration ait du retirer les lettres en cause.
Si ces correspondances avaient été mises à disposition du public par exemple en salle de lecture, leur auteur aurait pu également critiquer ce mode de divulgation dans la mesure où il s’agissait d’archives privées (fonds d’archives privées transférées en propriété à l’Etat). Le fait est que le risque est en ce cas amplifié par la diffusion internet.

12. Can you please briefly summarize what the elements of a claim in France (1) for a violation of one’s right to privacy and (2) for an author’s/publisher’s mistake of fact in a publication?

Pourriez-vous résumer quels sont les éléments à prouver pour établir (1) la méconnaissance de son droit à la vie privée, et (2) une erreur sur les faits commise par un auteur ou un éditeur ?
L’atteinte à la vie privée est une notion complexe et très casuistique.
Il n’existe pas de définition juridique de la vie privée, c’est une construction purement jurisprudentielle.
On peut y attacher plusieurs éléments dont la vie familiale, sentimentale, la santé, les loisirs, les mœurs, les circonstances de la morts, les convictions philosophiques et religieuses (sauf cas des personnages publics). Deux exceptions principales permettent de déroger à l’interdiction de porter atteinte à la vie privée (hormis bien évidemment le cas du consentement de la personne) : le concept de vie publique et celui d’événement d’actualité, tous deux reliés à l’idée d’un droit à l’information (sur ces questions, les réflexions savantes, voir Nathalie Mallet-Poujol, les archives orales et le respect de la vie privée in Archives et Sciences sociales, aspects juridiques et coopérations scientifiques, L’Harmattan, nov. 2006, p. 115 et s.).

13. Has France adopted laws concerning laws concerning limitations of service provider liability pursuant to the E-commerce directive? If so, could you tell us
what they provide?

Pourriez-vous fournir la référence et un résumé des solutions prévues par la loi portant transposition de la directive Européenne sur le commerce électronique, concernant la responsabilité des services en ligne ?

14. You cite a Cour d’Appel ruling that said that libraries placing materials online are attempting to attract patrons and not merely using the Internet as a means of preservation. What case was this? Can you please give us the correct citation?

Aux pages 24-25, vous citez une décision de la Cour d’appel de Paris, mais la référence y manque. Pourriez-vous la fournir ?

15. We also are having problems with the correct citation for the Law on the Freedom of the press of July 29, 1881 as modified by Law no. 2004-575. Can you please give us as much information as you can for this?

Nous cherchons également la bonne référence à la loi sur la liberté de la presse du 29 juillet 1881, telle que modifiée par la loi No. 2004-575. C’est une loi qui n’a pas de numéro et qui a été modifiée à de nombreuses reprises (voir sur le site de légifrance).

16. How does one cite Law n.2004-801 which describes when data can be collected and retained?

Quelle est la bonne référence pour la loi No. 2004-801, sur le traitement des données à caractère personnel ?


Loi sur la confiance en l’économie numérique
L’essentiel est dans l’article 6 que je vous reproduis. Je cherche d’ici lundi de nouvelles références. Il y a sur Wikipédia un article sur la loi pour la confiance dans l’économie numérique.
Il me manque encore une référence, celle de la cour d’appel je vous la joins lundi.
Bien à vous.

CHAPITRE II : Les prestataires techniques.

Article
5

a modifié les dispositions suivantes :
Article 6

I. - 1. Les personnes dont l'activité est d'offrir un accès à des services de communication au public en ligne informent leurs abonnés de l'existence de moyens techniques permettant de restreindre l'accès à certains services ou de les sélectionner et leur proposent au moins un de ces moyens.

2. Les personnes physiques ou morales qui assurent, même à titre gratuit, pour mise à disposition du public par des services de communication au public en ligne, le stockage de signaux, d'écrits, d'images, de sons ou de messages de toute nature fournis par des destinataires de ces services ne peuvent pas voir leur responsabilité civile engagée du fait des activités ou des informations stockées à la demande d'un destinataire de ces services si elles n'avaient pas effectivement connaissance de leur caractère illicite ou de faits et circonstances faisant apparaître ce caractère ou si, dès le moment où elles en ont eu cette connaissance, elles ont agi promptement pour retirer ces données ou en rendre l'accès impossible.

L'aléna précédent ne s'applique pas lorsque le destinataire du service agit sous l'autorité ou le contrôle de la personne visée audit aléna.

3. Les personnes visées au 2 ne peuvent voir leur responsabilité pénale engagée à raison des informations stockées à la demande d'un destinataire de ces services si elles n'avaient pas effectivement connaissance de l'activité ou de l'information illicites ou si, dès le moment où elles en ont eu connaissance, elles ont agi promptement pour retirer ces informations ou en rendre l'accès impossible.

L'aléna précédent ne s'applique pas lorsque le destinataire du service agit sous l'autorité ou le contrôle de la personne visée audit aléna.

4. Le fait, pour toute personne, de présenter aux personnes mentionnées au 2 un contenu ou une activité comme étant illicite dans le but d'en obtenir le retrait ou d'en faire cesser la diffusion, alors qu'elle sait cette information inexacte, est puni d'une peine d'un an
d'emprisonnement et de 15 000 Euros d'amende.

5. La connaissance des faits litigieux est présomue acquise par les personnes désignées au 2 lorsqu'il leur est notifié les éléments suivants :

- la date de la notification ;

- si le notifiant est une personne physique : ses nom, prénoms, profession, domicile, nationalité, date et lieu de naissance ; si le requérant est une personne morale : sa forme, sa dénomination, son siège social et l'organe qui la représente légalement ;

- les nom et domicile du destinataire ou, s'il s'agit d'une personne morale, sa dénomination et son siège social ;

- la description des faits litigieux et leur localisation précise ;

- les motifs pour lesquels le contenu doit être retiré, comprenant la mention des dispositions légales et des justifications de faits ;

- la copie de la correspondance adressée à l'auteur ou à l'éditeur des informations ou activités litigieuses demandant leur interruption, leur retrait ou leur modification, ou la justification de ce que l'auteur ou l'éditeur n'a pu être contacté.

6. Les personnes mentionnées aux 1 et 2 ne sont pas des producteurs au sens de l'article 93-3 de la loi n° 82-652 du 29 juillet 1982 sur la communication audiovisuelle.

7. Les personnes mentionnées aux 1 et 2 ne sont pas soumises à une obligation générale de surveiller les informations qu'elles transmettent ou stockent, ni à une obligation générale de rechercher des faits ou des circonstances révélant des activités illicites.
Le précédent alinéa est sans préjudice de toute activité de surveillance ciblée et temporaire demandée par l'autorité judiciaire.

Compte tenu de l'intérêt général attaché à la répression de l'apologie des crimes contre l'humanité, de l'incitation à la haine raciale ainsi que de la pornographie enfantine, de l'incitation à la violence ainsi que des atteintes à la dignité humaine, les personnes mentionnées ci-dessus doivent concourir à la lutte contre la diffusion des infractions visées aux cinquième et huitième alinéas de l'article 24 de la loi du 29 juillet 1881 sur la liberté de la presse et aux articles 227-23 et 227-24 du code pénal.

A ce titre, elles doivent mettre en place un dispositif facilement accessible et visible permettant à toute personne de porter à leur connaissance ce type de données. Elles ont également l'obligation, d'une part, d'informer promptement les autorités publiques compétentes de toutes activités illicites mentionnées à l'alinéa précédent qui leur seraient signalées et qu'exerceraient les destinataires de leurs services, et, d'autre part, de rendre publics les moyens qu'elles consacrent à la lutte contre ces activités illicites.

Compte tenu de l'intérêt général attaché à la répression des activités illégales de jeux d'argent, les personnes mentionnées aux 1 et 2 mettent en place, dans des conditions fixées par décret, un dispositif facilement accessible et visible permettant de signaler à leurs abonnés les services de communication au public en ligne tenus pour répréhensibles par les autorités publiques compétentes en la matière. Elles informent également leurs abonnés des risques encourus par eux du fait d'actes de jeux réalisés en violation de la loi.

Tout manquement aux obligations définies aux quatrième et cinquième alinéas est puni des peines prévues au 1 du VI. ;

8. L'autorité judiciaire peut prescrire en référé ou sur requête, à toute personne mentionnée au 2 ou, à défaut, à toute personne mentionnée au 1, toutes mesures propres à prévenir un dommage ou à faire cesser un dommage occasionné par le contenu d'un service de communication au public en ligne.

II. - Les personnes mentionnées aux 1 et 2 du I détiennent et conservent les données de nature à permettre l'identification de quiconque a contribué à la création du contenu ou de l'un des contenus des services dont elles sont prestataires.
Elles fournissent aux personnes qui éditent un service de communication au public en ligne des moyens techniques permettant à celles-ci de satisfaire aux conditions d'identification prévues au III.

L'autorité judiciaire peut requérir communication auprès des prestataires mentionnés aux 1 et 2 du I des données mentionnées au premier alinéa.

Les dispositions des articles 226-17, 226-21 et 226-22 du code pénal sont applicables au traitement de ces données.

Un décret en Conseil d'Etat, pris après avis de la Commission nationale de l'informatique et des libertés, définit les données mentionnées au premier alinéa et détermine la durée et les modalités de leur conservation.

II bis (1). - Afin de prévenir [Dispositions déclarées non conformes à la Constitution par la décision du Conseil constitutionnel n° 2005-532 DC du 19 janvier 2006] les actes de terrorisme, les agents individuellement désignés et dûment habilités des services de police et de gendarmerie nationales spécialement chargés de ces missions peuvent exiger des prestataires mentionnés aux 1 et 2 du I la communication des données conservées et traitées par ces derniers en application du présent article.

Les demandes des agents sont motivées et soumises à la décision de la personnalité qualifiée instituée par l'article L. 34-1-1 du code des postes et des communications électroniques selon les modalités prévues par le même article. La Commission nationale de contrôle des interceptions de sécurité exerce son contrôle selon les modalités prévues par ce même article.

Les modalités d'application des dispositions du présent II bis sont fixées par décret en Conseil d'Etat, pris après avis de la Commission nationale de l'informatique et des libertés et de la Commission nationale de contrôle des interceptions de sécurité, qui précise notamment la procédure de suivi des demandes et les conditions et durée de conservation des données transmises.
III. - 1. Les personnes dont l'activité est d'éditer un service de communication au public en ligne mettent à disposition du public, dans un standard ouvert :

a) S'il s'agit de personnes physiques, leurs nom, prénoms, domicile et numéro de téléphone et, si elles sont assujetties aux formalités d'inscription au registre du commerce et des sociétés ou au répertoire des métiers, le numéro de leur inscription ;

b) S'il s'agit de personnes morales, leur dénomination ou leur raison sociale et leur siège social, leur numéro de téléphone et, s'il s'agit d'entreprises assujetties aux formalités d'inscription au registre du commerce et des sociétés ou au répertoire des métiers, le numéro de leur inscription, leur capital social, l'adresse de leur siège social ;

c) Le nom du directeur ou du codirecteur de la publication et, le cas échéant, celui du responsable de la rédaction au sens de l'article 93-2 de la loi n° 82-652 du 29 juillet 1982 précitée ;

d) Le nom, la dénomination ou la raison sociale et l'adresse et le numéro de téléphone du prestataire mentionné au 2 du I.

2. Les personnes éditant à titre non professionnel un service de communication au public en ligne peuvent ne tenir à la disposition du public, pour préserver leur anonymat, que le nom, la dénomination ou la raison sociale et l'adresse du prestataire mentionné au 2 du I, sous réserve de lui avoir communiqué les éléments d'identification personnelle prévus au 1.

Les personnes mentionnées au 2 du I sont assujetties au secret professionnel dans les conditions prévues aux articles 226-13 et 226-14 du code pénal, pour tout ce qui concerne la divulgation de ces éléments d'identification personnelle ou de toute information permettant d'identifier la personne concernée. Ce secret professionnel n'est pas opposable à l'autorité judiciaire.

IV. - Toute personne nommée ou désignée dans un service de communication au public en ligne dispose d'un droit de réponse, sans préjudice des demandes de correction ou de suppression du message qu'elle peut adresser au service, [Dispositions déclarées non
conformes à la Constitution par décision du Conseil constitutionnel n° 2004-496 DC du 10 juin 2004].

La demande d'exercice du droit de réponse est adressée au directeur de la publication ou, lorsque la personne éditant à titre non professionnel a conservé l'anonymat, à la personne mentionnée au 2 du I qui la transmet sans délai au directeur de la publication. Elle est présentée au plus tard dans un délai de trois mois à compter de [Dispositions déclarées non conformes à la Constitution par décision du Conseil constitutionnel n° 2004-496 DC du 10 juin 2004] la mise à disposition du public du message justifiant cette demande.

Le directeur de la publication est tenu d'insérer dans les trois jours de leur réception les réponses de toute personne nommée ou désignée dans le service de communication au public en ligne sous peine d'une amende de 3 750 Euros, sans préjudice des autres peines et dommages-intérêts auxquels l'article pourrait donner lieu.

Les conditions d'insertion de la réponse sont celles prévues par l'article 13 de la loi du 29 juillet 1881 précitée. La réponse sera toujours gratuite.

Un décret en Conseil d'Etat fixe les modalités d'application du présent IV.

V. - Les dispositions des chapitres IV et V de la loi du 29 juillet 1881 précitée sont applicables aux services de communication au public en ligne et la prescription acquise dans les conditions prévues par l'article 65 de ladite loi [Dispositions déclarées non conformes à la Constitution par décision du Conseil constitutionnel n° 2004-496 DC du 10 juin 2004].

[Dispositions déclarées non conformes à la Constitution par décision du Conseil constitutionnel n° 2004-496 DC du 10 juin 2004]

VI. - 1. Est puni d'un an d'emprisonnement et de 75 000 Euros d'amende le fait, pour une personne physique ou le dirigeant de droit ou de fait d'une personne morale exerçant l'une des activités définies aux 1 et 2 du I, de ne pas satisfaire aux obligations définies aux quatrième et cinquième alinéas du 7 du I, de ne pas avoir conservé les éléments d'information visés au II ou de ne pas déférer à la demande d'une autorité judiciaire
d'obtenir communication desdits éléments.

Les personnes morales peuvent être déclarées pénalement responsables de ces infractions dans les conditions prévues à l'article 121-2 du code pénal. Elles encourent une peine d'amende, suivant les modalités prévues par l'article 131-38 du même code, ainsi que les peines mentionnées aux 2° et 9° de l'article 131-39 de ce code. L'interdiction mentionnée au 2° de cet article est prononcée pour une durée de cinq ans au plus et porte sur l'activité professionnelle dans l'exercice ou à l'occasion de laquelle l'infraction a été commise.

2. Est puni d'un an d'emprisonnement et de 75 000 Euros d'amende le fait, pour une personne physique ou le dirigeant de droit ou de fait d'une personne morale exerçant l'activité définie au III, de ne pas avoir respecté les prescriptions de ce même article.

Les personnes morales peuvent être déclarées pénalement responsables de ces infractions dans les conditions prévues à l'article 121-2 du code pénal. Elles encourent une peine d'amende, suivant les modalités prévues par l'article 131-38 du même code, ainsi que les peines mentionnées aux 2° et 9° de l'article 131-39 de ce code. L'interdiction mentionnée au 2° de cet article est prononcée pour une durée de cinq ans au plus et porte sur l'activité professionnelle dans l'exercice ou à l'occasion de laquelle l'infraction a été commise.

Copyright and Archives: The UK Position

Robert Burrell and Lionel Bently

1 Do the domestic copyright laws of the U.K. contain provisions specifically addressed to archives?

Copyright law in the United Kingdom is governed by the Copyright, Designs and Patents Act 1988 (as amended). Sections 37-44A contain a range of exceptions to the exclusive rights conferred on a copyright owner (by section 16-21) that apply to ‘libraries and archives’ (and these are set out in full in the Appendix 1). These provisions allow:

(i) copying by libraries of single copies of articles in periodicals, or of parts of published works, for users who require them for research or private study (sections 38 and 39);

(ii) lending of books by libraries and archives (section 40A);

(iii) supplying copies of articles or published editions by one library to another so as to expand the receiving library’s collection (section 41);

(iv) making copies of a work for preservation purposes by libraries and archives (section 42);

(v) supplying copies of unpublished works by libraries and archives (section 43);

(vi) making a copy of a work of cultural or historical importance in order to deposit it in an appropriate library or archive as a condition of export from the UK (section 44).

(vii) making a copy of a non-print publication by a library of legal deposit (section 44A).

It will be apparent from the above overview that some of the ‘library and archive’ exceptions apply to both libraries and to archives (ss. 40A, 42, 43, 44); others apply

1 Some of these provisions were introduced in the Copyright Act 1956, Section 7: e.g. Section 38 of the CDPA derives from section 7(1) of the 1956 Act, and section 39 of the CDPA from section 7(3) of the 1956 Act. Section was entitled ‘Special exceptions as respects libraries and archives’ but did not expressly refer to ‘archives’. For background, see Report of the Copyright Committee (Gregory Committee 1952, Cmd 8662, paras. 38-54.

2 And for sections of the Legal Deposit Libraries Act 2003, see Appendix 3.
only to libraries (ss. 38, 39, 41, 44A); but none apply to archives alone. For present purposes this is significant because it means that less rests on the definition of ‘archive’ than in other jurisdictions: a potential defendant could always argue in the alternative that it is a ‘library’.

2 Do they define the term “archive”?

Overview

The term ‘archive’ is not defined by the Act. Of the provisions noted above the Act states that sections 40A, 42 and 43 apply to ‘prescribed’ archives. In contrast section 44 applies to any archive.³ ‘Prescribed’ archive in this context means prescribed by regulations made by the relevant minister, with the Act providing some further guidance as to the permissible scope of such regulations⁴. The regulations in question are The Copyright (Librarians and Archivists) (Copying of Copyright Material) Regulations 1989⁵. The key provision of the Library Regulations is reg. 3(4), which defines archive as follows:

i) For the purposes of Section 43 (supply of a copy of an unpublished work to a person who requires the copy for purposes of private study or non-commercial research) all archives in the United Kingdom are prescribed for the purposes of this section.

ii) Similarly, for the purposes of Section 42 (making copies of a work for preservation purposes) all archives in the United Kingdom are prescribed for the purposes of making and supplying copies, but any receiving archive must be an archive ‘not conducted for profit’.

iii) For the purposes of section 40A an archive is ‘prescribed’ if it is ‘not conducted for profit’.

³ This may at first seem significant, but it is important to appreciate that section 44 is quite different in operation from that of the other library and archive provisions in that it provides a mechanism by which works can be supplied to libraries and archives, rather than a mechanism to allow such bodies to make copies. By leaving the category of ‘archive’ to which this section applies entirely open this section leaves regulatory authorities with a completely free hand to determine the most appropriate institution of deposit.

⁴ In particular, see CDPA 1988, s. 37.

⁵ SI 1989 No 1212 (hereafter, the ‘Library Regulations’). See Appendix 4.
Implications:

Although the Regulations set out categories of prescribed archives they do so without providing any real guidance as to how an archive is to be identified. This would seem to leave open the possibility that these provisions might be treated as applying to new forms of archive as the term expands to include, for example, online document storage services. Ultimately, it would be for a court to determine whether a particular collection was an archive (but there have been no such decisions).\(^6\) However, in practice, the importance of this issue is confined by the extremely restrictive nature of the exceptions that apply to archives in the United Kingdom.

More specifically:

1) Section 40A only applies to the lending of works by archives not conducted for profit. Assuming that 'lending' has the same definition as in section 18A (2)(b) of the Act, which refers to "making a copy of the work available for use, on terms that it will or may be returned", it appears to be concerned with tangible copies. Consequently, it is highly unlikely that the section will be construed as applying to functionally equivalent acts in the online environment. Moreover, the provision of a copy of a work online will invariably involve its reproduction and this will not be permitted by the defence which is limited in its application to lending.

2) Section 42 allows copies of a work of a literary, dramatic or musical work (and any accompanying illustrations or the typographical arrangement) to be made for internal preservation purposes, that is, to preserve a copy that is in danger of becoming damaged and to replace a copy at another archive that has been lost, damaged or destroyed in circumstances where it is not ‘reasonably practicable’ to purchase a copy of the item in question.\(^7\) Significantly, there is no restriction on the medium onto which the copy can be made – it might therefore be possible to rely on this section in

---

\(^6\) If the Minister decided to specify a particular institution as being an archive, it would equally fall to a court to decide whether the Minister acted ultra vires by prescribing a body that was not in fact an archive. We can learn some examples of institutions that the Minister considers to be archives from the regulations made under sections 61 and 75, but we should bear in mind the different nature and history of these provisions.

\(^7\) So would cover, for example, microfilm copies of newspapers, where physical use by members of the public might destroy the originals.
order to place a copy of a work on a CD-ROM or onto an intranet service. However, it would not appear to be possible to rely on this section to place a copy of a work onto the Internet (inter alia) because the exception applies only to the making of a copy, and does not include 'communication to the public.' Moreover, the section would not seem to facilitate the copying of material from the Internet for preservation purposes, because the Regulations prescribe that the work copied be ‘in the permanent collection’ of the archive ‘maintained wholly or mainly for the purposes of reference on the premises of the library’. (But note the new section 44A to the CDPA, which only applies to the legal deposit libraries ie the British Library Board, the National Library of Scotland, the National Library of Wales, the Bodleian Library, Oxford, the University Library, Cambridge, and the Library of Trinity College, Dublin).

3) Section 43 allows an archive to make and supply a copy of an unpublished literary, dramatic or musical work (and any accompanying illustrations or the typographical arrangement) to a person who requires the copy for the purposes of private study or non-commercial research. The Library Regulations specify that the researcher must satisfy the archivist that he requires the document for research for a non-commercial purpose or private study, and must supply a declaration to that effect (on which the archivist may rely). Once again there is no expressly stated restriction on the medium onto which the copy can be made (so it could, for example, be on CD-ROM). While the concept of 'supply' is distinct from the concept of 'issue to the public' (in section 18) and 'communication to the public' (section 20), so that it could be interpreted as allowing electronic supply, e.g. by e-mail, other facets of the provision seem to preclude such a mode of supply. More specifically, the section

---

8 If the users of the intranet count as ‘the public’ then this might infringe, on the basis that there is a communication to the public.
9 Para 6. It is difficult to imagine the concept of ‘premises’ being interpreted other than as referring to physical premises.
10 In the context of online ‘archives’ it should be noted that making a work available by means of an ‘electronic retrieval system’ would in any event amount to a publication of the work and hence will invalidate the operation of the section even if the other criteria for the section to apply could be satisfied: CDPA 1988, s. 175. This is not the case if the publication was not an authorised act: s. 175(6).
11 One question would be whether an archive which has digitised its documents could operate an automated system of supplying such documents, relying purely on a researcher filling in the statutory declaration. The system as established clearly envisaged a role for the flesh-and-blood archivist refusing to supply documents where they are ‘aware that the signed declaration….is false in a material particular’.
only allows an archivist to 'make and supply a copy' of a work, so appears to require that the copy that is made must also be the copy which is supplied to the researcher. It seems, therefore, that it will not normally be possible to supply a copy of an unpublished manuscript by e-mail since the process of scanning a work into a computer will normally involve making a number of further electronic copies that will not be supplied to a reader.\textsuperscript{12} It is unclear whether this reasoning would equally to apply if the work was already in digital form (e.g. if the scanning had been justified by section 42). This would seem to depend on construction and application of section 28A of the CDPA on ‘transient and incidental’ copying.\textsuperscript{13}

\section*{3 Other provisions applying to ‘archives’}

It is also worth noting that the Act contains provisions to allow for the recording of folksongs\textsuperscript{14} and broadcasts\textsuperscript{15} for ‘archival’ purposes. These sections are extremely limited in scope, but are interesting insofar as they indicate that at some point at least Parliament adopted a modern, expansive understanding of the concept of an archive. However, they provide little assistance as to what the term ‘archive’ means in the context of the library and archive provisions since for the institutions that are entitled to rely on these exceptions are defined exhaustively in secondary legislation.\textsuperscript{16}

\section*{4 Is there otherwise a general understanding of what an archive is, and if so, what is that understanding and what does it derive from? (e.g., does it derive from judicial decisions, industry practice, etc.?)}

Robert Burrell and Alison Coleman, in conducting research for their book Copyright Exceptions: The Digital Impact (Cambridge: CUP, 2005, forthcoming), had

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{12} Laddie \textit{et al}, 3\textsuperscript{rd} ed., para. 33.37.
\item \textsuperscript{13} Section 28A of the Act implements Article 5(1) of Directive 2001/29/EC (the 'Information Society' Directive'). This provides that ‘temporary acts of reproduction… which are an integral and essential part of a technological process, whose sole purpose is to enable … a lawful use to be made of a work or other subject matter, and which have no independent economic significance, shall be exempted from the right set out in Article 2.’
\item \textsuperscript{14} CDPA 1988. s. 61
\item \textsuperscript{15} CDPA 1988. s. 75
\item \textsuperscript{16} See, Appendix 5 & 6 for the Copyright (Recording of Folksongs for Archives) (Designated Bodies) Order 1989 (SI 1989 No 1012) and the Copyright (Recording for Archives of Designated Class of Broadcasts and Cable Programmes) (Designated Bodies) Order 1993 (SI 1993 No 74).
\end{itemize}
\end{footnotesize}
conversations with archivists (in the traditional sense). These suggested that archives have historically been understood as comprising documentation that accumulates naturally over time, in particular, as the product of the business of government and other large organisations. As elsewhere, however, this definition is becoming outdated because of the increasing tendency to refer to collections of films and sound recordings and certain special interest collections as ‘archives’.

b. **Does U.K. copyright law contain provisions of broader application that may nonetheless be relevant to archives (e.g., exceptions or privileges)?**

Yes most important are probably:

**1. Section 7(6) 1956 Act**

Although the 1956 Act was repealed in 1988, certain provisions are preserved by transitional provisions, including section 7(6). In order to understand this provision, it needs to be understood that, prior to the 1988 Act, copyright in unpublished literary, dramatic or musical works was perpetual. An unpublished work from, say, 1820 would have still been in copyright. The 1988 Act brought this situation to an end, so that the duration of copyright in unpublished and published works are equally determined by reference to a fixed period *post mortem auctoris* (now, generally, 70 years). For transitional purposes, the 1988 Act provided that the perpetual copyright in works still unpublished as of August 1, 1989 be converted into a fixed period of fifty years, ending in 2039. It also maintained section 7 of the 1956 Act, as regards works created before 1st August, 1989.

Section 7 had sought to mitigate the negative effects of perpetual copyright in unpublished works. It provides that where an unpublished literary, dramatic or musical work has been open to public inspection in any institution in the United Kingdom, it may be copied by any person without infringing copyright in the work or in any accompanying illustrations, as long as a number of conditions are fulfilled. These: are

---

17 And see CDPA 1988, ss. 61 and 75 (discussed above).
18 This fixed term was subsequently increased in some cases so as to comply with the Term Directive.
19 See CDPA 1988, Sched. 1, para. 16. For the 1956 Act, see Appendix 2.
that: the work is more than a hundred years old; that the author died at least fifty years previously and that the copy is made for the purposes of research or private study, or 'with a view to publication'. The fact that this section allows for reproduction for the purposes of publication is particularly noteworthy. If the work or part of the old work is published, section 7(8) goes on to provide that it may also be “broadcast” or “transmitted to subscribers to a diffusion service” without infringing copyright therein.

2. Private Study
Read literally, there is nothing in the Act to prevent an archivist acting as a reader’s agent, such that copying of a work could well be held to fall with the aegis of the section 29 fair dealing defence. Confusion on this point may arise because of section 29(3), which provides that copying by a librarian is not fair dealing if ‘he does anything which regulations under section 40 would not permit to be done under section 38 or 39’. This provision is sometimes treated as though it excluded librarians and archivists from seeking to rely on the research and private study exception in all circumstances. It is therefore important to emphasise that this limitation has a more restricted effect. It would not preclude an archivist from seeking to rely on the research and private study exception when operating outside the terms of sections 38 and 39 (which only apply to libraries), as would be the case when making a copy of an unpublished artistic work. In practice, however, it seems that the uncertainty that surrounds the extent to which it is fair for the purposes of research or private study to copy an unpublished work or the whole of an artistic work means that librarians and archivists will not seek to rely on a section 29 defence. In this context it is notable that Padfield in his guide to copyright for archivists states that ‘in the great majority of cases, archivists should be very wary of providing copies of copyright artistic works (including most maps, drawings and photographs) in their collections’.20


20 Padfield, Copyright for Archivists and Users of Archives, (London: PRO, 2001) p. 91. In reaching this conclusion he argues: ‘there are special provisions for copying on behalf of a researcher by an archivist or librarian…Because of this, it seems that the defence of fair dealing would not for the most part be available to a librarian or archivist who supplied copies outside the terms of those special provisions (at p. 76). (2nd edition, p. 104).
A number of provisions specified as applying to libraries may also benefit archives, insofar as the archive is regarded as a library. Many archives have their own libraries, i.e. collections of published books and periodicals for reference (and otherwise), so there seems no reason why they should not also be treated as libraries. As noted already these provisions allow copying by libraries of single copies of articles in periodicals, or of parts of published works, for users who require them for research or private study (sections 38 and 39); as well as the supplying copies of articles or published editions by one library to another so as to expand the receiving library’s collection (section 41). As with section 43, discussed above, these provisions permit the library to ‘make and supply’ a copy a phrase which could include electronic supply, but are limited to the extent that the copy supplied must be the same copy as that made. Since electronic supply will involve the production of a number of electronic copies, unless these are capable of being ignored under section 28A, there will be infringement. There are similar requirements that the researcher proffer a signed declaration that the work is required for the purposes of non-commercial research or private study.

To the extent these principles were developed when archives were created and maintained with physical copies, how do they relate to the electronic environment and the manner in which archives (particularly digital archives) currently operate?

It should be clear from the foregoing that the exceptions were developed to deal with physical copies, particularly in response to the emergence of photocopying. The exceptions continue to operate in an electronic environment to some extent (e.g. as we have seen, exceptions that permit copying prima facie permit the making of electronic copies.) However, activities in the electronic environment that may be seen, by archivists and users, as functionally equivalent to acts permitted in the non-electronic, such as supplying works by e-mailing electronic copies, or lending works by electronic transfer (with the recipient undertaking to destroy its copy when it has finished with the work) are often not covered by the existing wording (especially as new rights have been given to copyright owners).
What limits or privileges, if any, have courts in the U.K. placed on or provided to archives with respect to:

a. acquisition of material  
b. maintenance and updating material  
c. making the material available to the public  
   i. as physical copies (original or facsimile), or  
   ii. in digital form

There are no cases on these matters, but as regards acquisition see: CDPA s. 61, s. 75, and s. 44A.

4. Are there judicial decisions in the U.K. addressing publishers’ or archives’ liability with respect to documents included in the archives’ collections that infringe copyright?

NO
APPENDIX 1: Copyright, Designs and Patents Act 1988 (as amended)

s 37 Libraries and archives: introductory.

(1) In sections 38-43 (copying by librarians and archivists)--
(a) references in any provision to a prescribed library or archive are to a library or archive
of a description prescribed for the purposes of that provision by regulations made by the
Secretary of State; and
(b) references in any provision to the prescribed conditions are to the conditions so
prescribed.
(2) The regulations may provide that, where a librarian or archivist is required to be
satisfied as to any matter before making or supplying a copy of a work--
(a) he may rely on a signed declaration as to that matter by the person requesting the
copy, unless he is aware that it is false in a material particular, and
(b) in such cases as may be prescribed, he shall not make or supply a copy in the absence
of a signed declaration in such form as may be prescribed.
(3) Where a person requesting a copy makes a declaration which is false in a material
particular and is supplied with a copy which would have been an infringing copy if made
by him--
(a) he is liable for infringement of copyright as if he had made the copy himself, and
(b) the copy shall be treated as an infringing copy.
(4) The regulations may make different provision for different descriptions of libraries or
archives and for different purposes.
(5) Regulations shall be made by statutory instrument which shall be subject to
annulment in pursuance of a resolution of either House of Parliament.
(6) References in this section, and in sections 38 to 43, to the librarian or archivist include
a person acting on his behalf.

s.38 Copying by librarians: articles in periodicals.

(1) The librarian of a prescribed library may, if the prescribed conditions are complied
with, make and supply a copy of an article in a periodical without infringing any
copyright in the text, in any illustrations accompanying the text or in the typographical
arrangement.
(2) The prescribed conditions shall include the following--
[ (a) that copies are supplied only to persons satisfying the librarian that they require
them for the purposes of-
(i) research for a non-commercial purpose, or
(ii) private study,
and will not use them for any other purpose;
(b) that no person is furnished with more than one copy of the same article or with copies
of more than one article contained in the same issue of a periodical; and
(c) that persons to whom copies are supplied are required to pay for them a sum not less
than the cost (including a contribution to the general expenses of the library) attributable
to their production.]
s 39 Copying by librarians: parts of published works.

(1) The librarian of a prescribed library may, if the prescribed conditions are complied with, make and supply from a published edition a copy of part of a literary, dramatic or musical work (other than an article in a periodical) without infringing any copyright in the work, in any illustrations accompanying the work or in the typographical arrangement.

(2) The prescribed conditions shall include the following--
(a) that copies are supplied only to persons satisfying the librarian that they require them for the purposes of-
(i) research for a non-commercial purpose, or
(ii) private study,
and will not use them for any other purpose;
(b) that no person is furnished with more than one copy of the same material or with a copy of more than a reasonable proportion of any work; and
(c) that persons to whom copies are supplied are required to pay for them a sum not less than the cost (including a contribution to the general expenses of the library) attributable to their production.

s 40 Restriction on production of multiple copies of the same material.

(1) Regulations for the purposes of sections 38 and 39 (copying by librarian of article or part of published work) shall contain provision to the effect that a copy shall be supplied only to a person satisfying the librarian that his requirement is not related to any similar requirement of another person.

(2) The regulations may provide--
(a) that requirements shall be regarded as similar if the requirements are for copies of substantially the same material at substantially the same time and for substantially the same purpose; and
(b) that requirements of persons shall be regarded as related if those persons receive instruction to which the material is relevant at the same time and place.

s 40A Lending of copies by libraries or archives.

40A.-- Lending of copies by libraries or archives.
(1) Copyright in a work of any description is not infringed by the lending of a book by a public library if the book is within the public lending right scheme.
For this purpose-
(a) "the public lending right scheme" means the scheme in force under section 1 of the Public Lending Right Act 1979, and
(b) a book is within the public lending right scheme if it is a book within the meaning of the provisions of the scheme relating to eligibility, whether or not it is in fact eligible.
(2) Copyright in a work is not infringed by the lending of copies of the work by a prescribed library or archive (other than a public library) which is not conducted for profit.
s 41 Copying by librarians: supply of copies to other libraries.

(1) The librarian of a prescribed library may, if the prescribed conditions are complied with, make and supply to another prescribed library a copy of--
(a) an article in a periodical, or
(b) the whole or part of a published edition of a literary, dramatic or musical work, without infringing any copyright in the text of the article or, as the case may be, in the work, in any illustrations accompanying it or in the typographical arrangement.
(2) Subsection (1)(b) does not apply if at the time the copy is made the librarian making it knows, or could by reasonable inquiry ascertain, the name and address of a person entitled to authorise the making of the copy.

s 42 Copying by librarians or archivists: replacement copies of works.

(1) The librarian or archivist of a prescribed library or archive may, if the prescribed conditions are complied with, make a copy from any item in the permanent collection of the library or archive--
(a) in order to preserve or replace that item by placing the copy in its permanent collection in addition to or in place of it, or
(b) in order to replace in the permanent collection of another prescribed library or archive an item which has been lost, destroyed or damaged, without infringing the copyright in any literary, dramatic or musical work, in any illustrations accompanying such a work or, in the case of a published edition, in the typographical arrangement.
(2) The prescribed conditions shall include provision for restricting the making of copies to cases where it is not reasonably practicable to purchase a copy of the item in question to fulfil that purpose.

s 43 Copying by librarians or archivists: certain unpublished works.

(1) The librarian or archivist of a prescribed library or archive may, if the prescribed conditions are complied with, make and supply a copy of the whole or part of a literary, dramatic or musical work from a document in the library or archive without infringing any copyright in the work or any illustrations accompanying it.
(2) This section does not apply if--
(a) the work had been published before the document was deposited in the library or archive, or
(b) the copyright owner has prohibited copying of the work, and at the time the copy is made the librarian or archivist making it is, or ought to be, aware of that fact.
(3) The prescribed conditions shall include the following--
(a) that copies are supplied only to persons satisfying the librarian or archivist that they require them for the purposes of-
(i) research for a non-commercial purpose, or
(ii) private study,
and will not use them for any other purpose;
(b) that no person is furnished with more than one copy of the same material; and
(c) that persons to whom copies are supplied are required to pay for them a sum not less
than the cost (including a contribution to the general expenses of the library or archive) attributable to their production.

s 44 Copy of work required to be made as condition of export.

If an article of cultural or historical importance or interest cannot lawfully be exported from the United Kingdom unless a copy of it is made and deposited in an appropriate library or archive, it is not an infringement of copyright to make that copy.

s 44A Legal deposit libraries

44A Legal deposit libraries
(1) Copyright is not infringed by the copying of a work from the internet by a deposit library or person acting on its behalf if-
(a) the work is of a description prescribed by regulations under section 10(5) of the 2003 Act,
(b) its publication on the internet, or a person publishing it there, is connected with the United Kingdom in a manner so prescribed, and
(c) the copying is done in accordance with any conditions so prescribed.
(2) Copyright is not infringed by the doing of anything in relation to relevant material permitted to be done under regulations under section 7 of the 2003 Act.
(3) The Secretary of State may by regulations make provision excluding, in relation to prescribed activities done in relation to relevant material, the application of such of the provisions of this Chapter as are prescribed.
(4) Regulations under subsection (3) may in particular make provision prescribing activities-
(a) done for a prescribed purpose,
(b) done by prescribed descriptions of reader,
(c) done in relation to prescribed descriptions of relevant material,
(d) done other than in accordance with prescribed conditions.
(5) Regulations under this section may make different provision for different purposes.
(6) Regulations under this section shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.
(7) In this section-
(a) "the 2003 Act" means the Legal Deposit Libraries Act 2003;
(b) "deposit library", "reader" and "relevant material" have the same meaning as in section 7 of the 2003 Act;
(c) "prescribed" means prescribed by regulations made by the Secretary of State.

s 61 Recordings of folksongs.

(1) A sound recording of a performance of a song may be made for the purpose of including it in an archive maintained by a designated body without infringing any copyright in the words as a literary work or in the accompanying musical work, provided the conditions in subsection (2) below are met.
(2) The conditions are that--
(a) the words are unpublished and of unknown authorship at the time the recording is made, 
(b) the making of the recording does not infringe any other copyright, and 
(c) its making is not prohibited by any performer. 
(3) Copies of a sound recording made in reliance on subsection (1) and included in an archive maintained by a designated body may, if the prescribed conditions are met, be made and supplied by the archivist without infringing copyright in the recording or the works included in it.
(4) The prescribed conditions shall include the following--
(a) that copies are only supplied to persons satisfying the archivist that they require them for the purposes of-
(i) research for a non-commercial purpose, or 
(ii) private study, and will not use them for any other purpose, and 
(b) that no person is furnished with more than one copy of the same recording.
(5) In this section--
(a) "designated" means designated for the purposes of this section by order of the Secretary of State, who shall not designate a body unless satisfied that it is not established or conducted for profit,
(b) "prescribed" means prescribed for the purposes of this section by order of the Secretary of State, and 
(c) references to the archivist include a person acting on his behalf.
(6) An order under this section shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

s 75 Recording for archival purposes.

(1) A recording of a broadcast of a designated class, or a copy of such a recording, may be made for the purpose of being placed in an archive maintained by a designated body without thereby infringing any copyright in the broadcast or in any work included in it.
(2) In subsection (1) "designated" means designated for the purposes of this section by order of the Secretary of State, who shall not designate a body unless he is satisfied that it is not established or conducted for profit.
(3) An order under this section shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

Schedule 1

Para 16

The following provisions of section 7 of the 1956 Act continue to apply in relation to existing works--
(a) subsection (6) (copying of unpublished works from manuscript or copy in library, museum or other institution);
(b) subsection (7) (publication of work containing material to which subsection (6) applies), except (duty to give notice of intended publication) paragraph (a);
(c) subsection (8) (subsequent broadcasting, performance, &c. of material published in
accordance with subsection (7)); and subsection (9)(d) (illustrations) continues to apply for the purposes of those provisions.
(1) The copyright in an article contained in a periodical publication is not infringed by the making or supplying of a copy of the article, if the copy is made or supplied by or on behalf of the librarian of a library of a class prescribed by regulations made under this subsection by the Board of Trade, and the conditions prescribed by those regulations are complied with.

(2) In making any regulations for the purposes of the preceding subsection the Board of Trade shall make such provision as the Board may consider appropriate for securing--

(a) that the libraries to which the regulations apply are not established or conducted for profit;

(b) that the copies in question are supplied only to persons satisfying the librarian, or a person acting on his behalf, that they require them for purposes of research or private study and will not use them for any other purpose;

(c) that no person is furnished under the regulations with two or more copies of the same article;

(d) that no copy extends to more than one article contained in any one publication; and

(e) that persons to whom copies are supplied under the regulations are required to pay for them a sum not less than the cost (including a contribution to the general expenses of the library) attributable to their production, and may impose such other requirements (if any) as may appear to the Board to be expedient.

(3) The copyright in a published literary, dramatic or musical work, other than an article contained in a periodical publication, is not infringed by the making or supplying of a copy of part of the work, if the copy is made or supplied by or on behalf of the librarian of a library of a class prescribed by regulations made under this subsection by the Board of Trade, and the conditions prescribed by those regulations are complied with:

Provided that this subsection shall not apply if, at the time when the copy is made, the librarian knows the name and address of a person entitled to authorise the making of the copy, or could by reasonable inquiry ascertain the name and address of such a person.

(4) The provisions of subsection (2) of this section shall apply for the purposes of the last preceding subsection:

Provided that paragraph (d) of the said subsection (2) shall not apply for those purposes, but any regulations made under the last preceding subsection shall include such provision as the Board of Trade may consider appropriate for securing that no copy to which the regulations apply extends to more than a reasonable proportion of the work in question.

(5) The copyright in a published literary, dramatic or musical work is not infringed by the making or supplying of a copy of the work, or of part of it, by or on behalf of the librarian of a library of a class prescribed by regulations made under this subsection by the Board of Trade, if--
(a) the copy is supplied to the librarian of any library of a class so prescribed;
(b) at the time when the copy is made, the librarian by or on whose behalf it is supplied
does not know the name and address of any person entitled to authorise the making of the
copy, and could not by reasonable inquiry ascertain the name and address of such a
person; and
(c) any other conditions prescribed by the regulations are complied with:
Provided that the condition specified in paragraph (b) of this subsection shall not apply in
the case of an article contained in a periodical publication.
(6) Where, at a time more than fifty years from the end of the calendar year in which the
author of a literary, dramatic or musical work died, and more than one hundred years
after the time, or the end of the period, at or during which the work was made,--
(a) copyright subsists in the work, but
(b) the work has not been published, and
(c) the manuscript or a copy of the work is kept in a library, museum or other institution
where (subject to any provisions regulating the institution in question) it is open to public
inspection, the copyright in the work is not infringed by a person who reproduces the
work for purposes of research or private study, or with a view to publication.
(7) Where a published literary, dramatic or musical work (in this subsection referred to as
"the new work") incorporates the whole or part of a work (in this subsection referred to as
"the old work") in the case of which the circumstances specified in the last preceding
subsection existed immediately before the new work was published, and--
(a) before the new work was published, such notice of the intended publication as may be
prescribed by regulations made under this subsection by the Board of Trade had been
given, and
(b) immediately before the new work was published, the identity of the owner of the
copyright in the old work was not known to the publisher of the new work,
then for the purposes of this Act--
(i) that publication of the new work, and
(ii) any subsequent publication of the new work, either in the same or in an altered form,
shall, in so far as it constitutes a publication of the old work, not be treated as an
infringement of the copyright in the old work or as an unauthorised publication of the old
work:
Provided that this subsection shall not apply to a subsequent publication incorporating a
part of the old work which was not included in the new work as originally published,
unless (apart from this subsection) the circumstances specified in the last preceding
subsection, and in paragraphs (a) and (b) of this subsection, existed immediately before
that subsequent publication.
(8) In so far as the publication of a work, or of part of a work, is, by virtue of the last
preceding subsection, not to be treated as an infringement of the copyright in the work, a
person who subsequently broadcasts the work, or that part thereof, as the case may be, or
causes it to be transmitted to subscribers to a diffusion service, or performs it in public, or
makes a record of it, does not thereby infringe the copyright in the work.
(9) In relation to an article or other work which is accompanied by one or more artistic
works provided for explaining or illustrating it (in this subsection referred to as
"illustrations"), the preceding provisions of this section shall apply as if--
(a) wherever they provide that the copyright in the article or work is not infringed, the
reference to that copyright included a reference to any copyright in any of the illustrations;
(b) in subsections (1) and (2), references to a copy of the article included references to a copy of the article together with a copy of the illustrations or any of them;
(c) in subsection (3) to (5), references to a copy of the work included references to a copy of the work together with a copy of the illustrations or any of them, and references to a copy of part of the work included references to a copy of that part of the work together with a copy of any of the illustrations which were provided for explaining or illustrating that part; and
(d) in subsections (6) and (7), references to the doing of any act in relation to the work included references to the doing of that act in relation to the work together with any of the illustrations.
(10) In this section "article" includes an item of any description.
APPENDIX 3

Legal Deposit Libraries Act 2003

s. 7 Restrictions on activities in relation to non-print publications

(1) Subject to subsection (3), a relevant person may not do any of the activities listed in subsection (2) in relation to relevant material.

(2) The activities are-

(a) using the material (whether or not such use necessarily involves the making of a temporary copy of it);
(b) copying the material (other than by making a temporary copy where this is necessary for the purpose of using the material);
(c) in the case of relevant material comprising or containing a computer program or database, adapting it;
(d) lending the material to a third party (other than lending by a deposit library to a reader for use by the reader on library premises controlled by the library);
(e) transferring the material to a third party;
(f) disposing of the material.

(3) The Secretary of State may by regulations make provision permitting relevant persons to do any of the activities listed in subsection (2) in relation to relevant material, subject to such conditions as may be prescribed.

(4) Regulations under this section may in particular make provision about-

(a) the purposes for which relevant material may be used or copied;
(b) the time at which or the circumstances in which readers may first use relevant material;
(c) the description of readers who may use relevant material;
(d) the limitations on the number of readers who may use relevant material at any one time (whether by limiting the number of terminals in a deposit library from which readers may at any one time access an electronic publication or otherwise).

(5) In this section-

(a) "reader" means a person who, for the purposes of research or study and with the permission of a deposit library, is on library premises controlled by it;
(b) "relevant material" means-
   (i) a copy delivered under section 1 of a work published in a medium other than print;
   (ii) a copy delivered pursuant to regulations under section 6 of a computer program or material within section 6(2)(b);
   (iii) a copy of a work to which section 10(6) applies;
   (iv) a copy (at any remove) of anything within any of subparagraphs (i) to (iii);
(c) "relevant person" means-
   (i) a deposit library or person acting on its behalf;
   (ii) a reader;
   (d) references to a deposit library include references to the Faculty of Advocates.

(6) A contravention of this section is actionable at the suit of a person who suffers loss as a result of the contravention, subject to the defences and other incidents applying to actions for breach of statutory duty.

s.10 Exemption from liability: activities in relation to publications

(1) A deposit library, or a person acting on its behalf, is not liable in damages, or subject to any criminal liability, for defamation arising out of the doing by a relevant person of an activity listed in section 7(2) in relation to a copy of a work delivered under section 1.

(2) Subsection (1) does not apply to the liability of a deposit library where-

(a) it knows, or in the case of liability in damages it knows of facts or circumstances from which it ought to know, that the copy contains a defamatory statement, and

(b) it has had a reasonable opportunity since obtaining that knowledge to prevent the doing of the activity in relation to the copy.

(3) Where, pursuant to section 1, a person (in this section, "the publisher") has delivered a copy of a work to an address specified by a deposit library, the publisher is not liable in damages, or subject to any criminal liability, for defamation arising out of the doing by a relevant person of an activity listed in section 7(2) in relation to the copy.

(4) Subsection (3) does not apply where-
(a) the publisher knows, or in the case of liability in damages the publisher knows of facts or circumstances from which it ought to know, that the copy contains a defamatory statement, and

(b) it has had a reasonable opportunity since obtaining that knowledge to inform the library of the matter, facts or circumstances known to it and has not done so.

(5) Where a work is published on the internet, subsection (6) applies to a copy of the work if-

(a) the work is of a description prescribed by regulations under this subsection,

(b) the publication of the work on the internet, or a person publishing it there, is connected with the United Kingdom in a manner so prescribed, and

(c) the copy was made by a deposit library or person acting on its behalf copying the work from the internet in accordance with any conditions so prescribed.

(6) Where this subsection applies to a copy of a work-

(a) no person other than the library is liable in damages, or subject to any criminal liability, for defamation arising out of the doing by a relevant person of an activity listed in section 7(2) in relation to the copy, and

(b) subsections (1) and (2) apply in relation to the doing of an activity in relation to the copy as they apply in relation to the doing of the activity in relation to a copy of a work delivered under section 1.

(7) In this section-

(a) "relevant person" has the same meaning as in section 7;

(b) references to activities listed in section 7(2) are references to those activities whether or not done in relation to relevant material (as defined in section 7);

(c) references to a deposit library include references to the Faculty of Advocates.

(8) The Secretary of State may by regulations provide for this section, as it applies in relation to liability in damages and criminal liability for defamation, to apply in relation to liability (including criminal liability) of any description prescribed in the regulations, subject to such modifications as may be prescribed.

(9) Where this section applies to the doing of an activity in relation to a copy of a work it also applies to the doing of the activity in relation to a copy (at any remove) of that copy.

(10) Nothing in this section imposes liability on any person.
14 Interpretation
In this Act-

"the 1988 Act" means the Copyright, Designs and Patents Act 1988 (c. 48);
"database right" has the meaning given by regulation 13(1) of the Copyright and Rights in Databases Regulations 1997 (S.I. 1997/3032);
"deposit library" means any of the British Library Board and the authorities controlling-
(a) the National Library of Scotland,
(b) the National Library of Wales,
(c) the Bodleian Library, Oxford,
(d) the University Library, Cambridge,
(e) the Library of Trinity College, Dublin;
"electronic publication" means an on line or off line publication including any publication in electronic form (within the meaning given by section 178 of the 1988 Act);
"film" has the meaning given by section 5B of the 1988 Act;
"medium" means any medium of publication, including in particular any form of on line or off line publication;
"prescribed" means prescribed by regulations made by the Secretary of State;
"publication", in relation to a work-
(a) means the issue of copies of the work to the public, and
(b) includes making the work available to the public by means of an electronic retrieval system;
and related expressions are to be interpreted accordingly;
"publication right" has the meaning given by regulation 16(1) of the Copyright and Related Rights Regulations 1996 (S.I. 1996/2967);
"sound recording" has the meaning given by section 5A of the 1988 Act.
APPENDIX 4

COPYRIGHT (LIBRARIANS AND ARCHIVISTS) (COPYING OF COPYRIGHT MATERIAL) REGULATIONS 1989/1212
UK Statutory Instruments Crown Copyright. Reproduced by permission of the Controller of Her Majesty's Stationery Office.

Made: July 14, 1989

Laid before Parliament: July 18, 1989

Coming into force: August 1, 1989

The Secretary of State, in exercise of the powers conferred upon him by sections 37(1), (2) and (4) and 38 to 43 of the Copyright, Designs and Patents Act 1988, hereby makes the following Regulations:-

UK SI 1989/1212 (Refs & Annos)

Reg 1 Citation and commencement
These Regulations may be cited as the Copyright (Librarians and Archivists) (Copying of Copyright Material) Regulations 1989 and shall come into force on 1st August 1989.

Reg 2 Interpretation
In these Regulations-
"the Act" means the Copyright, Designs and Patents Act 1988;
"the archivists" means the archivists of a prescribed archive;
"the librarian" means the librarian of a prescribed library;
"prescribed archive" means an archive of the descriptions specified in paragraph (4) of regulation 3 below;
"prescribed library" means a library of the descriptions specified in paragraphs (1), (2) and (3) of regulation 3 below.

Reg 3 Descriptions of libraries and archives
(1) The descriptions of libraries specified in Part A of Schedule 1 to these Regulations are prescribed for the purposes of section 38 and 39 of the Act:
Provided that any library conducted for profit shall not be a prescribed library for the purposes of those sections.
(2) All libraries in the United Kingdom are prescribed for the purposes of sections 41, 42 and 43 of the Act as libraries the librarians of which may make and supply copies of any material to which those sections relate.
(3) Any library of a description specified in Part A of Schedule 1 to these Regulations which is not conducted for profit and any library of the description specified in Part B of that Schedule which is not conducted for profit are prescribed for the purposes of sections 41 and 42 of the Act as libraries for which copies of any material to which those sections
relate may be made and supplied by the librarian of a prescribed library.

(4) All archives in the United Kingdom are prescribed for the purposes of sections 42 and 43 of the Act as archives which may make and supply copies of any material to which those sections relate and any archive within the United Kingdom which is not conducted for profit is prescribed for the purposes of section 42 of the Act as an archive for which copies of any material to which that section relates may be made and supplied by the archivist of a prescribed archive.

(5) In this regulation "conducted for profit", in relation to a library or archive, means a library or archive which is established or conducted for profit or which forms part of, or is administered by, a body established or conducted for profit.

Reg 4 Copying by librarian of article or part of published work

(1) For the purposes of sections 38 and 39 of the Act the conditions specified in paragraph (2) of this regulation are prescribed as the conditions which must be complied with when the librarian of a prescribed library makes and supplies a copy of any article in a periodical or, as the case may be, of a part of a literary, dramatic or musical work from a published edition to a person requiring the copy.

(2) The prescribed conditions are-

(a) that no copy of any article or any part of a work shall be supplied to the person requiring the same unless-

(i) he satisfies the librarian that he requires the copy for purposes of research for a non-commercial purpose or private study and will not use it for any other purpose; and

(ii) he has delivered to the librarian a declaration in writing, in relation to that article or part of a work, substantially in accordance with Form A in Schedule 2 to these Regulations and signed in the manner therein indicated;

(b) that the librarian is satisfied that the requirement of such person and that of any other person-

(i) are not similar, that is to say, the requirements are not for copies of substantially the same article or part of a work at substantially the same time and for substantially the same purpose; and

(ii) are not related, that is to say, he and that person do not receive instruction to which the article or part of the work is relevant at the same time and place;

(c) that such person is not furnished-

(i) in the case of an article, with more than one copy of the article or more than one article contained in the same issue of a periodical; or

(ii) in the case of a part of a published work, with more than one copy of the same material or with a copy of more than a reasonable proportion of any work; and

(d) that such person is required to pay for the copy a sum not less than the cost (including a contribution to the general expenses of the library) attributable to its production.

(3) Unless the librarian is aware that the signed declaration delivered to him pursuant to paragraph (2)(a)(ii) above is false in a material particular, he may rely on it as to the matter he is required to be satisfied on under paragraph (2)(a)(i) above before making or supplying the copy.

Reg 5 Copying by librarian to supply other libraries
(1) For the purposes of section 41 of the Act the conditions specified in paragraph (2) of this regulation are prescribed as the conditions which must be complied with when the librarian of a prescribed library makes and supplies to another prescribed library a copy of any article in a periodical or, as the case may be, of the whole or part of a published edition of a literary, dramatic or musical work required by that other prescribed library.

(2) The prescribed conditions are-
(a) that the other prescribed library is not furnished with more than one copy of the article or of the whole or part of the published edition; or
(b) that, where the requirements is for a copy of more than one article in the same issue of a periodical, or for a copy of the whole or part of a published edition, the other prescribed library furnishes a written statement to the effect that it is a prescribed library and that it does not know, and could not by reasonable inquiry ascertain, the name and address of a person entitled to authorise the making of the copy; and
(c) that the other prescribed library shall be required to pay for the copy a sum equivalent to but not exceeding the cost (including a contribution to the general expenses of the library) attributable to its production.

Reg 6 Copying by librarian or archivist for the purposes of replacing items in a permanent collection
(1) For the purposes of section 42 of the Act the conditions specified in paragraph (2) of this regulation are prescribed as the conditions which must be complied with before the librarian or, as the case may be, the archivist makes a copy from any item in the permanent collection of the library or archive in order to preserve or replace that item in the permanent collection of that library or archive or in the permanent collection of another prescribed library or archive.

(2) The prescribed conditions are-
(a) that the item in question is an item in the part of the permanent collection maintained by the library or archive wholly or mainly for the purposes of reference on the premises of the library or archive, or is an item in the permanent collection of the library or archive which is available on loan only to other libraries or archives;
(b) that it is not reasonably practicable for the librarian or archivist to purchase a copy of that item to fulfil the purpose under section 42(1)(a) or (b) of the Act;
(c) that the other prescribed library or archive furnishes a written statement to the effect that the item has been lost, destroyed or damaged and that it is not reasonably practicable for it to purchase a copy of that item, and that if a copy is supplied it will only be used to fulfil the purpose under section 42(1)(b) of the Act; and
(d) that the other prescribed library or archive shall be required to pay for the copy a sum equivalent to but not exceeding the cost (including a contribution to the general expenses of the library or archive) attributable to its production.

Reg 7 Copying by librarian or archivist of certain unpublished works
(1) For the purposes of section 43 of the Act the conditions specified in paragraph (2) of this regulation are prescribed as the conditions which must be complied with in the circumstances in which that section applies when the librarian or, as the case may be, the archivist makes and supplies a copy of the whole or part of a literary, dramatic or musical work from a document in the library or archive to a person requiring the copy.
(2) The prescribed conditions are-
(a) that no copy of the whole or part of the work shall be supplied to the person requiring
the same unless-
(i) he satisfies the librarians or archivist that he requires the copy for purposes of
research[ for a non-commercial purpose] [FN1] or private study and will not use it for
any other purpose; and
(ii) he has delivered to the librarian or, as the case may be, the archivist a declaration in
writing, in relation to that work, substantially in accordance with Form B in Schedule 2 to
these Regulations and signed in the manner therein indicated;
(b) that such person is not furnished with more than one copy of the same material; and
(c) that such person is required to pay for the copy a sum not less than the cost (including
a contribution to the general expenses of the library or archive) attributable to its
production.
(3) Unless the librarian or archivist is aware that the signed declaration delivered to him
pursuant to paragraph (2)(a)(ii) above is false in a material particular, he may rely on it as
to the matter he is required to be satisfied on under paragraph (2)(a)(i) above before
making or supplying the copy.

Reg 8 Revocations
The Regulations mentioned in Schedule 3 to these Regulations are hereby revoked.

Signatures

Eric Forth
Parliamentary Under Secretary of State,
Department of Trade and Industry
14th July 1989

SCHEDULE 1

SCHEDULE PART A

Para 1
Any library administered by-
(a) a library authority within the meaning of the Public Libraries and Museums Act 1964
in relation to England and Wales;
(b) a statutory library authority within the meaning of the Public Libraries (Scotland) Act
1955, in relation to Scotland;
(c) an Education and Library Board within the meaning of the Education and Libraries
(Northern Ireland) Order 1986, in relation to Northern Ireland.

Para 2
The British Library, the National Library of Wales, the National Library of Scotland, the
Bodleian Library, Oxford and the University Library, Cambridge.
Para 3
Any library of a school within the meaning of section 174 of the Act and any library of a description of educational establishment specified under that section in the Copyright (Educational Establishments) (No. 2) Order 1989.

Para 4
Any parliamentary library or library administered as part of a government department, including a Northern Ireland department, or as part of the Scottish Administration, or any library conducted for or administered by an agency which is administered by a Minister of the Crown.

Para 5
Any library administered by-
(a) in England and Wales, a local authority within the meaning of the Local Government Act 1972, the Common Council of the City of London or the Council of the Isles of Scilly;
(b) in Scotland, a local authority within the meaning of the Local Government (Scotland) Act 1973;
(c) in Northern Ireland, a district council established under the Local Government Act (Northern Ireland) 1972.

Para 6
Any other library conducted for the purpose of facilitating or encouraging the study of bibliography, education, fine arts, history, languages, law, literature, medicine, music, philosophy, religion, science (including natural and social science) or technology, or administered by any establishment or organisation which is conducted wholly or mainly for such a purpose.

SCHEDULE 1
SCHEDULE PART B

Para 1
Any library outside the United Kingdom which is conducted wholly or mainly for the purpose of facilitating or encouraging the study of bibliography, education, fine arts, history, languages, law, literature, medicine, music, philosophy, religion, science (including natural and social science) or technology.

Sched 2 & 3 omitted

EXPLANATORY NOTE

Para 1
These Regulations revoke and replace the Copyright (Libraries) Regulations 1957, which
were made under the Copyright Act 1956 (c. 74) (now repealed). These Regulations
prescribe the descriptions of libraries and archives which may, subject to the prescribed
conditions, make and supply copies of copyright works to persons for the purposes of
research or private study or to other libraries or archives requiring copies of such works
for reference purposes or to replace lost or damaged items in their permanent collection
where it is not reasonably practicable to purchase the items. A person requesting copies
of copyright works must deliver a signed declaration to the librarian or archivist to the
effect that he requires them for research or private study and, in the case of a request for a
copy of an article in a periodical or of a part of a published work, that his requirement for
the same is not related to any similar requirement of another person.

Regulation 3 prescribes the descriptions of libraries and archives which may be supplied
with copies of material by a prescribed library or archive.

These Regulations also revoke the Copyright (Copying by Librarians and Archivists)
Regulations 1989 (S.I. 1989/1009, as amended by S.I. 1989/1069) (which were defective)
before they came into force.
APPENDIX 5

COPYRIGHT (RECORDING FOR ARCHIVES OF DESIGNATED CLASS OF BROADCASTS AND CABLE PROGRAMMES) (DESIGNATED BODIES) ORDER 1993/74

UK Statutory Instruments Crown Copyright. Reproduced by permission of the Controller of Her Majesty's Stationery Office.

Made: January 18, 1993

Laid before Parliament: January 21, 1993

Coming into force: February 12, 1993

The Secretary of State, in exercise of powers conferred upon him by section 75 of the Copyright, Designs and Patents Act 1988 ("the Act"), and upon being satisfied that the bodies designated by this Order are not established or conducted for profit, hereby makes the following Order:

UK SI 1993/74 (Refs & Annos)

Art 1

This Order may be cited as the Copyright (Recording for Archives of Designated Class of Broadcasts and Cable Programmes) (Designated Bodies) Order 1993 and shall come into force on 12th February 1993

Art 2

Each of the bodies specified in the Schedule to this Order is designated as a body for which a recording of a broadcast [...] [FN1] of the class designated by article 3 below, or a copy thereof, may be made for the purpose of placing the same in any archive maintained by it.

Art 3

All broadcasts other than encrypted transmissions [...] [FN1] are designated as a class for the purposes of section 75 of the Act.

Art 4

The Copyright (Recording for Archives of Designated Class of Broadcasts and Cable Programmes) (Designated Bodies) Order 1991 is hereby revoked.

SCHEDULE 1 DESIGNATED BODIES
Para 1

The British Film Institute
The British Library
The British Medical Association
The British Music Information Centre
The Imperial War Museum
The Music Performance Research Centre
The National Library of Wales
The Scottish Film Council

EXPLANATORY NOTE

Para 1

Section 75 of the Copyright, Designs and Patents Act 1988 provides that copies of broadcasts and cable programmes of a designated class may be made for the purpose of being placed in an archive maintained by a designated body without infringement of copyright. The Copyright (Recording for Archives of Designated Class of Broadcasts and Cable Programmes) (Designated Bodies) Order 1991 designated five bodies and a class of broadcasts and cable programmes for the purposes of that section.

This Order re-enacts that Order and designates the British Medical Association, the British Music Information Centre and the Imperial War Museum as further bodies.
APPENDIX 6

COPYRIGHT (RECORDINGS OF FOLKSONGS FOR ARCHIVES) (DESIGNATED BODIES) ORDER 1989/1012

Made: June 13, 1989

Laid before Parliament: June 26, 1989

Coming into force: August 1, 1989

The Secretary of State, in exercise of the powers conferred upon him by section 61 of the Copyright, Designs and Patents Act 1988 ("the Act"), and upon being satisfied that the bodies designated by this Order are not established or conducted for profit, hereby makes the following Order:-

UK SI 1989/1012 (Refs & Annos)

Art 1

This Order may be cited as the Copyright (Recordings of Folksongs for Archives) (Designated Bodies) Order 1989 and shall come into force on 1st August 1989.

Art 2

Each of the bodies specified in the Schedule to this Order is designated as a body for the purposes of section 61 of the Act.

Art 3

(1) For the purposes of section 61(3) of the Act the conditions specified in paragraph (2) of this article are prescribed as the conditions which must be met for the making and supply, by the archivist of an archive maintained by a body designated by this Order, of a copy of a sound recording made in reliance on section 61(1) of the Act and included in such archive.

(2) The prescribed conditions are:-
(a) that the person requiring a copy satisfies the archivist that he requires it for purposes of research [for a non-commercial purpose ] [FN1] or private study and will not use it for any other purpose, and
(b) that no person is furnished with more than one copy of the same recording.

SCHEDULE 1
Para 1
The Archive of Traditional Welsh Music, University College of North Wales.

Para 2
The Centre for English Cultural Tradition and Language.

Para 3
The Charles Parker Archive Trust (1982).

Para 4
The European Centre for Traditional and Regional Cultures.

Para 5
The Folklore Society.

Para 6
The Institute of Folklore Studies in Britain and Canada.

Para 7
The National Museum of Wales, Welsh Folk Museum.

Para 8
The National Sound Archive, the British Library.

Para 9
The North West Sound Archive.

Para 10
The Sound Archives, British Broadcasting Corporation.

Para 11
Ulster Folk and Transport Museum

Para 12
The Vaughan Williams Memorial Library, English Folk Dance and Song Society.

EXPLANATORY NOTE

This Order designates the bodies for which, subject to the conditions specified in section
61(2) of the Copyright, Designs and Patents Act 1988, sound recordings of performances of songs may be made for the purpose of including the same in archives maintained by them. Article 3 of the Order prescribes the conditions on which copies of such sound recordings may be made and supplied by the archivist to persons requiring them for purposes of research or private study.
**A. Copyright Analysis:**

1. **Does your country’s copyright law, or other law (whether statutory or case law) provide any moral rights such as a “right of withdrawal” that could affect archives’ ability to retain an author’s work?**

United Kingdom copyright law does not provide a right of withdrawal, but it does provide authors and directors with three statutory moral rights, namely, the right to be identified when a work is reproduced (the right of attribution),¹ the right not to be named as the author of a work created by someone else (the right against false attribution),² and the right to prevent derogatory changes being made to a work (the right of integrity).³ Moral rights do have some importance for archivists and librarians, but in order to appreciate the potential significance of these rights in the present context it is important to distinguish between three types of case.

- **Supplying Copies.** One possibility is that an archive or library might be alleged to be infringing such a right by supplying an unattributed / falsely attributed / derogatory

---

² CDPA, s. 84.
³ CDPA ss. 80-83.

* Herchel Smith Professor of Intellectual Property Law, University of Cambridge; Senior Lecturer in Law, King’s College London, and Reader in Law, University of Queensland, respectively. We would like to thank the following people for their help: Toby Bainton (Society of College, National and University Libraries (SCONUL)), Dick Greener (Thomson Publishing Co), Clive Field (British Library), Peter Fox (University of Cambridge), Patricia Killiard (University of Cambridge), Charles Oppenheim (University of Loughborough), Tim Padfield (National Archives) and Chris Rycroft (Oxford University Press).
copy to a reader. In this context it is important to note that the archive and library exceptions (considered in detail in our responses to Phase I of this report) do not provide protection against alleged infringements of moral rights. Consequently, moral rights may have some relevance for archivists and librarians when supplying copies to readers – archivists and librarians ought to take some care to ensure that the author’s name is reproduced when a copy of a work is made, etc. Overall, however, moral rights only have a very limited impact on acts of copying that result in single copies of works being supplied to readers. This is because the statutory moral rights identified typically only apply where there is some public act that communicates the unattributed / derogatory / falsely attributed copy to the public. For example, the author of a literary work has the right to be identified whenever a copy of the work is ‘published commercially, performed in public or communicated to the public’.\(^4\) In contrast, the exceptions that apply to archives in the United Kingdom (described in detail in Phase I) are for the most part limited to providing readers with a single copies of a work for the purposes of private study or non-commercial research, that is, acts of copying that do not fall within the scope of moral rights protection in the UK.\(^5\)

- **Republishing Existing material.** A second possibility is that a library or archive might be alleged to have infringed moral rights when republishing or reutilising copyright material under licence. Here we have in mind, for example, a case where a library enters into an arrangement with newspaper publishers to create a digital on-line archive of newspapers. In such a case, the institution in question ought to take steps to ensure that authors of the underlying material are properly attributed and that the copying is not of a type or a quality that might amount to an infringement of the right of integrity. Generally speaking, however, arrangements of this type raise few issues specific to the archive and

\[^4\] CDPA s. 77(2)(a). Communication to the public is defined in CDPA s. 20 as communication by electronic transmission and includes broadcasting and ‘making available’. It is arguable that the supply of copies in electronic form e.g. by e-mail could be ‘communication to the public’ if the recipient can be regarded as ‘the public.’

\[^5\] The most important exception is where publication of a work created prior to the 1 August 1989 held by an institution and open to public inspection is justified under the transitional provisions that preserve the operation of s 7 of the Copyright Act 1956 (see Phase I for further detail as to the operation of this provision). In such a case the moral rights of the author could play a more important role – generally the same as that in the second category of case considered below.
library context – anyone who republishes material under a licence from the copyright owner(s) must still take steps to avoid infringing a third party’s moral rights. Nevertheless, it might be noted that the rights of attribution and integrity only apply to ‘commercial publication’. Thus, depending on the precise nature of the arrangements in question, in might be possible for an institution to avoid liability even in a case where the right of attribution or integrity would otherwise seem to have been infringed.

- **Where Library Material Itself Infringes.** The first two scenarios outlined above relate to situations in which it is claimed that some new act of copying carried out on behalf of an archive or library amounts to an infringement of one or more moral rights. Consideration should also be given, however, to the potential impact of an earlier breach of moral rights on the work of archivists or librarians. Here we have in mind cases where, for example, an article in a newspaper is found to infringe a third party’s moral rights. Such cases form part of a more general problem faced by archives and libraries, namely, how to deal with material held within a collection that is found by a court to be unlawful, for instance, because it is defamatory. As we explain in detail below, the normal practice in such cases is for the institution concerned to block access to the material under the underlying cause of action has disappeared through passage of time. In the case of moral rights such a strategy would likely be effective to shelter the institution from liability since the delivery up remedy is not available for a breach of moral rights. Care would also have to be taken, however, when entering into the sort of arrangement described in the second scenario (that is, when an archive or library is

---

6 But note that the right against false attribution is not so limited.  
7 Possession of non-attributed material would not involve liability, but possession of a derogatory treatment or a falsely attributed copy might do so were this to be regarded as ‘possession in the course of business’: CDPA s. 83(1)(a), s. 84(5)(a). Both forms of liability are dependent upon the possessor knowing or having reason to believe that the copy has been subjected to derogatory treatment or falsely attributed. Further, the integrity right is only infringed where there is possession in the course of business in circumstances where the person knows that the derogatory copy is likely to be subjected to an act of publication: CDPA s. 83(2)(b). If a library was merely storing the ‘derogatory treatment’ until copyright had lapsed, this provision should be a sufficient shield from liability. With regard to the issue of the possession of falsely attributed copies in the course of business, where the relevant scienter relates just to the falsity of the attribution, there is no such limitation. Liability will turn on whether storage until the lapse of copyright counts as possession in the course of business. Nevertheless, even if such acts are technically civil wrongs, it is very difficult to imagine how a claim to damages might be framed, or that a court would order delivery up. Cf p. 6 below, for a discussion of the potential impact of this remedy on the ability of an archive or library to avoid liability by blocking access to material that is found to infringe copyright.
producing a compilation or collection of materials originally produced by a third party). In such a case it would be prudent to ensure that any material that infringes moral rights was omitted from the collection.

It is also worth emphasising that moral rights receive only limited protection in the United Kingdom. In addition to some of the limitations noted above, it should be noted that moral rights can be waived,\(^8\) they are of limited duration\(^9\) and the right of attribution is only enforceable in cases where the author has taken positive steps to assert her or his rights.\(^{10}\) Moreover, it should be pointed out that moral rights are still a relatively recent introduction to UK law (the rights of attribution and integrity having been introduced in 1989) and it is therefore not surprising that there have not been any judicial decisions in the UK that address the role of moral rights in the archive and library contexts. Nor are we aware of any other disputes regarding the moral rights of authors in this context. There are, however, two other issues arising from UK copyright law to which it is worth drawing attention when considering the liability of an archive or library for failing to remove / continuing to provide access to certain types of material in the face of complaints.

The first issue to which it is worth drawing attention is the effect of one of the provisos to section 43 of the CDPA 1988. Section 43 is arguably the most important of the special exceptions that applies to the work of archives. It was seen in Phase I of this report that section 43 allows archivists to make and supply a copy of an unpublished literary, dramatic or musical work (and accompanying illustrations) held by an archive, subject to a number of further conditions being satisfied. One of these conditions is that the copyright owner must not have prohibited copying of the work.\(^{11}\) This condition is worthy of special note in the present context. It seems that this condition was introduced in recognition of the fact that many of those who deposit unpublished works in an archive wish to restrict copying or access. It is important that the wishes of such people are respected so that others will have the confidence to deposit their own works. Limiting the exception to cases in which consent to copying has not been withheld is thus, broadly

---

\(^8\) CDPA 1988, s 87.
\(^9\) CDPA 1988, s 86: The rights of attribution and integrity last for the life of the author plus seventy years thereafter, the right against false attribution last for twenty years after a person’s death.
\(^{10}\) CDPA 1988, s 78.
\(^{11}\) CDPA 1988, s 43(2)(b).
speaking, justifiable. The Act also seeks to safeguard librarians and archivists since liability will only be imposed if, at the time the copy was made, the librarian or archivist knew or ought to have been aware of the fact that copying had been prohibited (although good practice ought to dictate that the terms of deposit are readily available for consultation by staff making copies). However, linking the restriction on copying to the copyright owner’s consent can produce unfortunate results that Parliament did not envisage.

One consequence of consent being linked to copyright ownership in this way would seem to be that a person who derives title from the person depositing the material can impose restrictions on its use other than those the depositor intended. Most significantly, this creates the danger that future owners will attempt to limit access to material that they believe casts the depositor in a poor light.

Tying the requirement of consent to copyright ownership also means that, in theory at least, if person A deposits her personal papers in an archive and those papers contain letters written by A and letters written to A by B, A can only restrict copying of her letters under this section. A cannot use this section to restrict the copying of B’s letters, for copyright in them vests in B. Only B or B’s successor in title can prohibit copying of letters that she has written. This would not seem to provide adequate protection for A’s interests. In short, therefore, there are circumstances in which the scheme created by the Act would seem to provide insufficient protection for the interests of either the depositor or the public.12

The second issue to which it is worth drawing attention is the potential impact in this context of the limited right to privacy in photographs and films contained in section 85 of the CDPA 1988. This right will only rarely impact upon the work of archives and libraries, primarily because the right in question only applies to a limited range of photographs and films, namely, photographs and films that were ‘commissioned’ for ‘private and domestic purposes’. Nevertheless, there might be cases in which photographs or films falling within this section might find their way into an archive. In such a case an archive that obtained permission from the copyright owner to reproduce

---

the material in a published collection or electronically might unwittingly find that it has breached a third party’s right to privacy under the 1988 Act. Particular problems might arise in cases where original photographs are placed on public display – in such a case it might not occur to the organisers that any permission under the 1988 Act would be required, since in the UK artistic copyright does not provide any right to control public exhibition of a work.13

2. Please update the copyright analysis you did last year in connection with the Phase I questionnaire. In particular, have there been any new judicial decisions, legislation or regulations relevant to your earlier analysis?

No relevant legislation or regulations have been enacted since Phase I of this report was completed. Perhaps most surprisingly, we are still awaiting regulations under the Legal Deposit Libraries Act 2003. It will be remembered that this Act was designed to protect the position of the six UK ‘legal deposit’ or ‘copyright’ libraries in the face of the move to non-print forms of publication. Most significantly, the 2003 Act introduced a new section into the Copyright, Designs and Patents Act that allows a person acting on behalf of a deposit library to copy works made available online without infringing copyright.14 However, in order for this exception to apply, the copying in question has to comply with regulations made under the 2003 Act. Since, at the time of writing, no regulations under this section have been made the power to copy material cannot, as yet, be exercised. This means that, as yet, it is not lawful to copy for preservation purposes material made available online, despite the fact that Parliament clearly intended that this power would be available, albeit only to a limited range of institutions.15

There have no relevant copyright or moral rights cases handed down in the period since Phase I. It is also worth noting that the more extensive survey of the experiences of librarians and archivists that was conducted for this Phase of the report failed to reveal any examples of archives or libraries being threatened with legal action over a copyright

13 CDPA 1988, s 19.
14 CDPA 1988, s 44A.
15 The Libraries Minister, Andrew McIntosh, announced the commencement of a consultation process to establishing an advisory panel for legal deposit libraries on the 24th November, 2004. Membership of the panel was announced on 1st September 2005 and meetings of the panel have now commenced.
or moral rights dispute. It is perhaps worth mentioning, however, that one respondent noted that were such a dispute to arise, in his view institutions would generally seek to block access to the offending item, rather than removing it permanently from their collections, on the basis that copyright will eventually expire.16 This would amount to an extension of the normal practice in cases where material is alleged to be defamatory, where it seems that the usual approach is to block access to material until the person libelled has died.17 One potential obstacle to such a course of action is that in copyright matters the owner of the copyright in a work which has been infringed may apply to the court for an order that the infringing copy or articles be delivered up to him or to such other person as the court may direct.18 But whether an order for delivery up would ever be made against an archive or library is open to doubt: first, because such orders are always discretionary; and secondly, because it is unclear whether a court would be entitled to grant such an order against an archive or library at all – in order for such an order to be made the copy must possessed ‘in the course of business’,19 language which may or may not be sufficient to cover a copy held by a library or archive.20

B. Tortious Liability For Offending Material In Archives

3. Could you briefly summarize the bodies of law (other than copyright and related rights) that may be relevant to decisions by publishers or libraries/archives to remove materials from archival collections or databases (e.g., libel/defamation, privacy, censorship/national security).

The primary relevant area is defamation, where liability arises when material tending to expose a claimant to hatred, ridicule or contempt is published by the defendant to a third

---

16 Email correspondence with Professor Charles Oppenheim, October 2005.
17 See page 15 below.
19 CDPA 1988, s 99(1)(a).
20 The meaning of these words has yet to be judicially considered in this context. At first glance these words might well seem inapt to cover copies held by institutions such as libraries and archives. However, the Act goes on to make it clear (in s 178) that ‘in the course of business’ includes a copy held in the course of ‘a trade or profession’ and, perhaps more importantly, s 99 of the CDPA 1988 can be contrasted with the delivery up provision that applies to design rights, contained in s 230 of the same Act, which applies to copies held for ‘commercial purposes’, perhaps suggesting that ‘in the course of business’ needs to be given a broader interpretation than ‘for the purposes of commerce’.
party. If the matter published is in writing – such as a book – or other permanent form, it falls under the category of libel\textsuperscript{21}. Liability for libel does not require a claimant to prove damage arising from the publication – damage is presumed, and will be assessed by the judge or, if there is one, the jury, at the trial. There is also no requirement of fault\textsuperscript{22}: the defendant is liable whether or not he took reasonable steps to check if the material contained a defamatory implication, or if it referred to the claimant.

Various defences are available. First, if the defendant proves that the matter was true in substance, he has a complete defence. The burden of proof lies on the defendant. Second, if the defamatory matter expresses an opinion on a matter of public interest, a defence may arise if three further criteria are satisfied. First, the comment must make clear what its factual foundations are\textsuperscript{23}. Second, the comment must be ‘fair’, in the sense that it expresses a view that a person might legitimately form given the factual basis. Third, there must be no malice in the defendant. ‘Malice’ means that the defendant’s dominant motive was to injure the claimant\textsuperscript{24}.

A third possible defence is qualified privilege. This arises where the defendant either had a duty to speak, or an interest to protect by speaking, and the third party had a corresponding duty to receive, or interest in receiving, the communication.\textsuperscript{25} For instance, an employer giving a reference about one of his employees to a prospective new employer would be protected. Qualified privilege, like fair comment, is lost if the claimant proves malice; malice has the same sense as it does in fair comment.

Finally, there are a range of more specific, specialised defences. Absolute privilege prevents any liability in defamation arising from statements made by representatives in Parliament, or by the participants in litigation. It also extends to fair and accurate reports of most domestic legal proceedings. Qualified privilege has been extended by statute (the Defamation Act 1996) to other reports – for instance, of company shareholders’ meetings.

The remedies for defamation are injunction or damages. Injunctions may prevent publication before trial, but only if the allegation is clearly defamatory, and the defendant

\textsuperscript{21} Thorley \textit{v. Lord Kerry} (1812) 4 Taunt 355.
\textsuperscript{23} \textit{Kemsley v. Foot} [1952] AC 345.
\textsuperscript{24} \textit{Horrocks v. Lowe} [1975] AC 135.
\textsuperscript{25} \textit{Toogood v.Spyring} (1834) 1 C M & R 181.
offers no defence\textsuperscript{26}. More commonly, they are used to restrain further publication of a matter for which liability has been established. Damages aim to compensate the claimant for harm to his reputation, but may be increased if the defendant’s conduct has been particularly offensive. And where a defendant has calculated that the libel will make a net profit, after the payment of compensatory damages, additional, punitive, damages can be awarded to show the tortfeasor that ‘tort does not pay’\textsuperscript{27}.

Other potential tortious liabilities include invasion of privacy, negligence, the Consumer Protection Act 1987 and deceit. The law relating to invasion of privacy has only emerged recently, as an expansion of the tort of breach of confidence. It is still developing. Although the case law has not dealt with the position of archives, they would appear to fall within the emerging general principles of liability. In particular, the essence of the tort is now simply the disclosure of confidential information. Confidentiality is assessed objectively, and it is no longer necessary to show a prior relationship of confidence owed by the defendant to the claimant\textsuperscript{28}.

Liability in negligence requires a duty of care to be breached, causing actionable damage. These requirements are unlikely to be satisfied where an archive has supplied material to a reader. In the unlikely event that the material caused physical harm (for instance, by giving incorrect instructions about how to prepare food), it is difficult to see how the archive could have breached the standard of reasonable care by simply passing on what someone else had written. If the information led to purely financial loss, a claimant would find it very difficult to establish a duty of care at all. He would be required to show that the archive had assumed responsibility to him\textsuperscript{29}, and it is difficult to see how, in the ordinary course of things, an archive could be said to have done so.

The Consumer Protection Act 1987 imposes liability on the producer of defective products that cause injury to consumers\textsuperscript{30}. The publisher of a book could be regarded as a producer and, for instance, would clearly be liable if the paper used caused dermatitis when touched by readers. Whether a book would be a defective product if it gave incorrect instructions about, for example, food preparation, is more difficult, and there is

\textsuperscript{26} Bonnard v. Perryman [1891] 2 Ch 269.
\textsuperscript{27} Rookes v. Barnard [1964] AC 1129, ???.
\textsuperscript{28} Campbell v MGN [2004] 2 All ER 995.
\textsuperscript{29} Hedley Byrne & Co Ltd v. Heller & Partners Ltd [1964] AC 465.
\textsuperscript{30} Consumer Protection Act 1987 s.1.
no case law. It has been suggested that, in the light of US and French law on the point, liability would be unlikely.\footnote{Simon Whittaker, ‘European Product Liability and Intellectual Products’ (1989) 105 LQR 125.}

Deceit requires a fraudulent statement intended to cause loss to the claimant; the defendant is liable if the claimant suffers loss as a result. Fraud has been interpreted to mean knowledge of, or recklessness as to, falsity by the defendant\footnote{\textit{Derry v. Peek} (1889) 14 App Cas 337.}, which is unlikely where the statement has been made by an archive.

Criminal liability for disclosing secret government documents is imposed under Official Secrets Act 1989. Section 5 makes it an offence for any person outside government receiving secret information to disclose it “without lawful authority, knowing, or having reasonable cause to believe, that it is protected against disclosure”\footnote{Official Secrets Act 1989 s5(2).}, and knowing or having reasonable cause to believe that it has been disclosed to him without lawful authority. For some types of secret information there is the further requirement that the disclosure be damaging, and that the accused either knew or had reasonable cause to believe that it would be damaging\footnote{Official Secrets Act 1989 s5(3).}. The section has been little used\footnote{See further Robertson and Nicol, \textit{Media Law} 4\textsuperscript{th} edn (London: Penguin, 2002) 553-568.}, and it is unlikely that, even assuming that an archive received the information without lawful authority, it would satisfy the mental element of the offence.

There are also criminal offences relating to obscenity, blasphemy and racial hatred. Under Obscene Publications Act 1959 s. 1, it is an offence to publish an obscene article. The definition of obscenity is that the ‘effect’ of the article is ‘such as to tend to deprave and corrupt persons who are likely, in all the circumstances, to read, see or hear the matter contained or embodied within it.’ Section 4 provides a defence where publication ‘is justified as being for the public good’, which, for books and magazines, means ‘in the interests of science, literature, art or learning, or other objects of general concern.’\footnote{See further ibid. 155-178.} The common law offence of blasphemy, which is very rarely invoked, applies to outrageous, vilifying remarks about Christianity. The key racial hatred offence is contained in Public Order Act 1986 s.19, which makes it an offence to publish
threatening, abusive or insulting material either with an intention to provoke racial hatred, or in circumstances where hatred is likely to be stirred up.\textsuperscript{37}

4. Are there judicial decisions addressing publishers’ or archives’ liability with respect to allegedly offending material contained in the archives’ collections?

Yes. All the relevant cases relate to the tort of defamation.

a. What, if any, distinctions do courts articulate between the roles of publishers and of archives?

In the English cases and statutes the word “publisher” can have two distinct meanings. The first refers to a person whose business it is to produce books or other literature. The second, more technical meaning, denotes a person who has communicated defamatory matter to another person. In this second sense, an archive supplying a reader with defamatory matter is a publisher.

Taking “publisher” in the question to have the sense of a professional producer of literature, the basic requirements of English law do not distinguish between a publisher and an archive. All that is required is for the defendant to be “a party” to the communication of defamatory matter\textsuperscript{38}. The precise role of the defendant is irrelevant – he may be the author, editor, publisher, distributor, or even have designed the dust jacket for a defamatory book.

However, Defamation Act 1996 s.1 provides a possible defence for those only peripherally involved in the communication. It provides:

\begin{quote}
\textbf{s 1 Responsibility for publication.}
(1) In defamation proceedings a person has a defence if he shows that--
(a) he was not the author, editor or publisher of the statement complained of,
(b) he took reasonable care in relation to its publication, and
(c) he did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement.
(2) For this purpose "author", "editor" and "publisher" have the following meanings, which are further explained in subsection (3)--
"author" means the originator of the statement, but does not include a person who did not intend that his statement be published at all;
"editor" means a person having editorial or equivalent responsibility for the
\end{quote}

\textsuperscript{37} See further, ibid. 217-221.
\textsuperscript{38} \textit{Marchant v. Ford} [1936] 2 All ER 1510.
content of the statement or the decision to publish it; and
"publisher" means a commercial publisher, that is, a person whose business is
issuing material to the public, or a section of the public, who issues material
containing the statement in the course of that business.
(3) A person shall not be considered the author, editor or publisher of a
statement if he is only involved--
(a) in printing, producing, distributing or selling printed material containing
the statement;
(b) in processing, making copies of, distributing, exhibiting or selling a film
or sound recording (as defined in Part I of the Copyright, Designs and Patents
Act 1988) containing the statement;
(c) in processing, making copies of, distributing or selling any electronic
medium in or on which the statement is recorded, or in operating or providing
any equipment, system or service by means of which the statement is
retrieved, copied, distributed or made available in electronic form;
(d) as the broadcaster of a live programme containing the statement in
circumstances in which he has no effective control over the maker of the
statement;
(e) as the operator of or provider of access to a communications system by
means of which the statement is transmitted, or made available, by a person
over whom he has no effective control.
In a case not within paragraphs (a) to (e) the court may have regard to those
provisions by way of analogy in deciding whether a person is to be
considered the author, editor or publisher of a statement.
(4) Employees or agents of an author, editor or publisher are in the same
position as their employer or principal to the extent that they are responsible
for the content of the statement or the decision to publish it.
(5) In determining for the purposes of this section whether a person took
reasonable care, or had reason to believe that what he did caused or
contributed to the publication of a defamatory statement, regard shall be had to--
(a) the extent of his responsibility for the content of the statement or the
decision to publish it,
(b) the nature or circumstances of the publication, and
(c) the previous conduct or character of the author, editor or publisher.

The detailed application of this defence is considered below. As has been judicially
noted, the scope of the defence is a “relatively untrodden”39 area of law.

b. According to these decisions or other laws of your country, does the publisher’s
liability depend on the extent to which the publisher exercises control over the
contents and maintenance of the archive?

---

No. The publisher cannot invoke the statutory defence since under s1(1)(a) the defence applies only to those who are “not the author, editor or publisher”.

c. According to these decisions or other laws of your country, does the archives’ liability depend on the extent to which it controls the acquisition and maintenance of the offending material?

Yes. The extent of control over the acquisition and maintenance of material will determine whether the archive can invoke the defence given by Defamation Act 1996 s.1.

First, the selection of what is to be published could lead to the archive being seen as an editor. In particular it should be noted that, under the statutory definition, an “editor” is not limited to a person who shapes the form of the statement, but also includes a person with “editorial or equivalent responsibility for … the decision to publish [the defamatory statement]” (emphasis added).

Second, the more active the archive’s role, the more likely it is to come within the statutory definition of “publisher”, i.e. “a commercial publisher, that is, a person whose business it is to issue material to the public, or a section of the public” (emphasis added). Thus, the Law Commission has suggested that an Internet service that compiles and selects reports on particular topics for distribution to subscribers should be regarded as a commercial publisher, and therefore could not invoke the statutory defence (emphasis added). An archive where material was compiled and arranged by subject would appear to be covered by the same analysis.

Assuming that an archive is not an editor or publisher, it may be able to invoke the statutory defence provided that it did not know that it was distributing a defamatory statement and “took reasonable care” (emphasis added). To satisfy this test some degree of monitoring or control of the material is essential. So is an awareness of the track record of the authors, editors and publishers concerned (emphasis added). Some indication as to what detailed steps should be taken to satisfy the reasonable care test can be found in the earlier authorities, on which

---

40 Defamation Act 1996 s1(2).
41 Defamation Act 1996 s1(2).
43 Defamation Act 1996 s1(1)(b).
44 Defamation Act 1996 s1(5)(c).

E-II-13
the statutory section was based\textsuperscript{45}. For instance, the defendant should check trade publications for information about defamatory works\textsuperscript{46}, and should have some system in place for removing defamatory statements efficiently\textsuperscript{47}.

One particularly difficult question, on which the English authorities are inconclusive, is whether certain titles are so inherently scurrilous that it would be negligent to handle them at all without first checking for libels. In\textit{ Emmens v. Pottle}\textsuperscript{48} Bowen LJ suggested that there might be such titles when he said, “I by no means intend to say that the vendor of a newspaper will not be responsible for a libel contained in it if he knows, or ought to know, that the paper is one which is likely to contain a libel”\textsuperscript{49}. In\textit{ Goldsmith v. Sperrings Ltd}\textsuperscript{50}, however, Lord Denning MR took a more ambivalent view. He appeared to acknowledge that there were “some publications which are so bad – so prone to libel anyone without just cause or excuse – that no distributor should handle them; or at any rate should only do so at his peril”\textsuperscript{51}. However, he continued, “very strong evidence”\textsuperscript{52} would be needed to establish that fact. Slightly later in his judgment Lord Denning MR perhaps went further when he said that, “Even though a publication may be contentious and controversial even though it may be scurrilous and give offence to many – it is not to be banned on that account”\textsuperscript{53}. The other two members of the Court of Appeal did not discuss this point. Clearly if there are such titles, any archive proposing to store and distribute them faces lengthy and expensive legal checking procedures in order to avoid liability.

d. Does liability depend on the extent to which the archive makes the material accessible to the public?

Yes. The extent of accessibility would influence the availability of the defence of qualified privilege. This defence arises where it is proved that the defendant and the

\textsuperscript{46} \textit{Vizetelly v. Mudie's Select Library Ltd} [1900] 2 KB 170.
\textsuperscript{47} \textit{Sun Life Assurance Company of Canada v. WH Smith and Son Limited} (1933) 150 LT 211.
\textsuperscript{48} (1885) 16 QBD 354.
\textsuperscript{49} Ibid at 358.
\textsuperscript{50} [1977] 1 WLR 478.
\textsuperscript{51} Ibid. at 488.
\textsuperscript{52} Ibid.
\textsuperscript{53} Ibid.
recipient had mutual duties and interests to make and receive the communication. Proof of malice in the defendant destroys the defence, but in the ordinary course of things it is unlikely that an archive will be actuated by some dominant improper motive54.

Duties and interests are not confined to legal duties or financial interests. The court asks whether, in the situation before it, an ordinary reasonable person would recognise the necessary mutual duties or interests55. One application of the test that might be particularly relevant to archives is where one employee makes a communication to another employee of the same company in order to further the company’s business. There the Court of Appeal has held that the necessary mutual interests were present so as to give rise to a defence of qualified privilege56. The same analysis would seem to be obviously applicable to communications by a university archive to a university professor for the purposes of research.

Whether publication to the public at large could give rise to a defence of qualified privilege is doubtful. Traditionally the courts have been very reluctant to recognise duties or interests to communicate matter indiscriminately. Recently, however, the position has been modified by the House of Lords’ decision in Reynolds v. Times Newspapers Ltd57. There the defendants had published a newspaper story alleging that the claimant, a former Irish Prime Minister, had deliberately misled the Irish Parliament. The House of Lords held that a defence of qualified privilege could be available in circumstances like these, although on the facts of the case the defence was not established.

Their Lordships held that the principle to apply was identical to the principle for other types of qualified privilege – namely, whether there was a mutual relationship of duty or interest between the defendant and the recipients. But the House of Lords set out new tests for identifying such a relationship where the defamatory allegations were published in newspapers. The status of the claimant as a public figure was not determinative. Rather, all the circumstances had to be taken into account in deciding whether the defendant’s had met the standards of responsible journalism. Factors to be considered included, but were not limited to:

57 [2001] 2 AC 127.
1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.
2. The nature of the information, and the extent to which the subject matter is a matter of public concern.
3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.
4. The steps taken to verify the information.
5. The status of the information. The allegation may have already been the subject of an investigation which commands respect.
6. The urgency of the matter. News is often a perishable commodity.
7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.
8. Whether the article contained the gist of the plaintiff’s side of the story.
9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.
10. The circumstances of the publication, including the timing.\(^{58}\)

On the facts the newspaper had not succeeded in satisfying the test, because it had published an allegation by one of the claimant’s political opponents, without giving the claimant the chance to respond and the article did not, therefore, contain the claimant’s side of the story.

As can be seen, the focus of their Lordships’ attention was on the reporting of current affairs and responsible journalism. It is difficult, and probably misguided, to seek to deduce a general principle from the decision.\(^{59}\) Furthermore, the Court of Appeal has indicated that the policy reasons behind the development of the law in *Reynolds* are not so convincing for archives:

We accept that the maintenance of archives, whether in hard copy or on the Internet, has a social utility, but consider that the maintenance of archives is a

---

\(^{58}\) [1999] 3 WLR 1010, 1027 (per Lord Nicholls).

comparatively insignificant aspect of freedom of expression. Archive material is stale news and its publication cannot rank in importance with the dissemination of contemporary material.\footnote{Loutchansky v. Times Newspapers Ltd (Nos. 4 and 5) [2002] 2 WLR 640 at 665.}

It would appear, therefore, that limited accessibility is a prerequisite if an archive wishes to rely on qualified privilege\footnote{See also Vassiliev v Amazon.com Inc [2003] EWHC 2302 where it was observed at [14] that whether a publisher of an academic journal owed a social or moral duty to its readership in publishing a critical book review raised “considerations separate from those relevant to whether Amazon [the Internet bookseller, on whose website a defamatory review had been posted] was under such a duty, although no doubt there would be a degree of overlap”.}

If a publisher withdrew a particular item, and the archive made a decision to persevere in publishing its own back-up copy to readers, in our view it would be likely to fall outside the test in Defamation Act 1996 s.1. We would emphasise the statutory definition of editors, who are not protected, which refers to having ‘responsibility for the … decision to publish’. We do not think that legends would affect the status of the archive as a publisher. Legends might, however, help an archive to satisfy the requirements set out in \textit{Loutchansky} for qualified privilege.

e. Have the courts in your country imposed remedies against publishers who did not remove material containing allegedly offending material from archives over which they maintained control? If so, what type of remedies were imposed and under what circumstances?

Yes. In \textit{The Duke of Brunswick and Luneburg v. Harmer}\footnote{(1849) 14 QB 185.} the claimant sued successfully for allegations in a back issue of a newspaper purchased from the defendant publisher’s shop. In \textit{Loutchansky v. Times Newspapers Ltd}\footnote{[2002] 2 WLR 640.} the publication was in the form of the defendant’s electronic archive. The Court of Appeal held that the ordinary rules of limitation applied, so that a new cause of action arose each time the defamatory article was accessed. It also held that no defence of qualified privilege under \textit{Reynolds} was available, because the defendant had failed to act in accordance with standards of responsible journalism. Responsible journalism required the defendant to draw readers’
attention to the fact that the truth of the articles was “hotly contested” by the claimant, who had already brought an action in respect of the first appearance of the article in the defendant’s newspaper. In both cases the remedy sought was damages\(^64\).

**f. Have courts in your country imposed remedies against archives that retain or make available this material? If so, what type of remedies were imposed and under what circumstances?**

Yes, although actions against libraries are uncommon\(^65\). In *Vizetelly v. Mudie’s Select Library Limited*\(^66\) a lending library was held liable for circulating a defamatory book. The negligence consisted in failing to be aware of advertisements placed by the book’s publisher in the *Publishers’ Gazette* (a trade newspaper) and the *Athaeneum* (“a well-known medium of communication among literary people”\(^67\)). The advertisements had stated that the allegations made against the claimant in the book were untrue. In both cases the remedy was damages.

By contrast, in *Martin v The Trustees of the British Museum*\(^68\), an action was brought for giving readers in the British Museum’s library copies of pamphlets defaming the claimant, which the Museum had acquired under its general statutory powers to acquire books. Although the jury found that the defendants had not discharged their duties with proper care, the court entered a verdict for the defendants, saying that the jury’s finding was against the evidence. Pollock B emphasised the ‘vast public duty cast on the trustees to receive all books sent and purchase others’, and referred to the provisions of the Copyright Act (26 Geo. II), which, he said, showed that ‘the books were to be seen by all persons, and the student, the learned, and the curious were to have free access to them’\(^69\).

\(^{65}\) Law Commission, *Defamation and the Internet; A Preliminary Investigation* (London, 2002) at 3.15.  
\(^{66}\) [1900] 2 KB 170.  
\(^{67}\) Ibid. at 171.  
\(^{68}\) (1894) 10 Times LR 338.  
\(^{69}\) Ibid, 339.
5. Have litigants agreed to settlements that would affect the contents, maintenance, or public accessibility of material contained in archives? If so, what types of settlements have been reached and under what circumstances?

Distributors are often seen as soft targets for defamation actions, as they have no professional pride or interests at stake in contesting an action, and are also unlikely to have the materials to mount a defence. Furthermore, the statutory defence for distributors depends upon the defendant not knowing that he is contributing to the publication of defamatory material. As soon as a defendant is made aware that he is so contributing - when, for instance, the claimant’s solicitor writes him a letter informing him of that fact - the defence is lost. In one instance such a communication from a firm of solicitors notorious for its uncompromising letters prompted an Internet service provider to remove material from a website immediately.

The consequences of distributors’ vulnerability to defamation actions are particularly important in electronic publishing. The Law Commission recently highlighted that Internet service providers receive frequent complaints concerning material on their websites that has been written and posted by third parties. One service provider reported ten complaints a month. The standard response of the service provider is to close the site to avoid an action. Many complaints seem to come from companies, which might well indicate particular difficulties for an archive carrying business materials.

Defendants often insist on confidentiality as a term of any settlement, so reports of the terms on which individual actions have been discontinued are rare. However, one famous example can be highlighted. In Aldington v. Tolstoy a pamphlet circulated privately had accused Lord Aldington of complicity in war crimes. A jury awarded record

---

70 Report of the Committee on Defamation (Cmnd. 5909, 1975) at para 296.
71 Defamation Act 1996 s1(1)(c).
72 Peter Carter Ruck & Co. An obituary notice for Peter Carter-Ruck began: “To the libel lawyer Peter Carter-Ruck … the author and the editor were the meat and he was the tiger. His letters ruined the breakfast of many a publisher, as they were designed to do. There was about them none of the leisurely, contemplative to-ing and fro-ing that other solicitors adopted.” (James Morton, The Guardian, 22nd December 2003).
73 Private Eye, 1st May 1998, “Internet providers beware: Carter Fuck and Co. the celebrated libel lawyers are on to you”.
74 Law Commission, Defamation and the Internet; A Preliminary Investigation (London, 2002) at 2.28.
75 Ibid. at 2.30.
76 High Court, 30th November 1986.
damages (£1,500,000). The pamphlet was based on book by the same author, *The Minister and the Massacres*[^77]. The claimant’s solicitor, Allen & Overy, despatched letters to libraries giving the impression that the action had been brought in relation to the book, and that any library that continued to loan out the book would expose itself to similar liability. The letter concluded by requesting that all copies of the book be withdrawn. Most libraries that received Allen & Overy’s letter capitulated[^78]. Today it remains impossible to borrow a copy – although, strangely, it is easy to buy one[^79] – despite the fact that Lord Aldington is now dead[^80], and no liability could arise. The Bodleian Library online catalogue, for instance, gives a shelfmark and then states “Not available to be read”. Here archives’ perceptions of what they ought to make available has placed greater limits on accessibility than the legal rules required.

6. Have publishers, aggregators or archives in your country sought to avoid potential liability by removing allegedly offending material, without waiting to be notified (or sued) by persons claiming to be injured by the material? If so, under what circumstances?

Our inquiries among librarians and archivists revealed only one instance of offending material being removed before a complaint was made. The offending material was a letter defamatory of a living scientist, contained in a correspondence donated to the library of a learned society. Generally, however, it seems that librarians and archivists do not take steps to identify potential future legal liability. Indeed, where an archive is constantly acquiring vast amounts of material – the British Library, for instance, acquires about 2,500,000 items per annum - any attempt to monitor its factual accuracy is impossible. As one respondent commented, “few librarians actively scan the law reports … [they] tend to be reactive”. Although the same respondent felt that this approach was “risky”, there was also a different view expressed, namely, that the importance of maintaining public access to the materials in question required that they should not be removed or withdrawn until the legal position was conclusively established. This concern to maintain access was also

[^79]: Two online booksellers sought to pique buyers’ interest by describing the book as “banned” and “withdrawn from British libraries”. (Advertisements on www.abebooks.com, visited August 2004.)
[^80]: For an obituary notice see *The Guardian*, 9th December 2000.
emphasised by one respondent in describing an incident in 1998. Police had seized a book of photographs by the late Robert Mapplethorpe from a university library, alleging that it contravened the Obscene Publications Act; other libraries “vowed to keep their copies of the book on their shelves regardless of the police action”. A more cautious variation of this approach was evident in an account we were given of how a library dealt with a complaint that one of its books was anti-semitic. The complaint alleged that the book in question had been the subject of a criminal prosecution\(^{81}\), and the library’s first step was to check whether this claim was correct. On finding that it was incorrect, the library decided to retain access to the book.

7. What is the potential liability in your country for publication of allegedly offending material?

The publisher of defamatory material is liable to pay damages (assessed by either a judge or a jury) to reflect the damage to the claimant’s reputation done by the publication. The claimant does not need to prove any loss; although, if he does show some substantial damage resulting from the publication, this can be recovered in addition, as special damages. An injunction may also be available, to prevent future publication. There is no remedy of recalling offending material.

a. Is there any statutory or case law in your country for reducing damages in the case of nonprofit libraries or archives acting in good faith? & b. What factors do courts in your country use in assessing damages?

There are no authorities dealing with the specific issue of damages payable by nonprofit libraries or archives acting in good faith. But the general principle for assessing defamation damages is that the entirety of the defendant’s conduct can be taken into account, including his good faith\(^{82}\). Other relevant factors include the nature of the allegation, the extent of publication and the claimant’s pre-existing reputation. Exemplary damages for defamation can only be awarded where the defendant has made a cynical calculation that the gain from publication will outweigh any damages awarded.

\(^{81}\) Publishing the book might have been an offence under Public Order Act 1986 s.19 (see above, answer to Q.1 for more detail).

\(^{82}\) Bryce v Rusden (1886) 2 TLR 435.
8. Are there any industry standards or accepted practices in your country, other than withdrawal of an article, for addressing offending material contained in an archive or database? For example, are there any practices concerning legends or disclaimers to accompany offending material in order to continue to make it available?

The industry standard seems to be not to withdraw an article, but rather to block access to it until the material ceases to be offending (for instance, by the death of a potential libel claimant).

A very clear indication of the effectiveness of warnings was given by the Court of Appeal in *Loutchansky v Times Newspapers Ltd*[^83][^84], a case well-known in the library community. There it was said that:

> Where it is known that archive material is or may be defamatory, the attachment of an appropriate notice warning against treating it as the truth will normally remove any sting from the material.^[84]

In other words, an archive attaching a warning to the material would not be liable, since the warning would neutralise the defamatory sense of the offending material. A warning would also be relevant to a defence of qualified privilege. A publication is protected by qualified privilege only if there is a reciprocal duty or interest in its publication. Where the publication is to the public at large, the court identifies the necessary duties or interests by applying a test of “responsible journalism”^[85]. It falls below the standards of responsible journalism to republish material in an archive without drawing to readers’ attention that its truth was contested.^[86]

### C. CONTRACT ANALYSIS

9. Do contract provisions between archives and publishers in your country commonly address the issue of removing a work from the collection? If so, how do

[^84]: Ibid at 665.
[^85]: *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127.
[^86]: [2002] 2 WLR 640 at 666.
they do so? Do they address labelling, hyperlinking or any other means of dealing with the offending material than removing it?

The Joint Information Systems Committee (JISC) of the various UK funding councils (including the Higher Educational Funding Council) has developed ‘model licences’ to be used as a starting point in negotiations between publishers and higher education institutions, including university libraries. The current models cover the acquisition for use within these institutions of electronic information resources, such as datasets and e-books. The JISC Model Licence for datasets deals with the removal of offending material in clause 11.4:

The Licensee agrees to notify the Licensor immediately and provide full particulars in the event that it becomes aware of any actual or threatened claims by any third party in connection with any works contained in the Licensed Work. It is expressly agreed that upon such notification, or if the Licensor becomes aware of such a claim from other sources, the Licensor may remove such work(s) from the Licensed Work. If the Licensor decides to remove such work(s) from the Licensed Work, the Licensee agrees to remove such work(s) from the Licensed Work on its Secure Network and to notify any designated third parties that they must do the same. Failure to report knowledge of any actual or threatened claim by any third party shall be deemed a material breach of this Agreement.

10. To what extent might a publisher avoid liability related to the offending material through its contractual arrangements with a library or archives in your country?

A contract might validly seek to exclude liability for the accuracy of the information supplied. For example, the JISC Model Licence for datasets provides in clause 11.2 that:

While the Licensor has no reason to believe that there are any inaccuracies or defects in the information contained in the Licensed Work, the Licensor makes no representation and gives no warranty express or implied with regard to the information contained in any part of the Licensed Work including (without limitation) the fitness of such information or part for any purposes whatsoever and the Licensor accepts no liability for loss suffered or incurred by the Licensee, Authorised Institutions or Authorised Users as a result of their reliance on the Licensed Work.

A publisher might also include a contractual term indemnifying him against liability for publication by the archive or library. Such an indemnity, validly agreed to, would be enforceable – it would not come within the ambit of either the Unfair Contract Terms Act
1977\textsuperscript{87} or the Unfair Terms in Consumer Contracts Regulations 1999. However, it is interesting to note that the JISC Model Licence provisions do not contain such an indemnity. In fact, as regards liability for infringements of intellectual property rights, under the JISC Model Licence the publisher agrees to indemnify the Licensee for liabilities resulting from any infringements of the intellectual property rights of third parties that result from using the dataset in accordance with the terms of the Licence. The licence provides in clause 11.1:

```
The Licensor warrants to the Licensee that the Licensed Work and all Intellectual Property Rights therein are owned by or licensed to the Licensor and that the Licensed Work used as contemplated in this Agreement and the Sub-Licence Agreement do not infringe any copyright or other proprietary or Intellectual Property Rights of any natural or legal person. The Licensor agrees that the Licensee shall have no liability and the Licensor will indemnify, defend and hold the Licensee harmless against any and all damages, liabilities, claims, causes of action, legal fees and costs incurred by the Licensee or Authorised Institutions in defending against any third party claim of Intellectual Property Rights infringements or threats of claims thereof with respect of the Licensee's, an Authorised Institution's or an Authorised User’s use of the Licensed Work, provided that: (1) the use of the Licensed Work has been in full compliance with the terms and conditions of this Agreement and the Sub-Licence Agreement as applicable; (2) the Licensee and Authorised Institution(s) provide the Licensor with prompt notice of any such claim or threat of claim; (3) the Licensee co-operates fully with the Licensor in the defence or settlement of such claim; and (4) the Licensor has sole and complete control over the defence or settlement of such claim.
```

3. Have courts in your country enforced contractual obligations to remove or withdraw archived material? If so, under what circumstances?

There have been no cases where contractual obligations to remove or withdraw archived material have been enforced.

4. To what extent do contracts in your country between publishers, databases and libraries allow libraries to create their own archival or preservation copies of material to which libraries have access through databases? If contracts allow libraries or archives to make such copies, are there limitations as to when libraries

\textsuperscript{87} H Beale (ed), \textit{Chitty on Contracts} 29\textsuperscript{th} edn (London: Thomson Sweet and Maxwell, 2004) 14-076.
or archives may create those preservation/archival copies? (E.g., may a library allow its users to use those copies or are they strictly for “back-up” purposes in the event the publisher no longer provides access)?

The JISC Model Licence for e-books includes provision (in clause 9.7) for the supply of an archival copy in the event of termination of the agreement.

Upon termination of this Licence, the Licensor undertakes at no charge either to provide or to make arrangements for a third party to provide each Authorised Institution with an archive of the full text of the book title(s) selected and paid by such Authorised Institution from the Licensed Material. The archive will be supplied to Authorised Institutions in an electronic medium mutually agreed between the Licensor and each of such Authorised Institutions. Authorised Institutions wishing to network the archive within their institution may do so at their own costs. Continuing archival access and use is subject to the terms and conditions of use of the Sub-Licence Agreement.

There is no corresponding provision in the Model Licence for datasets.
RESPONSES TO ADDITIONAL QUESTIONS,
MAY 2007

UK:

1. Since courts take into account the previous conduct or character of an author or publisher when deciding liability for defamation, does this mean that libraries and archives shy away from carrying materials published by notoriously controversial figures or publishers? What about things like the Daily Mail which is always publishing odd headlines? PM

Two different categories of defendant need to be distinguished here. If the defendant is the initial creator of the defamatory material, liability is imposed regardless of previous conduct. If the defendant is a distributor (i.e., it did not create the defamatory material), then the test of liability is based on reasonable care; and there is some authority to support the view that a distributor supplying a notoriously controversial publication ought to anticipate that it contains defamatory matter. This legal position seems not to deter libraries from carrying materials by notoriously controversial figures or publishers. In practice it seems that such libraries or archives are never sued.

2. Under UK law, you say that particularly active archives might be considered publishers. Any idea where that line is drawn? PM/RB

There is no authority and, as we explain in our report, the provisions of the legislation make it difficult to say where the line would be drawn.

3. You note that the liability of a library is probably slim when it comes to holding works that violate an author’s moral rights because moral rights only come into play when the material in question is communicated to the public. Why wouldn’t a library holding a work be considered communicating it to the public? Are we assuming that the work is being contained in a non-circulating collection? Would that make a difference? RB

To elaborate, the key point is that the Act provides a closed list of examples of triggering acts or events that bring moral rights into play in the UK. In relation to literary works,
liability for infringement of the right of paternity and the right to object to derogatory
treatment only attaches to a person who (i) publishes the work commercially, (ii) performs
the work in public or (iii) communicates the work to the public. Communicate to the public is
further defined in s. 20 of the Act as meaning communicating by electronic transmission.
Consequently, a library holding a print copy would not infringe moral rights irrespective of
whether the copy was held in a circulating collection (also see answer to 8, below).

4. What if something like a newspaper in the libraries’ collections have breached an
author’s moral rights? I mention newspapers because there seems to be no way
that a library could vet newspapers like it could, potentially, vet books that might
violate moral rights because of the sheer volume that a daily paper generates. If
the library holds a compilation work (a newspaper or a book) do they have to
check to make sure no rights (moral, economic or otherwise) are violated by the
compilation or do they assume the publisher has verified this? RB
See answer to 3 above, in relation to moral rights. As far as we are aware libraries do not
check to ensure that no rights have been violated, but rather (as you suggest) assume that
the publisher has obtained the necessary permissions.

5. What is the status of the Legal Deposit Libraries Act of 2003? Have any
regulations been issued? What is covered by the term “legal deposit”? RB
No regulations have been issued. The Government is continuing to monitor the
effectiveness of voluntary arrangements and it now seems that no regulations will be
framed until spring 2008 at the earliest. The term ‘legal deposit’ has no special legal
significance. ‘Library of legal deposit’ is simply a shorthand way of referring to the six
libraries listed in the report that have been entitled to receive a copy of every book
published in the United Kingdom since the passage of the Copyright Act 1911. It might
further be noted that the libraries in question do not all enjoy the same rights of deposit,
as the British Library enjoys more extensive rights than the other five.
6. What is meant by the term ‘datasets’ when discussing the JISC Model License? (See p.22 of your report). How prevalent are these ‘datasets’? And the contracts? Is this common? ?LB?

The JISC licences are no longer on-line, so we have sent off for further information. ‘Dataset’ is usually understood as a collection of data, typically in tabulated form.

7. Regarding the Adlington case: You say his attorneys sent letters to libraries indicating that the book on which the pamphlet was based was also part of the defamation suit and that any library which continued to loan the book was opening itself up to liability. What if the library didn’t continue to loan the book but just house it in its collection? PM

Continuing to keep the book could not, in itself, be a tort – since the essence of the tort of defamation is publication. If the library was concerned about the risk of being sued, it could retain the book until after the death of the potential claimant. Since libel actions cannot be brought by a claimant’s estate (Law Reform (Miscellaneous Provisions) Act 1934, s.1), any loan of the book after the claimant’s death could not give rise to liability.

8. You mention that the likelihood of libraries violating an author’s moral rights are slim because moral rights only apply when the work is mistakenly attributed, unattributed or altered and communicated to the public. You then go on to say that an e-mail may be communication to the public if a “recipient” is considered the public. How would this be different than the public who checks out the materials (or even views the materials) in the library? Is the public one person or many? RB

The key point is that as soon as a work is made available by electronic means liability for communicating the work to the public may arise (cf. answer to 3, above). Much will then depend on how s. 20 is interpreted. Having set out that ‘communicate’ in this context means communicate via ‘electronic transmission’ the Act goes on to state that this includes ‘the making available to the public of the work by electronic transmission in such a way that members of the public may access it from a place and at a time
individually chosen by them’. This language is plainly broad enough to cover placing a work on the Internet and might well be broad enough to cover transmission by email (emails can be accessed from a place and at a time chosen by the recipient), but whether sending an email to one individual amounts to communication to the public remains a moot question.

9. Regarding the creation of digital collections:
   a. When creating a digital collection, what issues regarding moral rights do libraries have to be concerned about? Is there concern re: quality of the copy, for instance? RB

The risk to which libraries are exposed is limited by the restricted range acts that can trigger liability for a violation of moral rights in the UK (see answers to 3 and 8, above). On the assumption that a triggering act has occurred, liability would then be further dependent on the author (or the author’s representative) demonstrating that there has been a ‘treatment of the work’ (that is, ‘an addition, deletion, alteration or adaptation’ of the work) that amounts to ‘a distortion or mutilation of the work or is otherwise prejudicial to the honour or reputation of the author’). It is perhaps theoretically possible that a digital copy might be so poor as to amount to an ‘alteration’ that ‘distorts’ the work, but liability is only likely to arise in the most exceptional circumstances (particularly given the relatively cautious reception of moral rights by the judiciary thus far in the UK).

10. Can you please give us the elements of the torts of defamation, invasion of privacy and mistake of fact? PM

I am slightly confused by ‘mistake of fact’. There is no tort in English law with that name – perhaps the closest thing that we have would be deceit? We have explained the elements of each of these torts (and for others, such as negligence and breach of the statutory duty imposed by the Consumer Protection Act 1987) in our answer to question B.3.
Appendix F

PHASE I REPORT

THE LEGAL TREATMENT OF ARCHIVES
UNDER COPYRIGHT LAW
The Singapore Report

Associate Professor Ng-Loy Wee Loon
Faculty of Law, National University of Singapore

General Comment

Since Australia is one of the countries surveyed in this research project, it is worth mentioning here that the original version of the Singapore Copyright Act 1987 was modelled on the Australian Copyright Act (as amended in 1984). There are therefore many similarities between the two countries’ copyright law; on the treatment of archives, some of the legislative provisions are virtually identical. Annex A sets out a side-by-side comparison of the provisions of the two countries relevant to this discussion.

Responses to Questionnaire (Part 1)

Meaning of ‘archives’

There are provisions in the Singapore Copyright Act specifically addressed to ‘archives’, and this term is defined in the Copyright Act. Its statutory definition is set out in Annex A: in essence, ‘archives’ refers to a collection of materials of historical significance or public interest maintained by a non-profit body. (For the purpose of this discussion, I will use ‘archives’ to mean the body or institution maintaining archives.)

There is a distinction made between ‘archives’ and ‘library’ in the Copyright Act; unlike ‘archives’, the term ‘library’ is not defined. For the purposes of this discussion, this distinction is not critical because the provisions specifically addressed to archives (allowing them to make copies of copyright works; anti-circumvention exceptions) apply equally to libraries.¹

Right of archives to make copies of works – specific provisions

¹ These provisions, in fact, are found in the Copyright Act under Division 5 which is entitled ‘Copying of Works for Libraries’. In the case of section 46 – the right to copy for other libraries or archives, it appears at first glance that this right is available to libraries only. However, this is not the case: for the purposes of section 46, the term ‘libraries’ includes ‘archives’ [see section 46(8)].
The first set of provisions in the Copyright Act which are specifically addressed to archives, allow them to make copies of copyright works for the following purposes:

(a) Copying for its patron for his/her research or study (sections 45, 47, 112 and 116);
(b) Copying for other libraries or archives for inclusion in their collection or for their patron (section 46);
(c) Copying for preservation against deterioration, replacement of damaged or lost works, or other purpose (sections 48 and 113); and
(d) Publication of old unpublished works (section 49).

These provisions are set out in Annex A. The comments that follow will merely highlight some of the salient points about these exceptions.

- **Types of materials covered** – Not all types of copyright materials are covered in these exceptions do not allow archives to copy all types of copyright works. To give an example. There are three provisions – sections 45, 47 and 112 – which allow archives to copy for their patrons. Each of these provisions deals with different types of copyright works:

  - Section 45 allows copying of: (i) articles in periodical publications (which excludes artistic works); 2 artistic works incorporated into an article, thesis or literary, dramatic, or musical work for the purpose of explanation and illustration; 3 and (iii) published literary, dramatic and musical works.
  - Section 47 allows copying of old 4 unpublished literary, dramatic and musical works (and any artistic incorporated into such work for the purpose of explanation and illustration), 5 photographs and engravings, in its collection which is open to public inspection.
  - Section 112 allows copying of old 6 unpublished sound recordings and cinematographic films in its collection which is accessible to the public.

- **Permitted purposes** – Save for one instance, the permitted purposes under these exceptions are narrow in scope. For example, section 45 allows archives to copy certain authors’ works for their patron for the purpose of his research 7

---

2 See section 44.
3 See section 50.
4 By ‘old’, it means works in which copyright still subsist at a time more than 50 years after the death of the author and more than 75 years after the work was made.
5 See section 50.
6 By ‘old’, it means recordings and films in which copyright subsist at a time more than 50 years after the recording or film was made.
7 ‘Research’ was previously defined in section 44(b) to exclude industrial research or research carried out by bodies corporate (not being bodies corporate owned by the Government), companies, associations of bodies of persons carrying on business. This limitation was deleted in 1998. See further *infra*, note 18.
or study\textsuperscript{8} only.\textsuperscript{9} This is to be contrasted with the wider exceptions available to the patron if he had made the copy of the work himself/herself. In particular, since 1 January 2005, the defence of ‘fair dealing’ in Singapore is now more akin to the US ‘fair use’ exception in that it is no longer limited to any specific purpose.

The one provision which appears to give the archive carte blanche to copy a work held in its collection is section 48(2): it allows the copying of a “single copy” of a work held in the collection of the archive “for a purpose other than a purpose for which a copy may be made under subsection (1)”. The purposes for which a copy may be made under section 48(1) are: preservation and replacement of lost or damaged works\textsuperscript{10}. It is interesting to speculate on the usefulness of section 48(2) in a scenario that this research project is concerned with: where a work in electronic form is held in the collection of an archive via a subscription with the publisher and the latter wishes to remove this work, can the archive make a copy of this work (before its removal) and claim to be entitled to do so under section 48(2)? There is no judicial decision on the proper scope of section 48(2) – or for that matter, on any of these provisions specifically addressed to archives. It should also be noted that the privilege provided for in section 48(2), as well as in the other provisions specifically addressed to archives referred to in this report, can be overridden by contractual obligations in the subscription agreement between the publisher and the archive.

- **Quantitative amount of copying allowed** – There are limitations on the quantity that can be copied under these exceptions. For example, if a patron requests the archive to copy the whole of a literary, dramatic or musical work (other than an article in a periodical publication) or a part of such work which contains more than a reasonable portion of the work,\textsuperscript{11} the archives must make reasonable investigations to ensure that a copy (not being a second-hand copy) of the work cannot be obtained within a reasonable time at an ordinary commercial price.

- **Keeping of records of declarations**\textsuperscript{12} – In most of these exceptions, there is a duty on the archives to keep record of these declarations, and copyright

\textsuperscript{8} Until 1 January 2005, the patron’s use of the copy of work must be for the purpose of ‘private study’. The word ‘private’ was deleted with effect from 1 January 2005. This deletion was made to reflect a similar change in the defence of ‘fair dealing’ in section 35 of the Copyright Act: see further discussion below.

\textsuperscript{9} Note that in section 112 which allows archives to copy sound recordings and cinematographic films for patrons, there is one other permitted purpose, namely, where the patron requires the recording or film with a view to publication.

\textsuperscript{10} Section 48(2) finds no exact equivalent in the Australian Copyright Act. The Australian provision closest to section 48(2) would be section 51A(2) which permits the archive to make a reproduction of a work held in its collection “for administrative purposes”.

\textsuperscript{11} ‘A reasonable portion’ is defined in sections 7(2) and (2A) of the Copyright Act: for example, it can mean not more than 10% of the total number of pages in the publication, or not more than 10% of the total number of bytes in the case of works stored in an medium by electronic means.

\textsuperscript{12} See Regulations 9 and 11 of the Copyright Regulations.
owners have a right to inspect these declarations. The officer-in-charge of the archives who fails to keep proper records is guilty of an offence and liable on conviction to a fine not exceeding S$1,000.

- **Notation of copies**\(^{13}\) – In some cases, where the copying of the whole or part of the work is by or on behalf of an institution, the archives must ensure that, at or about the time the copy of the work is made, a notation is made on the copy of work made stating that the copy was made on behalf of the institution and the date on which it is made. Failure to do so is draconian: it deprives the archives of the defence in these provisions.

- **Adjustments to take into account the electronic environment** – Amendments, which came into effect on 1 January 2005, were made to facilitate operations of archives in a digital environment.

  First, section 45(9) allows archives to make electronic copies for their patrons, subject to certain conditions such as giving notification to the patron that the work might be subject to copyright protection etc, and destroying the electronic copy held by the archive.

  Second, section 45(7A), the archive is allowed, if it acquires a work in electronic form as part of its collection, to make it available online within its premises if its patrons cannot, by using any machine or equipment supplied by the archive, make an electronic copy of the work or communicate the work.

  Third, section 47 not only exempts the archives for the act of copying the unpublished work, but also the act of ‘communicating’ the work to the patron,\(^ {14}\) which includes the making available of the copy work (on a network or otherwise) in such a way that the work may be accessed by any person from a place and at a time chosen by him”.

(2) The second set of provisions which are specifically addressed to archives relate to protection against anti-circumvention measures introduced into the Singapore Copyright Act, with effect from 1 January 2005, as part of the implementation of the obligations owed under the US-Singapore Free Trade Agreement. The protection is very similar to that in the US (under its DMCA). The two specific provisions are:

- Section 261D which allows the circumvention of a technology access control measure which is done to enable the non-profit library or archive to have access to

---

\(^{13}\) See section 201.

\(^{14}\) ‘Communicate’ is defined in the Copyright Act as meaning “to transmit by electronic means (whether over a path, or a combination of paths, provided by a material substance or by wireless means or otherwise) a work or other subject-matter, whether or not it is sent in response to a request, and includes: (a) the broadcasting of a work or other subject-matter; (b) the inclusion of a work or other subject-matter in a cable programme; and (c) the making available of a work or other subject-matter (on a network or otherwise) in such a way that the work or subject-matter may be accessed by any person from a place and at a time chosen by him”.

F-I-4
the work, which is not otherwise available to the library or archive, “for the sole purpose of determining whether to acquire a copy of the work”.\(^{15}\)

- Section 261C(9) which excludes non-profit libraries and archives from criminal liability that can ensue from circumvention activities.\(^{16}\)

**Right of archives to make copies of works – general provisions**

(1) There are two provisions in the Copyright Act which are relevant for this discussion.

(2) First, the right to make back-up copies of computer software in section 39(1).\(^{17}\) More specifically, this right is to make a copy of the computer program “for the purpose only of being used, by or on behalf of the owner of the original copy, in lieu of the original copy in the event that the original copy is lost, destroyed or rendered unusable”.

(3) Secondly, the defence of ‘fair dealing’. This defence in Singapore used to follow the English tradition where this defence is limited to three purposes: research or private study (section 35), criticism or review (section 36), reporting of current events (section 37). This changed with effect from 1 January 2005: section 35 was amended to provide for a general ‘fair dealing’ defence that is not limited to the purpose of ‘research or private study’; the purpose of ‘research or study’ is just one of the purposes which may constitute ‘fair dealing’ in section 35. Below is the new section 35 (with the amendments shown in blue):

\[\text{Subject to this section, a fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, for any purpose other than a purpose referred to in section 36 or 37 shall not constitute an infringement of the copyright in the work.}\]

\[\text{The purposes for which a dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, may constitute a fair dealing under subsection (1) shall include research and study.}\]

\[\text{For the purposes of this Act, the matters to which regard shall be had, in determining whether a dealing with a literary, dramatic, musical or artistic work or with an adaptation of a literary, dramatic or musical work, being a dealing by way of copying the whole or a part of the work or adaptation, constitutes a fair}\]

\(^{15}\) Compare with section 1201(d) of the US Copyright Act.

\(^{16}\) Compare with section 1204(b) of the US Copyright Act.

\(^{17}\) Compare with section 106(2) of the US Copyright Act.
dealing with the work or adaptation for any purpose other than a purpose referred to in section 36 or 37 shall include —
(a) the purpose and character of the dealing, including whether such dealing is of a commercial nature or is for non-profit educational purposes;
(b) the nature of the work or adaptation;
(c) the amount and substantiality of the part copied taken in relation to the whole work or adaptation;
(d) the effect of the dealing upon the potential market for, or value of, the work or adaptation; and
(e) the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price.

(3) Notwithstanding subsection (2), a dealing with a literary, dramatic or musical work, or with an adaptation of such a work, being a dealing by way of the copying, for the purposes of research or study —
(a) if the work or adaptation comprises an article in a periodical publication, of the whole or a part of that work or adaptation; or
(b) in any other case, of not more than a reasonable portion of the work or adaptation,
shall be taken to be a fair dealing with that work or adaptation for the purpose of research or study.

(4) Subsection (3) shall not apply to a dealing by way of the copying of the whole or a part of an article in a periodical publication if another article in that publication, being an article dealing with a different subject-matter, is also copied.

[(5)] – deleted in 199818

With this amendment, Singapore’s new ‘fair dealing’ defence is now similar to the US ‘fair use’ exception.

It would be tempting to argue that this general defence is now available to libraries and archives when they copy works in their collection [assuming that their copying of the work is considered ‘fair’ as judged by the various factors listed in section 35(2)]. In support of this argument, it will be pointed out that while the pre-amendment ‘fair dealing’ defence speaks of ‘research or private study’, the post-amendment defence speaks of ‘research or study’ (as an example

18 Subsection (5) defined ‘research’ to exclude “industrial research or research carried out by bodies corporate (not being bodies corporate owned or controlled by the Government), companies, associations or bodies of persons carrying on any business”. This definition was deleted in 1998, after the decision in Aztech Systems Pte Ltd v Creative Technology Ltd [1997] 1 SLR 621, where the Singapore Court of Appeal found its hands tied by subsection (5) and was not able to find that the reverse engineering of computer program in the commercial context fell within the defence of fair dealing for the purpose of research or private study. See also, supra, note 7.
of what can constitute ‘fair dealing’). The omission of the word ‘private’ is significant because of the judicial interpretation that had been given to this phrase. The Singapore Court of Appeal had, in *Aztech Systems Pte Ltd v Creative Technology Ltd*, noted that the phrase ‘private study’ prevented educational institutions and libraries, which have provisions specifically addressed to them, from relying on this defence; copying by educational institutions and libraries. The deletion of the word ‘private’ from the ‘fair dealing’ defence, in the light of this comment from Singapore’s highest appellate court, could mean that Legislature intended this defence to extend to educational institutions, libraries and similar bodies such as archives.

However, if the new general ‘fair dealing’ defence can be extended to archives, this may largely render otiose the various provisions discussed above specifically addressed to archives (eg. sections 45 – 49). If Legislature intended that archives can have the benefit of the general ‘fair dealing’ defence in section 35 and the benefit of those specific provisions, there is a good chance that this intention would have made express. The situation involving software reverse engineering will illustrate this point.

Until 1 January 2005, software reverse engineering was dealt with under the ‘fair dealing for purpose of research or private study’ defence. On 1 January 2005, two new defences relevant to software reverse engineering came into force: sections 39A (decompilation) and section 39B (observing, studying and testing of computer programs). These new sections expressly provide that “[f]or avoidance of doubt, this section is without prejudice to the generality of section 35 and does not limit the operation of that section”. In other words, reverse engineering of software today can be justified under provisions specifically introduced to address this subject-matter (sections 39A and 39B) and under the general ‘fair dealing’ defence in section 35.

19 Copying by libraries is dealt with in sections 44 – 49, which have already been discussed. Copying by educational institutions is dealt with in other provisions, eg., section 52 (which provides in essence a statutory licence for copying for educational purposes in which copyright owners are entitled to an equitable remuneration).

20 Supra, note 18, at para 74. In taking this view, the Court of Appeal followed the English cases *University of London Press v University Tutorial Press Ltd* [1916] 2 Ch 601, and *Sillitoe v McGraw-Hill Book Co* [1983] FSR 545 where it was held that a defendant was not copying a work for the purpose of ‘private study’ when the study was not done by himself.

21 See eg., decompilation in *Sega Enterprises v Accolade* 977 F 2d 1510 (9th Cir, 1992) justified within the American ‘fair use’ doctrine.

22 These new sections are modelled on section 50B and section 50BA of the UK Copyright, Designs and Patents Act (CDPA).

23 See section 39A(4) and section 39B(3). Contrast with the UK position where, with the enactment of section 50B and section 50BA, *ibid*, software reverse engineering activities in the UK are excluded from the UK defence of fair dealing for the purpose of research or private study: see s 29(4) and (4A) of the CDPA.
Would Legislature not have proceeded in the same unequivocal manner had it intended archives to have the benefit of the specific provisions such as sections 45 – 49 and the benefit of the general ‘fair dealing’ defence in section 35?

Moral rights in Singapore

There is no moral right such as a ‘right of withdrawal or ‘right of retraction’ in Singapore. She does not even have the two moral rights guaranteed by Art 6bis of the Berne Convention – right of integrity and right of paternity – even though she is a member of the Berne Convention. The ‘moral rights’ found in her Copyright Act are in sections 187 – 193 on ‘false attribution of authorship’.

Conclusion

As mentioned above, there are no judicial decisions in Singapore on the scope of the various provisions specifically addressed to archives, nor on whether the new ‘fair dealing’ defence is applicable to copying by archives.

Further, there are no judicial decisions in Singapore addressing publishers’ or archives’ liability with respect to documents included in the archives’ collection that infringe copyright. Nor is the author aware of any such disputes which have been settled out of court.

16 June 2005
<table>
<thead>
<tr>
<th>Singapore</th>
<th>Australia</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Definition of ‘archives’</strong></td>
<td>See s 7(1):</td>
</tr>
<tr>
<td></td>
<td>(a) archival material in the custody of the National Archives of Singapore established under section 17 of the National Heritage Board Act (Cap. 196A);</td>
</tr>
<tr>
<td></td>
<td>s 17 of the National Heritage Board Act:</td>
</tr>
<tr>
<td></td>
<td>(1) The Board shall establish the National Archives of Singapore in which records of national or historical significance shall be preserved.</td>
</tr>
<tr>
<td></td>
<td>(2) The Board —</td>
</tr>
<tr>
<td></td>
<td>(a) shall examine the public records in any public office and advise the office as to their care and custody;</td>
</tr>
<tr>
<td></td>
<td>(b) shall take necessary measures to classify, identify, preserve and restore public records;</td>
</tr>
<tr>
<td></td>
<td>(c) shall make known information concerning archives by any means, including publications, exhibitions and heritage promotional activities;</td>
</tr>
<tr>
<td></td>
<td>(d) shall conduct a records management programme for the efficient creation, utilisation, maintenance, retention, preservation and disposal of public records;</td>
</tr>
<tr>
<td></td>
<td>(e) shall advise public offices concerning standards and procedures pertaining to the management of public records;</td>
</tr>
<tr>
<td></td>
<td>(f) may provide information, consultation, research and other services related to archives;</td>
</tr>
<tr>
<td></td>
<td>(g) may, subject to the terms and conditions, if any, on which they were acquired, reproduce or publish any public archives; and</td>
</tr>
<tr>
<td></td>
<td>(h) may acquire by purchase, donations, bequest or otherwise any document, book or other material which, in the opinion of the Board, is or is likely to be of national or historical significance.</td>
</tr>
<tr>
<td></td>
<td>(b) a collection of documents or other material to which this paragraph applies by virtue of subsection (4).</td>
</tr>
<tr>
<td>See s 7(4):</td>
<td>See s 10(1):</td>
</tr>
<tr>
<td>Where —</td>
<td>(a) archival material in the custody of:</td>
</tr>
<tr>
<td></td>
<td>(i) the Australian Archives;</td>
</tr>
<tr>
<td></td>
<td>(ii) the Archives Office of New South Wales established by the Archives Act 1960 of the State of New South Wales;</td>
</tr>
<tr>
<td></td>
<td>(iii) the Public Record Office established by the Public Records Act 1973 of the State of Victoria; or</td>
</tr>
<tr>
<td></td>
<td>(iv) the Archives Office of Tasmania established by the Archives Act 1965 of the State of Tasmania; or</td>
</tr>
<tr>
<td></td>
<td>(b) a collection of documents or other material to which this paragraph applies by virtue of subsection (4).</td>
</tr>
<tr>
<td>See s 10(4):</td>
<td>Where:</td>
</tr>
<tr>
<td></td>
<td>(a) a collection of documents or other material of historical significance or public interest that is in the custody of a body, whether incorporated or unincorporated, is being</td>
</tr>
<tr>
<td>Right of an archive to make copies of published works held in its collection for its users/patrons</td>
<td>See s 45: (1) A person may furnish to the officer-in-charge of a library (not being a library that is conducted for the profit, direct or indirect, of an individual or individuals) or the officer-in-charge of archives — (a) a request in writing to be supplied with a copy of an article, or a part of an article, contained in a periodical publication or of the whole or a part of a published literary, dramatic or musical work other than an article contained in a periodical publication; and (b) a declaration signed by him stating — (i) that he requires the copy for the purpose of research or study and will not use it for any other purpose; and (ii) that he has not previously been supplied with a copy of that article or other work, or the same part of the article or other work, as the case may be, by an authorised officer of the library or archives, or that he has lost, destroyed or damaged any such copy previously supplied to him. (2) Subject to this section, where a request and declaration referred to in subsection (1) are furnished to the officer-in-charge of a library or archives, an authorised officer of the library or archives may, unless the declaration contains a statement that to his knowledge is untrue in a material particular, make, or cause to be made, the copy to which the request relates and supply the copy to the person who made the request.</td>
</tr>
</tbody>
</table>
(2A) A person may make to an authorized officer of a library or archives:
(a) a request to be supplied with a reproduction of an article, or part of an article, contained in a periodical publication, or of the whole or a part of a published work other than an article contained in a periodical publication, being a periodical publication or a published work held in the collection of a library or archives; and
(b) a declaration to the effect that:
(i) the person requires the reproduction for the purpose of research or study and will not use it for any other purpose;
(ii) the person has not previously been supplied with a reproduction of the same article or other work, or the same part of the article or other work, as the case may be, by an authorized officer of the library or archives; and
(iii) by reason of the remoteness of the person's location, the person cannot conveniently furnish to the officer in charge of the library or archives a request and declaration referred to in subsection (1) in relation to the reproduction soon enough to enable the reproduction to be supplied to the person before the time by which the person requires it.

(2B) A request or declaration referred to in subsection (2A) is not required to be made in writing.

(2C) Subject to this section, where:
(a) a request and declaration referred to in subsection (2A) are made by a person to an authorized officer of a library or archives; and
(b) the authorized officer makes a declaration setting out particulars of the request and declaration made by the person and stating that:
(i) the declaration made by the person, so far as it relates to the matters specified in subparagraphs (2A)(b)(i) and (ii), does not contain a statement that, to the knowledge of the authorized officer, is untrue in a material particular; and
(ii) the authorized officer is satisfied that the declaration
(3) Where a charge is made for making and supplying a copy to which a request under subsection (1) relates, subsection (2) shall not apply in relation to the request if the amount of the charge exceeds the cost of making and supplying the copy and a reasonable contribution to the general expenses of the library.

(4) Subsection (2) shall not apply in relation to a request for a copy of, or parts of, 2 or more articles contained in the same periodical publication unless the articles relate to the same subject-matter.

(5) Subsection (2) shall not apply to a request for a copy of the whole of a literary, dramatic or musical work (other than an article contained in a periodical publication), or to a copy of a part of such a work that contains more than a reasonable portion of the work unless —

(a) the work forms part of the library or archives collection; and

(b) before the copy is made, an authorised officer of the library has, after reasonable investigation, made a declaration stating that he is satisfied that a copy (not being a second-hand copy) of the work cannot be obtained within a reasonable time at an ordinary commercial price.

(7A) If an article contained in a periodical publication or a published work (other than an article contained in a periodical publication) is acquired, in electronic form, as part of the collection of a library or archives, the copyright in the article or published work is not infringed by the officer-in-

made by the person is true so far as it relates to the matter specified in subparagraph (2A)(b)(iii):

an authorized officer of the library or archives may make, or cause to be made, the reproduction to which the request relates and supply the reproduction to the person.

(3) Where a charge is made for making and supplying a reproduction to which a request under subsection (1) or (2A) relates, subsection (2) or (2C), as the case may be, does not apply in relation to the request if the amount of the charge exceeds the cost of making and supplying the reproduction.

(4) Subsection (2) or (2C) does not apply in relation to a request for a reproduction of, or parts of, 2 or more articles contained in the same periodical publication unless the articles relate to the same subject-matter.

(5) Subsection (2) or (2C) does not apply to a request for a reproduction of the whole of a work (other than an article contained in a periodical publication), or to a reproduction of a part of such a work that contains more than a reasonable portion of the work unless:

(a) the work forms part of the library or archives collection; and

(b) before the reproduction is made, an authorized officer has, after reasonable investigation, made a declaration stating that he or she is satisfied that a reproduction (not being a second-hand reproduction) of the work cannot be obtained within a reasonable time at an ordinary commercial price.

(5A) If an article contained in a periodical publication, or a published work (other than an article contained in a periodical publication) is acquired, in electronic form, as part of the collection of a library or archives, the officer in charge of the library or archives may make it available online within the
charge of the library or archives making it available online within the premises of the library or archives in such a manner that users cannot, by using any equipment supplied by the library or archives —
  (a) make an electronic copy of the article or work; or
  (b) communicate the article or work.

(6) The copyright in an article contained in a periodical publication is not infringed by the making, in relation to a request under subsection (1), of a copy of the article, or of a part of the article, in accordance with subsection (2) unless the copy is supplied to a person other than the person who made the request.

(7) The copyright in a published literary, dramatic or musical work other than an article contained in a periodical publication is not infringed by the making, in relation to a request under subsection (1), of a copy of the work, or of a part of the work, in accordance with subsection (2) unless the copy is supplied to a person other than the person who made the request.

(9) Subsections (6) and (7) shall not apply to the making, in accordance with subsection (2), of an electronic copy of —
(a) an article, or a part of an article, contained in a periodical publication; or
(b) the whole or part of a published work, other than such an article,
in relation to a request under this section for communication to the person who made the request, unless —
(i) before or when the electronic copy is communicated to the person, a notice is given to the person in accordance with the regulations stating —
(A) that the electronic copy has been made under this section and that the article or work might be subject to copyright protection under this Act; and

premises of the library or archives in such a manner that users cannot, by using any equipment supplied by the library or archives:
(a) make an electronic reproduction of the article or work; or
(b) communicate the article or work.

(6) The copyright in an article contained in a periodical publication is not infringed by the making, in relation to a request under subsection (1) or (2A), of a reproduction of the article, or of a part of the article, in accordance with subsection (2) or (2C), as the case may be, unless the reproduction is supplied to a person other than the person who made the request.

(7) The copyright in a published work other than an article contained in a periodical publication is not infringed by the making, in relation to a request under subsection (1) or (2A), of a reproduction of the work, or of a part of the work, in accordance with subsection (2) or (2C), as the case may be, unless the reproduction is supplied to a person other than the person who made the request.

(7A) Subsections (6) and (7) do not apply to the making under subsection (2) or (2C) of an electronic reproduction of:
(a) an article, or a part of an article, contained in a periodical publication; or
(b) the whole or part of a published work, other than such an article;
in relation to a request under this section for communication to the person who made the request unless:
(c) before or when the reproduction is communicated to the person, the person is notified in accordance with the regulations:
(i) that the reproduction has been made under this section and that the article or work might be subject to copyright protection under this Act; and
(B) such other matters as may be prescribed; and
(ii) as soon as practicable after the electronic copy is
communicated to the person, the electronic copy made in
accordance with subsection (2) and held by the library or
archives is destroyed.

(ii) about such other matters (if any) as are prescribed; and
(d) as soon as practicable after the reproduction is
communicated to the person, the reproduction made under
subsection (2) or (2C) and held by the library or archives is
destroyed.

(8) The regulations may exclude the application of
subsection (6) or (7) in such cases as are specified in the
regulations.

(7B) It is not an infringement of copyright in an article
contained in a periodical publication, or of copyright in a
published work, to communicate it in accordance with
subsection (2), (2C) or (5A).

(8) The regulations may exclude the application of
subsection (6) or (7) in such cases as are specified in the
regulations.

(9) In this section:
library does not include a library that is conducted for the
profit, direct or indirect, of an individual or individuals.
supply includes supply by way of a communication.

See also section 116 (published editions):

The copyright in a published edition of a work or works is not
infringed by the making of a reproduction of the whole or a
part of that edition if that reproduction is made in the course
of —
(a) where the edition contains one work only —
(i) a dealing with that work, being a dealing that does not, by
virtue of section 35, 36, 37, 38 or 40, infringe copyright in
that work; or
(ii) the making of a copy (including a handicapped reader’s
copy or an intellectually handicapped reader’s copy) of the
whole or a part of that work, being a copy the making of
which does not, by virtue of section 45, 46, 48, 51, 52, 54 or
54A, infringe copyright in that work; or
(b) where the edition contains more than one work —
See also section 112 (published editions):

The copyright in a published edition of a work or works is not
infringed by the making of a reproduction of the whole or a
part of that edition if that reproduction is made in the course
of:
(a) where the edition contains one work only:
(i) a dealing with that work, being a dealing that does not, by
virtue of section 40, 41, 42, 43 or 44, infringe copyright in
that work; or
(ii) the making of a copy (including a copy for a person with
a print disability or a copy for a person with an intellectual
disability) of the whole or a part of that work, being a copy
the making of which does not, by virtue of section 49, 50,
51A, 135ZG, 135ZJ, 135ZK, 135ZL, 135ZM, 135ZN, 135ZP,
135ZQ, 135ZR, 135ZS, 135ZT or 182A, infringe copyright in
(i) a dealing with one of those works or dealings with some or all of those works, being a dealing that does not, or dealings that do not, by virtue of section 35, 36, 37, 38 or 40, infringe copyright in that work or those works; or
(ii) the making of a copy (including a handicapped reader’s copy or an intellectually handicapped reader’s copy) of the whole or a part of one of those works or the making of copies (including the handicapped reader’s copies or the intellectually handicapped reader’s copies) of the whole or parts of some or all of those works, being a copy the making of which does not, or copies the making of which do not, by virtue of section 45, 46, 48, 51, 52, 54 or 54A, infringe copyright in that work or in those works.

(b) where the edition contains more than one work:
(i) a dealing with one of those works or dealings with some or all of those works, being a dealing that does not, or dealings that do not, by virtue of section 40, 41, 42, 43 or 44, infringe copyright in that work or those works; or
(ii) the making of a copy (including a copy for a person with a print disability or a copy for a person with an intellectual disability) of the whole or a part of one of those works or the making of copies (including copies for persons with a print disability or copies for persons with an intellectual disability) of the whole or parts of some or all of those works, being a copy the making of which does not, or copies the making of which do not, by virtue of section 49, 50, 51A, 135ZG, 135ZJ, 135ZK, 135ZM, 135ZP, 135ZQ, 135ZR, 135ZS, 135ZT or 182A, infringe copyright in that work or in those works.

### Right of an archive to make copies of works for other libraries

See s 46:

(1) The officer-in-charge of a library may request, or cause another person to request, the officer-in-charge of another library to supply the officer-in-charge of the first-mentioned library with a copy of an article, or a part of an article, contained in a periodical publication, or of the whole or a part of a published literary, dramatic or musical work other than an article contained in a periodical publication —

(a) for the purpose of including the copy in the collection of the first-mentioned library, not being in substitution for a subscription to such periodical publication or work or a purchase of such work; or

(b) for the purpose of supplying the copy to a person who has made a request for the copy under section 45.

See s 50:

(1) The officer in charge of a library may request, or cause another person to request, the officer in charge of another library to supply the officer in charge of the first-mentioned library with a reproduction of an article, or a part of an article, contained in a periodical publication, or of the whole or a part of a published work other than an article contained in a periodical publication, being a periodical publication or a published work held in the collection of a library:

(a) for the purpose of including the reproduction in the collection of the first-mentioned library;

(aa) in a case where the principal purpose of the first-mentioned library is to provide library services for members of a Parliament—for the purpose of assisting a person who is a member of that Parliament in the performance of the person’s duties as such a member; or

(b) for the purpose of supplying the reproduction to a person who has made a request for the reproduction under section 45.
(2) Subject to this section, where a request is made by or on behalf of the officer-in-charge of a library to the officer-in-charge of another library under subsection (1), an authorised officer of the last-mentioned library may make, or cause to be made, the copy to which the request relates and supply the copy to the officer-in-charge of the first-mentioned library.

(3) Where, under subsection (2), an authorised officer of a library makes a copy of the whole or a part of a work and supplies it to the officer-in-charge of another library in accordance with a request made under subsection (1) —
(a) the copy shall, for all purposes of this Act, be deemed to have been made on behalf of an authorised officer of the other library for the purpose for which the copy was requested; and
(b) an action shall not be brought against the body administering that first-mentioned library, or against any officer or employee of that library, for infringement of copyright by reason of the making or supplying of that copy.

(4) Subject to this section, if a reproduction of the whole or a part of an article contained in a periodical publication, or of any other published literary, dramatic or musical work is, by virtue of subsection (3), to be deemed to have been made on behalf of an authorised officer of a library, the copyright in the article or other work is not infringed by the making of the copy.

who has made a request for the reproduction under section 49.

(2) Subject to this section, where a request is made by or on behalf of the officer in charge of a library to the officer in charge of another library under subsection (1), an authorized officer of the last-mentioned library may make, or cause to be made, the reproduction to which the request relates and supply the reproduction to the officer in charge of the first-mentioned library.

(3) Where, under subsection (2), an authorized officer of a library makes, or causes to be made, a reproduction of the whole or part of a work (including an article contained in a periodical publication) and supplies it to the officer in charge of another library in accordance with a request made under subsection (1):
(a) the reproduction shall, for all purposes of this Act, be deemed to have been made on behalf of an authorized officer of the other library for the purpose for which the reproduction was requested; and
(b) an action shall not be brought against the body administering that first-mentioned library, or against any officer or employee of that library, for infringement of copyright by reason of the making or supplying of that reproduction.

(4) Subject to this section, if a reproduction of the whole or a part of an article contained in a periodical publication, or of any other published work, is, by virtue of subsection (3), taken to have been made on behalf of an authorised officer of a library, the copyright in the article or other work is not infringed:
(a) by the making of the reproduction; or
(b) if the work is supplied under subsection (2) by way of a communication—by the making of the communication.
(5) The regulations may exclude the application of subsection (4) in such cases as are specified in the regulations.

(6) Where a charge is made for making and supplying a copy to which a request under subsection (1) relates, subsection (4) shall not apply in relation to the request if the amount of the charge exceeds the cost of making and supplying the copy and a reasonable contribution to the general expenses of the library.

(7) Subsection (4) shall not apply to or in relation to a copy of the whole or a part of an article or other work that is, by virtue of subsection (3), to be deemed to have been made on behalf of an authorised officer of a library for a purpose referred to in subsection (1) unless, as soon as practicable after the request was made, an authorised officer of the library made a declaration that set out particulars of the request (including the purpose for which the copy was requested) and stated —
(a) in a case where a copy of the whole or a part of the article or other work had previously been supplied, in accordance with a request under subsection (1), for the purpose of inclusion in the collection of the library — that the copy so supplied had been lost, destroyed or damaged, whichever was appropriate; and
(b) in a case where the copy was a copy of the whole of a literary, dramatic or musical work (other than an article contained in a periodical publication) or of a part of such a work that contains more than a reasonable portion of the work — that the copy was made and supplied as part of an inter-library arrangement which does not have the effect or the purpose of enabling participating libraries to receive copies of the whole works or parts thereof, by way of systematic reproduction and supply of copies, in such aggregate quantities as substitutes for a subscription to or purchase of such works.

(5) The regulations may exclude the application of subsection (4) in such cases as are specified in the regulations.

(6) Where a charge is made for making and supplying a reproduction to which a request under subsection (1) relates, subsection (4) does not apply in relation to the request if the amount of the charge exceeds the cost of making and supplying the reproduction.

(7) Where:
(a) a reproduction (in this subsection referred to as the relevant reproduction) of, or of a part of, an article, or of the whole or a part of another work, is supplied under subsection (2) to the officer in charge of a library; and
(b) a reproduction of the same article or other work, or of the same part of the article or other work, as the case may be, has previously been supplied under subsection (2) for the purpose of inclusion in the collection of the library;
subsection (4) does not apply to or in relation to the relevant reproduction unless, as soon as practicable after the request under subsection (1) relating to the relevant reproduction is made, an authorized officer of the library makes a declaration:
(c) setting out particulars of the request (including the purpose for which the relevant reproduction was requested); and
(d) stating that the reproduction referred to in paragraph (b) has been lost, destroyed or damaged, as the case requires.
(7A) If:
(a) a reproduction is made of the whole of a work (other than an article contained in a periodical publication) or of a part of such a work, being a part that contains more than a reasonable portion of the work; and
(b) the work from which the reproduction is made is in hardcopy form; and
(c) the reproduction is supplied under subsection (2) to the officer in charge of a library;
subsection (4) does not apply in relation to the reproduction unless:
(d) in a case where the principal purpose of the library is to provide library services for members of a Parliament—the reproduction is so supplied for the purpose of assisting a person who is a member of that Parliament in the performance of the person's duties as such a member; or
(e) as soon as practicable after the request under subsection (1) relating to the reproduction is made, an authorized officer of the library makes a declaration:
(i) setting out particulars of the request (including the purpose for which the reproduction was requested); and
(ii) stating that, after reasonable investigation, the authorized officer is satisfied that a copy (not being a second-hand copy) of the work cannot be obtained within a reasonable time at an ordinary commercial price.

(7B) If:
(a) a reproduction is made of the whole of a work (including an article contained in a periodical publication) or of a part of such a work, whether or not the part contains more than a reasonable portion of the work; and
(b) the work from which the reproduction is made is in electronic form; and
(c) the reproduction is supplied under subsection (2) to the officer in charge of a library;
subsection (4) does not apply in relation to the reproduction
unless:

(d) in a case where the principal purpose of the library is to provide library services for members of a Parliament—the reproduction is so supplied for the purpose of assisting a person who is a member of that Parliament in the performance of the person's duties as such a member; or

(e) as soon as practicable after the request under subsection (1) relating to the reproduction is made, an authorized officer of the library makes a declaration:

(i) setting out particulars of the request (including the purpose for which the reproduction was requested); and

(ii) if the reproduction is of the whole, or of more than a reasonable portion, of a work other than an article—stating that, after reasonable investigation, the authorised officer is satisfied that the work cannot be obtained in electronic form within a reasonable time at an ordinary commercial price; and

(iii) if the reproduction is of a reasonable portion, or less than a reasonable portion, of a work other than an article—stating that, after reasonable investigation, the authorised officer is satisfied that the portion cannot be obtained in electronic form, either separately or together with a reasonable amount of other material, within a reasonable time at an ordinary commercial price; and

(iv) if the reproduction is of the whole or of a part of an article—stating that, after reasonable investigation, the authorised officer is satisfied that the article cannot be obtained on its own in electronic form within a reasonable time at an ordinary commercial price.

(7C) If:

(a) a reproduction is made in electronic form by or on behalf of an authorised officer of a library of the whole of a work (including an article contained in a periodical publication) or of a part of such a work; and

(b) the reproduction is supplied under subsection (2) to the officer in charge of another library;
(8) In this section, a reference to a library shall be read as a reference to a library other than a library that is conducted for the profit, direct or indirect, of an individual or individuals, and as including a reference to archives.

subsection (4) does not apply in relation to the reproduction unless, as soon as practicable after the reproduction is supplied to the other library the reproduction made for the purpose of the supply and held by the first-mentioned library is destroyed.

(8) Subsection (4) does not apply to a reproduction or communication of, or of parts of, 2 or more articles that are contained in the same periodical publication and that have been requested for the same purpose unless the articles relate to the same subject matter.

(9) In this section, a reference to a library shall be read as a reference to a library other than a library that is conducted for the profit, direct or indirect of an individual or individuals, and as including a reference to archives.

(10) In this section: supply includes supply by way of a communication.

<table>
<thead>
<tr>
<th>Right of an archive to make copy of unpublished works kept in its collection</th>
<th>See s 47:</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Where, at a time more than 50 years after the expiration of the calendar year in which the author of a literary, dramatic or musical work, or of an artistic work being a photograph or engraving, died, and more than 75 years after the time at which, or the expiration of the period during which, the work was made, copyright subsists in the work but — (a) the work has not been published; and (b) the original version, or a copy, of the work is kept in the collection of a library or archives where it is, subject to any regulations governing that collection, open to public inspection, the copyright in the work is not infringed —</td>
<td>See s 51:</td>
</tr>
<tr>
<td>(1) Where, at a time more than 50 years after the end of the calendar year in which the author of a literary, dramatic, musical or artistic work died, copyright subsists in the work but: (a) the work has not been published; and (b) a reproduction of the work, or, in the case of a literary, dramatic or musical work, the manuscript of the work, is kept in the collection of a library or archives where it is, subject to any regulations governing that collection, open to public inspection; the copyright in the work is not infringed: (c) by the making or communication of a reproduction of the work by a person for the purposes of research or study or</td>
<td></td>
</tr>
</tbody>
</table>
(i) by the making of a copy, or the communication, of the work by a person for the purpose of research or study or with a view to publication; or
(ii) by the making of a copy, or the communication, of the work by or on behalf of the officer-in-charge of that library or archives, if the copy or work is supplied (whether by communication or otherwise) to a person who satisfies the officer-in-charge of that library or archives that he requires the copy or work for the purpose of research or study or with a view to publication and that he will not use it for any other purpose.

(2) Where the original version, or a copy, of a thesis or other similar literary work that has not been published is kept in a library of a university or other similar institution or in archives, the copyright in the thesis or other work is not infringed by the making of a copy, or the communication, of the thesis or other work by or on behalf of the officer-in-charge of the library or archives, if the copy, thesis or other work is supplied (whether by communication or otherwise) to a person who satisfies an authorized officer of the library or archives that he requires the copy, thesis or other work for the purpose of research or study.

See s 112 (for sound recordings and films):

Where, at a time more than 50 years after the time at which, or the expiration of the period during which, a sound recording or cinematograph film was made, copyright subsists in the sound recording or cinematograph film but —
(a) the sound recording or cinematograph film has not been published; and
(b) a record embodying the sound recording, or a copy of the cinematograph film, is kept in the collection of a library or archives where it is, subject to any regulations governing that collection, accessible to the public,

with a view to publication; or
(d) by the making or communication of a reproduction of the work by, or on behalf of, the officer in charge of the library or archives if the reproduction is supplied (whether by way of communication or otherwise) to a person who satisfies the officer in charge of the library or archives that the person requires the reproduction for the purposes of research or study, or with a view to publication, and that the person will not use it for any other purpose.

(2) If the manuscript, or a reproduction, of an unpublished thesis or other similar literary work is kept in a library of a university or other similar institution, or in archives, the copyright in the thesis or other work is not infringed by the making or communication of a reproduction of the thesis or other work by or on behalf of the officer in charge of the library or archives if the reproduction is supplied (whether by communication or otherwise) to a person who satisfies an authorized officer of the library or archives that he or she requires the reproduction for the purposes of research or study.

See s 110A (for sound recordings and films):

Where, at a time more than 50 years after the time at which, or the expiration of the period during which, a sound recording or cinematograph film was made, copyright subsists in the sound recording or cinematograph film but:  
(a) the sound recording or cinematograph film has not been published; and
(b) a record embodying the sound recording, or a copy of the cinematograph film, is kept in the collection of a library or archives where it is, subject to any regulations governing that collection, accessible to the public;
the copyright in the sound recording or cinematograph film and in any work or other subject-matter included in the sound recording or cinematograph film is not infringed —

(i) by the making of a copy, or the communication, of the sound recording or cinematograph film by a person for the purpose of research or study or with a view to publication; or

(ii) by the making of a copy, or the communication, of the sound recording or cinematograph film by or on behalf of the officer-in-charge of the library or archives, if the copy or the recording or film is supplied (whether by communication or otherwise) to a person who satisfies the officer that he requires the copy or the recording or film for the purpose of research or study or with a view to publication and that he will not use it for any other purpose.

Right of an archive to make copies of works which forms or formed part of its collection, for preservation and other purposes

See s 48:

(1) Subject to subsection (4), the copyright in a work that forms, or formed, part of the collection of a library or archives is not infringed by the making, by or on behalf of the officer-in-charge of the library or archives, of a copy of the work —

(a) if the work is the original version of the work — for the purpose of preserving the original version against loss or deterioration or for the purpose of research that is being, or is to be, carried out at the library or archives in which the work is held or at another library or other archives;

(b) if the work is held in the collection in a published form but has been damaged or has deteriorated — for the purpose of replacing the work; or

(c) if the work has been held in the collection in a published form but has been lost or stolen — for the purpose of replacing the work.

(2) The copyright in a work that is held in the collection of a

See s 51A:

(1) Subject to subsection (4), the copyright in a work that forms, or formed, part of the collection of a library or archives is not infringed by the making or communicating, by or on behalf of the officer in charge of the library or archives, of a reproduction of the work:

(a) if the work is held in manuscript form or is an original artistic work—for the purpose of preserving the manuscript or original artistic work, as the case may be, against loss or deterioration or for the purpose of research that is being, or is to be, carried out at the library or archives in which the work is held or at another library or other archives;

(b) if the work is held in the collection in a published form but has been damaged or has deteriorated—for the purpose of replacing the work; or

(c) if the work has been held in the collection in a published form but has been lost or stolen—for the purpose of replacing the work.
library or archives is not infringed by the making, by or on behalf of the officer-in-charge of the library or archives, for a purpose other than a purpose for which a copy may be made under subsection (1), of a single copy of the work so held.

(3) The copyright in a work that is held in the collection of a library or archives is not infringed by the communication, by or on behalf of the officer in charge of the library or archives, of a reproduction of the work made under subsection (2) to officers of the library or archives by making it available online to be accessed through the use of a computer terminal installed within the premises of the library or archives with the approval of the body administering the library or archives.

(3A) The copyright in an original artistic work that is held in the collection of a library or archives is not infringed in the circumstances described in subsection (3B) by the communication, by or on behalf of the officer in charge of the library or archives, of a preservation reproduction of the work by making it available online to be accessed through the use of a computer terminal:
(a) that is installed within the premises of the library or archives; and
(b) that cannot be used by a person accessing the work to make an electronic copy or a hardcopy of the reproduction, or to communicate the reproduction.

(3B) The circumstances in which the copyright in the original artistic work is not infringed because of subsection (3A) are that either:
(a) the work has been lost, or has deteriorated, since the preservation reproduction of the work was made; or
(b) the work has become so unstable that it cannot be displayed without risk of significant deterioration.
(3) Subsection (1) shall not apply in relation to a work held in published form in the collection of a library or archives unless an authorised officer of the library or archives has, after reasonable investigation, made a declaration stating that he is satisfied that a copy (not being a secondhand copy) of the work cannot be obtained within a reasonable time at an ordinary commercial price.

(4) Where a copy of an unpublished work is made under subsection (1) by or on behalf of the officer-in-charge of a library or archives for the purpose of research that is being, or is to be, carried out at another library or archives, the supply of the copy by or on behalf of the officer to the other library or archives does not, for any purpose of this Act, constitute publication of the work.

See s 113 (for sound recordings and films):

(1) Subject to subsection (3), where a copy of a sound recording, being a sound recording that forms, or formed, part of the collection of a library or archives, is made by or on behalf of the officer-in-charge of the library or archives —

(a) if the sound recording is held in the collection in the form of a first record — for the purpose of preserving the record against loss or deterioration or for the purpose of research that is being, or is to be, carried out at the library or archives in which the record is held or at another library or archives;

(b) if the sound recording is held in the collection in a published form but has been damaged or has deteriorated —

(4) Subsection (1) does not apply in relation to a work held in published form in the collection of a library or archives unless an authorized officer of the library or archives has, after reasonable investigation, made a declaration stating that he or she is satisfied that a copy (not being a second-hand copy) of the work cannot be obtained within a reasonable time at an ordinary commercial price.

(5) Where a reproduction of an unpublished work is made under subsection (1) by or on behalf of the officer in charge of a library or archives for the purpose of research that is being, or is to be, carried out at another library or archives, the supply or communication of the reproduction by or on behalf of the officer to the other library or archives does not, for any purpose of this Act, constitute the publication of the work.

(6) In this section:

preservation reproduction, in relation to an artistic work, means a reproduction of the work made under subsection (1) for the purpose of preserving the work against loss or deterioration.

See s 110B (for sound recordings and films):

(1) Subject to subsection (3), where a copy of a sound recording, being a sound recording that forms, or formed, part of the collection of a library or archives, is made by or on behalf of the officer in charge of the library or archives:

(a) if the sound recording is held in the collection in the form of a first record—for the purpose of preserving the record against loss or deterioration or for the purpose of research that is being, or is to be, carried out at the library or archives in which the record is held or at another library or archives;

(b) if the sound recording is held in the collection in a published form but has been damaged or has deteriorated—
— for the purpose of replacing the sound recording; or
(c) if the sound recording has been held in the collection in a published form but has been lost or stolen — for the purpose of replacing the sound recording, the making of the copy does not infringe copyright in the sound recording or in any work or other subject-matter included in the sound recording.

(2) Subject to subsection (3), where a copy of a cinematograph film, being a cinematograph film that forms, or formed, part of the collection of a library or archives, is made by or on behalf of the officer-in-charge of the library or archives —
(a) if the cinematograph film is held in the collection in the form of a first copy — for the purpose of preserving the copy against loss or deterioration or for the purpose of research that is being, or is to be, carried out at the library or archives in which the copy is held or at another library or archives; (b) if the cinematograph film is held in the collection in a published form but has been damaged or has deteriorated — for the purpose of replacing the cinematograph film; or (c) if the cinematograph film has been held in the collection in a published form but has been lost or stolen — for the purpose of replacing the cinematograph film, the making of the copy does not infringe copyright in the cinematograph film or in any work or other subject-matter included in the cinematograph film.

for the purpose of replacing the sound recording; or
(c) if the sound recording has been held in the collection in a published form but has been lost or stolen—for the purpose of replacing the sound recording; the making of the copy does not infringe copyright in the sound recording or in any work or other subject-matter included in the sound recording.

(2) Subject to subsection (3), where a copy of a cinematograph film, being a cinematograph film that forms, or formed, part of the collection of a library or archives, is made by or on behalf of the officer in charge of the library or archives:
(a) if the cinematograph film is held in the collection in the form of a first copy—for the purpose of preserving the copy against loss or deterioration or for the purpose of research that is being, or is to be, carried out at the library or archives in which the copy is held or at another library or archives; (b) if the cinematograph film is held in the collection in a published form but has been damaged or has deteriorated—for the purpose of replacing the cinematograph film; or (c) if the cinematograph film has been held in the collection in a published form but has been lost or stolen—for the purpose of replacing the cinematograph film;

(2A) The copyright in a sound recording or cinematograph film that forms, or formed, part of the collection of a library or archives, or in any work or other subject-matter included in such a sound recording or film, is not infringed by the communication, by or on behalf of the officer in charge of the library or archives, of a copy of the sound recording or film made under subsection (1) or (2) to officers of the library or archives by making it available online to be accessed.
(3) Subsection (1) does not apply in relation to a sound recording, and subsection (2) does not apply in relation to a cinematograph film, held in a published form in the collection of a library or archives unless an authorised officer of the library or archives has, after reasonable investigation, made a declaration stating that he or she is satisfied that a copy (not being a second-hand copy) of the sound recording or cinematograph film, as the case may be, cannot be obtained within a reasonable time at an ordinary commercial price.

(4) Where a copy of an unpublished sound recording or an unpublished cinematograph film is made under subsection (1) or (2) by or on behalf of the officer-in-charge of a library or archives for the purpose of research that is being, or is to be, carried out at another library or archives, the supply of the copy by or on behalf of the officer to the other library or archives does not, for any purpose of this Act, constitute the publication of the sound recording or cinematograph film or

(2B) If:
(a) a copy of a sound recording or a cinematograph film is made by or on behalf of the officer in charge of a library or archives under this section; and
(b) the copy is made for the purpose of research that is being, or is to be, carried out at another library or archives; the copyright in the sound recording or film, or in any work or other subject-matter included in it, is not infringed by the communication, by or on behalf of the officer in charge, of the copy to the other library or archives by making it available online to be accessed through the use of a computer terminal installed within the premises of the other library or archives with the approval of the body administering the other library or archives.
of any work or other subject-matter included in the sound recording or cinematograph film.

<table>
<thead>
<tr>
<th>Publication of old unpublished works</th>
<th>See s 49:</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Where —</td>
<td></td>
</tr>
<tr>
<td>(a) a published literary, dramatic or musical work (referred to in this section as the new work) incorporates the whole or a part of a work (referred to in this section as the old work) to which section 47 (1) applied immediately before the new work was published;</td>
<td></td>
</tr>
<tr>
<td>(b) before the new work was published, the prescribed notice of the intended publication of the work had been given; and</td>
<td></td>
</tr>
<tr>
<td>(c) immediately before the new work was published, the identity of the owner of the copyright in the old work was not known to the publishers of the new work, then, for the purposes of this Act, the first publication of the new work, and any subsequent publication of the new work whether in the same or in an altered form, shall, insofar as it constitutes a publication of the old work, be deemed not to be an infringement of the copyright in the old work or an unauthorized publication of the old work.</td>
<td></td>
</tr>
</tbody>
</table>

(2) Subsection (1) shall not apply to a subsequent publication of the new work incorporating a part of the old work that was not included in the first publication of the new work unless — |
| (a) section 47 (1) would, but for this section, have applied to that part of the old work immediately before that subsequent publication; |
| (b) before that subsequent publication, the prescribed notice of the intended publication had been given; and |
| (c) immediately before that subsequent publication, the identity of the owner of the copyright in the old work was not |

See s 52: |
<table>
<thead>
<tr>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Where:</td>
</tr>
<tr>
<td>(a) a published literary, dramatic or musical work (in this section referred to as the new work) incorporates the whole or a part of a work (in this section referred to as the old work) to which subsection 51(1) applied immediately before the new work was published;</td>
</tr>
<tr>
<td>(b) before the new work was published, the prescribed notice of the intended publication of the work had been given; and</td>
</tr>
<tr>
<td>(c) immediately before the new work was published, the identity of the owner of the copyright in the old work was not</td>
</tr>
</tbody>
</table>

(2) The last preceding subsection does not apply to a subsequent publication of the new work incorporating a part of the old work that was not included in the first publication of the new work unless: |
| (a) subsection 51(1) would, but for this section, have applied to that part of the old work immediately before that subsequent publication; |
| (b) before that subsequent publication, the prescribed notice of the intended publication had been given; and |
| (c) immediately before that subsequent publication, the identity of the owner of the copyright in the old work was not |
known to the publisher of that subsequent publication.

(3) Where a work, or part of a work, has been published and, by virtue of this section, the publication is to be deemed not to be an infringement of the copyright in the work, the copyright in the work is not infringed by a person who, after that publication took place, broadcasts the work or that part of the work, as the case may be, or includes it in a cable programme or performs it in public, or makes a record of it.

(3) If a work, or part of a work, has been published and, because of this section, the publication is taken not to be an infringement of the copyright in the work, the copyright in the work is not infringed by a person who, after the publication took place: (a) broadcasts the work, or that part of the work; or (b) electronically transmits the work, or that part of the work (other than in a broadcast) for a fee payable to the person who made the transmission; or (c) performs the work, or that part of the work, in public; or (d) makes a record of the work, or that part of the work.

Types of works to which these provisions apply

See s 44:

In this Division [ie. sections 45 – 49], a reference to an article contained in a periodical publication shall be read as a reference to anything (other than an artistic work) appearing in such a publication.

See s 50:

Where an article, thesis or literary, dramatic or musical work is accompanied by artistic works provided for the purpose of explaining or illustrating the article, thesis or other work (referred to in this section as the illustrations), the provisions of this Division shall apply as if — (a) where any of those sections provides that the copyright in the article, thesis or work is not infringed — the reference to that copyright included a reference to any copyright in the illustrations; (b) a reference in section 45, 46, 47 or 48 to a copy of the article, thesis or work included a reference to a copy of the article, thesis or work together with a copy of the

See s 48:

In this Division, a reference to an article contained in a periodical publication shall be read as a reference to anything (other than an artistic work) appearing in such a publication.

See s 53:

Where an article, thesis or literary, dramatic or musical work is accompanied by artistic works provided for the purpose of explaining or illustrating the article, thesis or other work (in this section referred to as the illustrations), the preceding sections of this Division apply as if: (a) where any of those sections provides that the copyright in the article, thesis or work is not infringed—the reference to that copyright included a reference to any copyright in the illustrations; (b) a reference in section 49, section 50, section 51 or 51A to a reproduction of the article, thesis or work included a reference to a reproduction of the article, thesis or work...
<table>
<thead>
<tr>
<th>illustrations;</th>
<th>together with a reproduction of the illustrations;</th>
</tr>
</thead>
<tbody>
<tr>
<td>(c) a reference in section 45 or 46 to a copy of a part of the article or work included a reference to a copy of that part of the article or work together with a copy of the illustrations that were provided for the purpose of explaining or illustrating that part; and</td>
<td></td>
</tr>
<tr>
<td>(d) a reference in section 48 or 49 to the doing of any act in relation to the work included a reference to the doing of that act in relation to the work together with the illustrations.</td>
<td>(c) a reference in section 49 or section 50 to a reproduction of a part of the article or work included a reference to a reproduction of that part of the article or work together with a reproduction of the illustrations that were provided for the purpose of explaining or illustrating that part; and</td>
</tr>
<tr>
<td>(d) a reference in section 51A or section 52 to the doing of any act in relation to the work included a reference to the doing of that act in relation to the work together with the illustrations.</td>
<td></td>
</tr>
</tbody>
</table>
A. Introduction

The research explores the legal treatment of archival material in Singapore, in particular whether the removal of material from archives and libraries are given special attention in contracts made between archives/libraries and publishers/copyright owners.

This report should be read in conjunction with the Legal Treatment of Archives under Copyright Law – the Singapore Report which outlines the legal position of archives in Singapore.

B. Methodology

The investigation was conducted through a series of interviews carried out by the IP Academy with the following organisations. These organisations were identified as significant to the investigation as they are non-profit institutions which are well-established in Singapore and have a collection of archival material. They are:

Libraries/Archives (Institutions)
(See Annexes A to C for details of their background and findings of our interviews)

- C J Koh Law Library at the National University of Singapore
- National Library Board, Singapore (“NLB”)
- National Archives of Singapore (which comes under the National Heritage Board) (“NAS”)

Publishers – Please see Annexes D for details
(See Annexes D for details of their background and findings of our interviews)

- Marshall Cavendish, Singapore

As the interview progressed, we were able to ascertain, in addition to their specific actions to certain matters, their general attitude towards and treatment of removal of materials from archives, for example their reasons for removal of materials.

C. Responses to Questionnaire (Part II: Contract Analysis)
Contracts between archives and publishers

Contracts between the archives and publishers are rare. The general attitude is that once materials are acquired, it is seen as the property of the library or archive and will be used as the institutions see fit\(^1\). This includes archiving materials.

The exception is NAS\(^2\) which has standard and specific contracts with their private individuals and organisations. These contributors might not be the publishers of materials, but they are the copyright owners of the materials from whom NAS has acquired materials, or who have donated materials to NAS.

NAS will first ascertain that the contributor owns the copyright to the materials. NAS will ask for confirmation in writing in addition to the contract that they will enter into with the contributor. NAS and the contributor will then come to an agreement with regard to public access of the material. It will be stated clearly in the contract the preference of the contributors with respect to archiving and access to the public. For the Oral History Centre in particular, the contributor may refuse archiving even after giving NAS the materials\(^3\). This is sometimes the case for a contributor who agrees to be audio taped for purposes of archiving oral history. Even after giving their account of the past, contributors may request that NAS erase all traces of the audio tape. NAS will also comply with the contributor's wishes regarding public access of the materials.

The contributor can also restrict public access to certain sections of the materials. The contributor is further given the option of embargoing the materials for a number of years before releasing it to the public and this is stipulated in the contracts signed with the contributors\(^4\).

Marshall Cavendish\(^5\) does not contract with archives or libraries regarding physical archival material. The understanding is that every newly published book is provided to the legal deposit for reference only. There is no restriction on the institutions physically archiving the books as this does not violate copyright laws. As for digital archiving, Marshall Cavendish contracts with all its authors, contributors and freelancers in the development & publishing of content and is therefore responsible for the protection of their intellectual property. The grant of rights for usage of all content is clearly documented in the contracts and unless the permission is granted, Marshall Cavendish will not exploit the content beyond the agreed parameters, or allow for the exploitation of the contents by anyone else without permission. For non-fiction books, the contract will include a declaration

---

1 Please see the various Annexes for the backgrounds and details of the different organisations and institutions that were interviewed.
2 Please refer to Annex C for the background and details of NAS’s handling of archival material from both public and private sources.
3 Please see Annex C for a more details on the Oral History Centre of the NAS
4 Please see Appendix 1 for a copy of the standard contracts used by the Oral History Centre, NAS
5 Please see Annex E for the background and details of Marshall Cavendish
by the author, contributor or freelancer that he or she is the sole owner of the contents, that they are not infringing the copyrights of another, and that the contents are accurate to the best of his or her ability. There is also a limited liability clause in the majority of books published by them.

Avoidance of liability under contractual arrangements

NAS is the only institution in the investigation that contracts with the publishers/copyright owners.

NAS currently does not limit their liability in their contractual arrangements with the contributors. However, there are intentions to start doing so.

Judicial Decisions in Singapore

To date, there have been no judicial decisions in Singapore that addresses the publishers’ or archives’ liability with respect to the enforcement of a contractual obligation to remove or withdraw archived material.

The unwritten policy in these institutions is to remove or withdraw materials of a sensitive nature before there is any legal threat. The internal evaluation processes in these institutions are stringent and err on the side of caution should any doubt be presented.

D. Conclusion

In general, there are no contracts between the archives/libraries and publishers. The NAS is the only institution who contracts with their contributor and/or copyright owner laying out the terms by which the public can gain access to their materials. To date, there have been no judicial decisions regarding the liability of the libraries/archives and publishers. The institutions err on the side of caution, review their materials scrupulously and remove any materials that are likely to cause potential legal issues.
ANNEX A

C J Koh Law Library, National University of Singapore

Background

The C J Koh Law Library is one of the libraries within the National University of Singapore (NUS) and was established in September 1957 as the Law Library. It had its name changed to its present one at the beginning of 2001. The C J Koh Law Library\(^6\) collection development policy emphasises the acquisition of the complete primary resources of Singapore and Malaysia. The legal resources of the United Kingdom, United States of America, India, Canada, Australia and New Zealand are also acquired extensively. Over the years, the library has developed collections on public international law, international business transactions, the laws of the European Community, ASEAN nations, and the People's Republic of China. The library currently maintains a title collection of 46,021 books and 4,394 periodicals in addition to their 65 CD-ROM titles. The law library also subscribes to a growing collection of online legal resources which are available via the NUS Libraries’ portal. Major databases include Lexis.Com and HeinOnline. Access to the library is only open to students of the university, staff and corporate members of the library.

The library also has a Rare Books Reference collection where books of over 100 years old are kept. Viewing is only permitted in the library and no photocopying is allowed due to the delicate/fragile nature of the books. The Rare Books Reference section is by legal definition an archive of the C J Koh Law Library.

To date, none of the books have been digitised. There has been the intention to digitise books that have gone beyond the copyright period. However, this project has stalled due to the lack of funds.

The database for the Rare Books Reference sections is part of the library’s database as a whole. The books in this section, like the rest of the library, are accessible only to students, staff and corporate members of the library.

Findings

There is no contract between the C J Koh Law Library and the publisher of any book. There is no such practice within the library to contract with the retailer or publisher\(^7\). Books are either purchased from the retailer or publisher. The CJ Koh Law Library is in ready compliance of the list of banned materials that comes from the Ministry of Information, Communications and the Arts (“MICA”) of Singapore who is the official authority on censorship and banned materials in Singapore. Further to this, if there are books and materials that are potentially offensive and have come to the

\(^6\) http://www.lib.nus.edu.sg/llb/about.html
knowledge of the staff, they are carefully reviewed first before a decision is made as to whether they will be removed or placed on the shelves. There are no stringent guidelines concerning the erasing of records from their catalogue/database should there be materials that they wish to remove from their shelves. To date, there have been no materials from their archives that have been removed as a result of copyright issues or a case of the limiting liability of the parties of the contract.
ANNEX B

National Library Board, Singapore

Background

The National Library Board (“NLB”) was established as a statutory board in 1995. Although a public library in Singapore had existed since 1823, the National Library Board was founded in order to transform Singapore’s library services to better serve the public in light of electronic advancement. Their aim was to link all libraries across Singapore as well as internationally, in order that knowledge transcended physical borders.

In accordance with S10 of the Singapore National Library Board Act 1995, every publisher in Singapore, commercial or otherwise, has to deposit a copy of every book and literary material published by them, within 4 weeks of publication. This is known as a Legal Deposit. This includes pamphlets, brochures and other literary materials that have been published. This is housed in a warehouse belonging to the NLB in Singapore and is carefully catalogued, in order to preserve the collection of books and other literary material published in Singapore for public and historical significance. Some of these materials are also accessible by the Patrons of the public library network in Singapore.

In addition to the Legal Deposit, NLB has begun a digitization of a selection of very rare books and other library materials which they have deemed to be of great historical significance. This project ensures the preservation, conservation and access to such library material, by the general public in Singapore via the public libraries. These books and/or documents have been placed online on their website and can be accessed by various on-line users, whether they are researchers, library patrons or a fee paying member.

Part of the Singapore Pages is a unique collection known as NORA – NLB Online Repository of Artistic Works. It is a collection of approximately 150 unpublished and out-of-print artistic and literary works by local writers and composers. Launched in January 2005, these works are contributed by local authors who have given permission for the digitization and public accessibility of their work. The purpose of the Singapore pages is to provide a source of reference for those that are interested in Singapore literature and the arts. Apart from the benefits of providing the nation with archival records of unpublished local works, schools and the arts community will also benefit from having local works at hand to produce as well as academics, which can facilitate the incorporation of more local works into the arts education. Currently it only holds works in English but there are plans to add works that are in Chinese, Tamil and Malay to the collection.

---

8 www.elibraryhub.com/heritage/heritageCollection.asp
Membership to the Singapore pages is free and one need only register online before accessing these works.

**Findings**

It is not the practice of the NLB to contract with publishers of the books and materials in Singapore. The NLB complies with the list of banned books, as dictated by the MICA and removes them from their shelves, only for the duration of the ban. Apart from complying with the list of banned books, NLB also conducts its own internal evaluation process. In addition to acquiring books and materials for the library, the Library Support Services Group (“LSS”) also evaluates them for suitability purposes, using a set criteria: whether there is any national value to these materials, whether they are controversial (for example propagating narcotics usage; racially inflammatory works; the proliferation of banned substances; engendering extremist and terrorist activities; etc), the legality of their content (for example, content on how to build a bomb in your own back yard, information on secret society, buying of or use of homemade weapons), keeping in mind whether the materials in question are popular and whether the material has in place the basic form of English.

Most allegedly offending material is brought to the attention of NLB by the public, the media and various other sources. The LSS Group will investigate the matter upon the registration of the official complaint. There are some very rare occasions when persons who allegedly have been affected by the materials, have informed NLB of the nature of the material, requesting its removal from the shelf. In this case, an internal evaluation will also be carried out. Though there is a no self-censorship policy in NLB, the attitude taken by NLB is to err on the side of caution – i.e. to not offend the Singapore Government’s national agenda and vision-mission for the benefit of the Singapore electorate and tax payer. Therefore the internal evaluation process is taken very seriously and in any event of doubt as to the allegedly offensive nature of the material, a decision will be taken to remove the materials, until legal resolution is confirmed, by the parties being offended. The decision process is undertaken jointly with their legal counsel and director of NLB, and publishers do not play a part in this process. The allegedly offensive materials however remain in NLB’s warehouse for posterity as well as reference. The said materials will be kept in their warehouse catalogue.
Background

The National Archives of Singapore (“NAS”) is one of the institutions operated by
the National Heritage Board (“NHB”)\(^ \text{10} \). It was established in 1968 to oversee the
collection and management of the nation's public and private historical records, in
various formats such as text, photographs, maps, building plans, film, video and
audio-tape with a Singapore emphasis. These records range from private memoirs to
government records and date as far back as the 18\(^{\text{th}}\) century. Aside from collecting
and housing historical materials, the NAS also facilitates research and promotes
public interest in Singapore's heritage through exhibitions to schools, publications and
websites\(^ \text{11} \).

There are different departments within the NAS that serve different functions. The
pertinent departments interviewed are the following:

1. Archives Services: responsible for the acquisition of archival material. They
   are also the first point of contact for the public;
2. Audio-Visual Archives and Exhibitions Unit: responsible for the acquisition,
   preservation, and promotion of Singapore’s moving image and recorded sound
   history;
3. Records Management (RM) Division: responsible for the record management
   of governmental records and identification of public records of historical
   significance;
4. Oral History Centre: preserves the memory of its people through oral history
   methodology

Findings

The collection of materials is divided generally into two kinds: public records and
private records. Approximately 80\(^{\%}\)\(^ \text{12} \) of all NAS archival records are made up of
public records. These consist of governmental records that the Records Management
Division has the power to examine and take the necessary measures to ‘classify,
identify, preserve and restore’\(^ \text{13} \). Due to the powers conferred on the NAS by the
National Heritage Board Act, NAS sees no further need to contract separately with
the Government departments. The Records Acquisition Committee is responsible for

\(^{10} \text{http://www.museum.org.sg/MCC. The NHB operates other national institutions such as it the Singapore}
\text{History Museum, Singapore National Philatelic Museum, Asian Civilisation Museum (both sites at}
\text{Empress Place as well as Armenian Street), Singapore Art Museum, Heritage Conservation Centre}

\(^{11} \text{http://www.museum.org.sg/NAS/nas.shtml}

\(^{12} \text{interview with Archives Services, Records Management, Audio-Visual and Oral History Centre from}
\text{NAS on 31 May 2005}

\(^{13} \text{S17(2) National Heritage Board Singapore}
the examination of all Government records. These are considered “Public Archives”\textsuperscript{14} which are any public records that are more than 25 years old. However, not all public archives are automatically opened to the public. This is determined by the Declassification Committee that will review the records with the particular government agency in order to determine the degree of sensitivity of the document\textsuperscript{15}. If there is a deposit acquired from or volunteered by private individuals and organisations\textsuperscript{16}, the NAS will sign a deposit agreement with the parties in question\textsuperscript{17}. There is currently no clause in these standard contracts with private individuals and organisations to limit the liability of NAS. NAS will also first ascertain that copyright rests with individuals and organisations by asking them to confirm separately in writing their physical and copyright ownership of the materials. On the rare occasion, NAS may choose to acquire the copyrights to certain collections if it is within their budget.

The depositing party and NAS will review the sensitivity of the materials (for example materials that pertain to national security and privacy issues) and if necessary impose restrictions on the viewing and/or reproduction by the public. If necessary, NAS will advise individuals on the sensitivity of the materials they have handed over to the NAS. NAS will comply with the wishes of the private individuals and organisations should they wish to restrict public access to part or all of the materials that they have donated or sold to NAS. In the agreement signed with the private individual or organisation, NAS gives them the option of determining the number of years the material can be accessed by the public (or at all). If the contributor wants to specify his own terms, he is also allowed to do so. In the case of the Oral History Division, where memories of individuals are recorded on audio tape, certain words or sections may be edited out before public release if the individual so wishes. NAS will keep a copy of the unedited version. If after recording, the individual wishes to erase all documented proof of their interview, NAS will also comply with their wishes. In this case, NAS will not keep a copy of it unless the contributor specifies otherwise.

\textsuperscript{14} S2(a) National Heritage Board Act
\textsuperscript{15} For example, documents pertaining to national security, national defence, personal records, information disclosure which would endanger the life or physical safety of the person, law enforcement records, legal documents, or information or disclosure that would have substantial adverse effect on the financial or property interests of a nation
\textsuperscript{16} These include clan associations, clubs, religious institutions, and societies as mentioned in the interview with NAS on 31 May 2005
\textsuperscript{17} The standard contracts with private individuals and organisations are can be found under Appendix 1.
ANNEX D

Marshall Cavendish

Background

Marshall Cavendish is an international publisher of Education, General & Reference, Business and Home & Library Reference content and its publishing network spans Asia, Europe and the USA, with products that reach across the globe in 13 languages. Marshall Cavendish publishes works of all nature from pre-school to academic with general interest to references and business knowledge.

Marshall Cavendish is a member of Times Publishing Limited.

Findings

Marshall Cavendish does not contract with archives or libraries regarding archival material. They understand that there is a need to comply with the National Library Board Act\(^\text{18}\) regarding legal deposit, and do so. Should the library or the archive require further books, they will purchase books from them. In any event, there is no contract between institution and publisher.

Marshall Cavendish does, as a matter of promotion or publicity, give away certain books. There is again, no contract between publisher and institution, if the institution is a recipient of such promotional or publicity material.

Marshall Cavendish has their own internal fact-checking process to ensure that the non-fiction books they publish are factually accurate. They work closely with the authors and have to ensure the accuracy of a book before publishing it, as they undertake certain risks once the book is published. Therefore, in the event that it is a non-fiction book, Marshall Cavendish will embark on a fact-checking process to ensure accuracy before publication; in the event that it is the publication of a fiction book, they will try and ensure it bears no resemblance to any real life events. The fact-checking process is however constrained by time and resources. To date, there have been no legal issues where they were involved in concerning archiving and accuracy of content.

---

\(^{18}\) S10 National Library Board Act. Please see Annex E for background details and findings of our interview with the Marshall Cavendish.
Bibliography

Websites

www.elibraryhub.com/heritage/heritageCollection.as
http://www.lexisnexis.com
http://www.lib.nus.edu.sg/llb/about.html

Statutes

National Heritage Board Act, Singapore
National Library Board Act, Singapore
A. Introduction

1. The research explores the legal treatment of archival material in Singapore, in particular the laws in Singapore (other than Copyright and Contract laws) that may influence the removal of material from archives and libraries by archives/libraries and publishers/copyright owners in Singapore.

B. Summaries of relevant Bodies of Law in Singapore

2. Set out below is a summary of the bodies of law in Singapore that is potentially relevant to decisions made by publishers or libraries/archives to remove materials from archival collections or databases. These laws may also influence a library or archive’s decision as to whether it could make available the offending material – assuming it has obtained a copy – when the publisher has not.

Overview

3. It is most likely the case that materials of a potentially damaging nature (i.e. publications which could be defamatory, flouting censorship laws of Singapore or a threat to national security for example) would be carefully scrutinised by the distributors and publishers, and not published or distributed in the first place. Generally, the decision to distribute or publish material would be made prior to them reaching libraries/archives. For example, major book suppliers such as PanSing Distribution Sdn Bhd, APD Singapore Pte Ltd, and major bookstores avoided distributing or carrying the book, ‘Your Future, My Faith,
Our Freedom: A Democratic Blueprint for Singapore’ by Dr. Chee Soon Juan, even though it was not banned under any laws in Singapore.

4. Local publishers would also be very cautious about publishing material of a potential damaging nature. If no such matter is published in Singapore, then they will not reach the libraries or archives where the public will have access to them.

5. However if any book of a potentially damaging nature does reach the libraries and archives, libraries and archives suspicious of the contents of the book will refer to the guidelines set out by the Ministry of Information, Communication and the Arts before displaying books/materials on shelves for public viewing. There are also internal processes set in place in each institution that will detect any material which is undesirable or not in line with the Singapore Government’s national agenda.

6. To-date, there are no direct cases or laws as to whether the publishers, libraries or archives will be sued along with the author or owner of the material if or when a suit arises, but there are indications that they might be liable as well. For example, section 33 of the Newspaper and Printing Presses Act 2002 implies

\[\text{http://www.singaporedemocrat.org/classic/news_display.php?id=108}\] – there is the implication that since the book was being sold at Kinokuniya Bookstore (a major bookstore in Singapore) and Select Bookstore, it is not banned, but has been avoided by most major bookstores and distributors in Singapore. Further, his previous book, ‘To Be Free: Stories from Asia's Struggle Against Oppression’ has not been banned either but he was charged with hawking that book in public without a licence (http://www.sfdonline.org/sfd/chee/newsrepts260299.html).

\[\text{http://www.sfdonline.org/sfd/chee/newsrepts260299.html}\].

\[\text{http://www.sfdonline.org/sfd/chee/newsrepts260299.html}\].

3 Please see The Legal Treatment of Archives under Contract Law – The Singapore Report by the IP Academy as to the laws regarding books and material published in Singapore by a publisher based in Singapore.

4 MICA governs and regulates censorship in Singapore and as part of their administration of censorship policy in Singapore it distributes a list of banned books and materials to all relevant institutions.

5 See The Legal Treatment of Archives under Contract Law - the Singapore Report by the IP Academy for examples of the institutions that have internal evaluation processes.

6 Section 33 states that '[a]ny person who publishes, sells, offers for sale or distributes or abets the sale, offer for sale or distribution of any newspaper the printing, publication, sale or distribution of which is
that not only can author and editor be prosecuted, but the distributor and printer as well. It appears to exert pressure on institutions and companies to self-censor in order to avoid objectionable content.

7. There are various laws in Singapore that could indirectly affect a publisher, library or archive’s decision to withdraw certain material from their shelves. Publication or circulation of material that is in contravention of the Penal Code, Undesirable Publications Act, Maintenance of Religious Harmony Act and the Sedition Act are examples of certain laws that libraries and archives have to be aware of. Publishers, libraries and archives have to observe the laws of defamation and censorship as well.

Summary of Policies and Laws

8. The policies and laws that could affect publishers and libraries/archives in Singapore are the following:

a. Censorship policies
b. Defamation Act 1985
c. Internal Security Act 1985
d. Maintenance of Religious Harmony Act 2001
e. Penal Code 1985
f. Sedition Act 1985
g. Undesirable Publications Act 1998

9. The following is a summary of the laws:

unlawful under any of the provisions of this Act shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $50,000 or to imprisonment for a term not exceeding 2 years or to both'.

7 See Attorney General v Lingle and Others [1995] 1 SLR 696; [1995] SGHC 31 where the printer and publisher were both found guilty of libel and fined.
a. **Censorship Policy**

10. The Ministry of Information, Communication and the Arts (‘MICA’) is responsible for formulating and administering the regulatory and developmental policies through the **Media Development Authority (‘MDA’)**. The MDA was formed on 1 January 2003 through the merger of the former Singapore Broadcasting Authority, the Films and Publications Department and the Singapore Films Commission. MDA's mission is to develop Singapore into a vibrant global media city so as to foster a creative economy and connected society. This includes the administration of Singapore censorship policy. According to MICA\(^8\), censorship is practised to:

- Preserve our traditional Asian values such as importance of the family, respect for elders and filial piety;
- Maintain racial harmony and religious tolerance amongst our people;
- Protect our social fabric and ensure social cohesion; and
- Protect children and young persons from corruption by undesirable materials.

11. An example of the Singapore authorities’ attempt to maintain and preserve the above values is the banning of *Cosmopolitan* in Singapore in 1982 by the then Ministry of Culture for ‘allegedly’ espousing extreme liberal values which local authorities viewed as offending family and moral norms in Singapore. There is no classification system for publications in Singapore. Hence, publications with sensitive contents such as *Cosmopolitan* and *Playboy* magazines were disallowed or banned rather than sold to a select group of the public as is the case in some Western societies such as the UK.

---

\(^8\) [http://www.mica.gov.sg/mica_business/b_media.html](http://www.mica.gov.sg/mica_business/b_media.html)
12. However in recent years, due to the advent of technology, it is becoming increasingly recognised that censorship measures taken in the past may no longer be relevant. MICA and MDA are of the view that globalisation and technological advances have developed over the years, creating a greater diversity of content and channels of access. Exposure to a wide array of content and communication channels has increased expectation for greater space and wider access. Singapore is seen as an emerging economy where ideas, creativity and innovation are key economic and social imperatives which must be accommodated. It is therefore understood that the diversity and aspirations present in its matrix will nurture a more vibrant society. This is the conclusion arrived at that paved the way for a liberalisation of the censorship policies.

13. The ways in which the public would gain access to these publications without the material falling into the ‘wrong’ hands were carefully debated by the Censorship Review Committee (‘CRC’). In the Report of the Censorship Review Committee 2003\(^9\), the CRC recommended that certain publications be allowed to adult readers via suitable channels even if the content may be sensitive to some. Some have argued that magazines such as *Cosmopolitan* should be allowed by classification of publications by allowing its sale to certain age groups, allowing its sale through subscriptions only, using cellophane paper to wrap the publication to avoid unsolicited viewing and reading at retail outlets, regulating its promotion and advertising to reduce its appeal to non-targeted readers. CRC did not recommend a full classification of publications due to the difficulty of implementation but did recommend the lifting of the ban on *Cosmopolitan*, such contents to be made available to the public through suitable distribution means in order to protect the young and prevent unsolicited viewing. MICA, which received the CRC Report, accepted

\(^9\) The Censorship Review Committee (CRC) is formed once every decade to review and update censorship objectives and principles to meet the long-term interests of our society. These committees and panels comprise members of the public with diverse backgrounds, and they serve to provide valuable inputs and balanced views on content issues. Inputs from the various ethnic committees are also filtered into appropriate standards for each community. MICA then administers content policies that aim to balance information and social needs
that *Cosmopolitan* be allowed through the appropriate channels and through MDA, will introduce safeguards to prevent unsolicited access and protect younger readers. MDA also reviewed its guidelines for adult themed publication. *Cosmopolitan* is now sold, shrink wrapped in cellophane paper and labeled ‘unsuitable for children’¹⁰.

14. There are also certain laws in Singapore administered by MDA that help govern and regulate the media and publishing industry across the different platforms in order to maintain the above policies. The applicable laws include:

- **Newspaper and Printing Presses Act** 2002 ¹¹
- **Undesirable Publications Act** 1998¹²
- **Public Entertainment and Meetings Act** 2001¹³

b. **Defamation Act 1985**

*The Law*

15. The law of defamation is governed by the Defamation Act. Libel and slander – the former is the written word, the latter the spoken word – both come under the umbrella of defamation. Libel will concern publishers or libraries/archives.

16. The test for defamation is whether ‘the words tend to lower the plaintiff in the estimation of right-thinking members of society generally.’ This is set out by

---

¹¹ This Act will be discussed below.
¹² This Act will be discussed below.
¹³ The *Public Entertainment and Meetings Act 2001* has been indirectly relevant to authors who have unlawfully promoted their books in public or published and distributed material in public without a licence. Both Dr Chee Soon Juan and JB Jeyaratnam (members of the opposition parties in Singapore) have both been fined and/or jailed under this Act. Therefore even though it was not the material they were promoting that was in question, the distribution of potentially damaging material was halted because both individuals (on separate occasions and separately) were found guilty of holding public events without a licence (which is governed by the Public Entertainment and Meetings Act). They failed to obtain licences to hold public events as they were adamant that it would not be approved.
the Court of Appeal in *Aaron v Cheong Yip Seng*\(^{14}\) as an objective test. This is further developed in *Chiam See Tong v Ling How Doong*\(^ {15}\), where TS Sinnathuray J in the High Court held that the views of the community as a whole must be considered and not just a limited class.

17. The words complained of must be shown by the plaintiff to have been published and that they concerned him. The general test is an objective one. The question is whether an ordinary reasonable reader of the publication would reasonably conclude that the words referred to the plaintiff. The words complained of:

- Ought to be construed in the context of the entire statement and that the plaintiff must be able to show by extrinsic facts and circumstances that the words used referred to him\(^ {16}\).
- Must also be construed in their natural and ordinary meaning. The test as to what is the natural and ordinary meaning of the words has been set out in *Rubber Improvement Ltd & Anor v Daily Telegraph Ltd*\(^ {17}\) where in actions for libel the question is what the words would convey to the ordinary man: it is not one of construction in the legal sense. This is what the ordinary man would infer without special knowledge. However, it is sometimes not necessary to go beyond the words themselves, as where the plaintiff has been called a thief or a murderer. But more commonly, the sting is not so much in the words themselves as in what the ordinary man will infer from them, and that is also regarded as part of their natural and ordinary meaning.

**Defences**

18. If the Judge finds the statement to not be defamatory then the matter ends there. However if the judge finds the statement defamatory, there are defences

\(^{14}\) [1996] [1] SLR 623 at 641  
\(^{15}\) [1997] 1 SLR 648  
\(^{16}\) *Morgan v Odhams Press Ltd* [1971] 2 All ER 1156  
\(^{17}\) [1964] AC 234
available to the defendant. Defences available are: Fair comment, justification and qualified privilege. The defendant must prove that what he said was true, or that it was fair comment on a matter of public interest, or that the circumstances of the statement made it qualified.

19. **Fair Comment**: In determining whether a particular statement was a comment or an assertion of fact, the test was whether an ordinary reasonable reader, on reading the whole article, would understand the words as a comment or as a statement of fact.

20. In *Chen Cheng v Central Christian Church* 18 the court held that the following elements had to be proved for the defence of fair comment to succeed:

   (a) the words complained of were comments though they might consist of or include inference of facts;

   (b) the comment was on a matter of public interest;

   (c) the comment was based on facts; and

   (d) the comment was one which a fair-minded person could honestly make on the facts proved.

21. If a defamatory allegation was to be defended as fair comment it must be recognisable by the ordinary, reasonable reader as a comment. One thing to consider was whether the allegation was supported by facts, stated or indicated. Much would depend on how the defamatory statement was expressed, the context in which it was set out and the content of the entire article or passage in question. Section 9 Defamation Act states that ‘in an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of

---

18 [1999] 1 SLR 94
opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved’.

22. **Justification:** To succeed in the defence of justification, the respondent must prove that the defamatory imputation of his remark was true and he had to prove the truth of the very imputation complained of. Section 8 of the Defamation Act also states that ‘a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff’s reputation having regard to the truth of the remaining charges’.

23. **Qualified privilege:** To establish the defence of qualified privilege, there must be circumstances that give rise to a legal, social or moral duty to make the statement and a corresponding interest or duty to receive the statement. There must be a duty on the part of the writer and publisher to publish that article and there must be a corresponding interest on the part of the members of that community to receive it. The fact that persons who are not members of such community could have access to the publication does not *ipso facto* destroy the privilege19.

24. Malice negates all the above defences. If the respondent had been actuated by malice when he made his comment, he would be disqualified from relying on the defences of justification, qualified privilege and fair comment.

25. Section 7 Defamation Act also provides that a ‘person who has published words alleged to be defamatory of another person may, if he claims that the words were published by him innocently in relation to that other person, make an offer of amends under this section’. This is known as ‘unintentional defamation’. If the offer is accepted by the aggrieved party then no proceedings for libel (or slander) can continue to take place against the person making the offer in

---

19 *Chen Cheng v Central Christian Church* [1999] 1 SLR 94
respect of the publication in question. If however, the offer is not accepted by the aggrieved party, then it will be a defence in any proceedings by him for libel (or slander) against the person making the offer in respect of the publication in question, to prove that the words complained of were published by the defendant or were published by the defendant innocently in relation to the plaintiff and that the offer was made as soon as practicable after the defendant received notice that they were or might be defamatory of the plaintiff, and has not been withdrawn.

26. The words shall be treated as published by one person (referred to as the publisher) innocently in relation to another person if the following conditions are satisfied:

i. that the publisher did not intend to publish them of and concerning that other person, and did not know of circumstances by virtue of which they might be understood to refer to him; or

ii. that the words were not defamatory on the face of them, and the publisher did not know of circumstances by virtue of which they might be understood to be defamatory of that other person.

27. In either case, the publisher should exercise all reasonable care in relation to the publication; and this includes any servant or agent of his who was concerned with the contents of the publication.

c. **Internal Security Act 1985**

28. The Internal Security Act is a legacy from British colonial days. British colonial Malaya introduced a set of Emergency Regulations in 1948 during the Malayan Emergency in response to a communist uprising. The regulations allowed the police the right to arrest anybody suspected of having acted or being likely to
act in a way that would threaten security without evidence or warrant, hold them incommunicado for investigation and detaining them indefinitely without the detainee being charged with a crime or tried in a court of law. In 1960, after Malaya (which included Singapore at this time) gained independence, the Emergency was declared over. However, a new Internal Security Act was passed in its place with much of the same powers. On its separation from Malaysia (which Malaya became known as after) in 1963, Singapore also retained the Internal Security Act and it is used to protect the national security of the country.

29. Section 20(1) of the Internal Security Act provides that where it appears that any document or publication contains any incitement to violence, counsels disobedience to the law or to any lawful order, is calculated or likely to lead to a breach of the peace, or to promote feelings of hostility between different races or classes of the population, or is prejudicial to the national interest, public order or security of Singapore, the Minister in charge of publication and printing presses may prohibit the printing, publication, sale, issue, circulation or possession of such document or publication.

30. The order may be extended so as to prohibit the publication, sale, issue, circulation, possession or importation of any past or future issue in the case of a periodical publication; and to prohibit the publication, sale, issue, circulation or importation of any other publication which may at any time whether before or after the date of the order have or appear or purport to have issued from such specified publishing house, agency or other source in the case of a publication which appears to or has issued from a specified publishing house, agency or other source.

d. **Newspaper and Printing Presses Act 2002**
31. Local publications require a permit under the Newspaper and Printing Presses Act 2002. Importers of foreign publications must register under MDA’s Registered Importers Scheme which requires them not to import publications that may denigrate race, religion, undermine moral values of our society or prejudice public order\(^{20}\).

32. Section 3 of the Newspaper and Printing Presses Act states that all printers must licence their printing press. ‘The Minister may in his discretion grant any person in Singapore a licence to keep and use a press for the printing of documents\(^{21}\). Section 4 further states that the Registrar shall keep a register of printing presses, in which he shall enter such particulars relating to persons licensed under section 3.

33. Section 5 states that every document printed within Singapore shall have printed legibly on its first or last printed leaf the name of its printer and publisher. Section 6 further states that every person who prints any document shall keep one copy on which he shall write or print the name and address of the publisher for 6 months, and produce the document to any person authorised by the Minister.

e. **Maintenance of Religious Harmony Act 2001**

34. The Maintenance of Religious Harmony Act, was prompted by actions that the Singapore Government perceived as threats to religious harmony, including aggressive and ‘insensitive proselytizing’ and ‘the mixing of religion and politics,’ allows the Government to restrain leaders and members of religious groups and institutions from carrying out political activities, ‘exciting disaffection against’ the Government, creating ‘ill will’ between religious

\(^{20}\) [www.mda.gov.sg](http://www.mda.gov.sg)

\(^{21}\) Section 3(1) Newspaper and Printing Presses Act 2002
groups, or carrying out subversive activities\textsuperscript{22}. The Act also prohibits judicial review of its enforcement or of any possible denial of rights arising from it.

35. Publication is defined under section 2 as including any newsletter, journal, periodical, book, film, videotape, audio tape or any written, pictorial, aural or printed matter containing any audio or visible representation which by its images, form, shape or sound or in any other manner is capable of suggesting words or ideas, and every copy and reproduction or substantial reproduction of any publication.

36. Section 8 states that the Minister may make a restraining order against any priest, monk, pastor, imam, elder, office-bearer, any other person who is in a position of authority in any religious group or institution or any other person who has committed or is attempting to commit any of the following acts will be found guilty of contravening the Maintenance of Religious Harmony Act:

(a) causing feelings of enmity, hatred, ill-will or hostility between different religious groups;
(b) carrying out activities to promote a political cause, or a cause of any political party while, or under the guise of, propagating or practising any religious belief;
(c) carrying out subversive activities under the guise of propagating or practising any religious belief; or
(d) exciting disaffection against the President or the Government while, or under the guise of, propagating or practising any religious belief

37. The person found guilty of the above charges can also be restrained from addressing orally or in writing any congregation, parish or group of worshippers or members of any religious group or institution on any subject, topic or theme as may be specified in the order without the prior permission of the Minister. He

\textsuperscript{22} http://www.state.gov/g/drl/rls/irf/2004/35427.htm
can also be restrained from printing, publishing, editing, distributing or in any way assisting or contributing to any publication produced by any religious group without the prior permission of the Minister.

f. **Penal Code 1985**

38. Section 151A states that whoever makes, prints, possesses, posts, distributes or has under his control any document containing any incitement to violence or counselling disobedience to the law or to any lawful order of a public servant or likely to lead to any breach of the peace shall be punished with imprisonment for a term which may extend to 3 years, or with fine, or with both.

39. Further, section 499 of the Penal Code also deals with defamation - whoever, by words either spoken or intended to be read, or by signs, or by visible representations, makes or publishes any imputation concerning any person, intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said to defame that person.

40. The Penal Code Singapore provides that whoever defames another shall be punished with imprisonment for a term which may extend to 2 years, or with fine, or both\(^{23}\). Further, whoever prints or engraves any matter, knowing or having good reason to believe that such matter is defamatory of any person, shall be punished with imprisonment for a term which may extend to 2 years, or with fine, or both\(^{24}\). Finally, the person who sells or offers for sale any printed or engraved substance, containing defamatory matter, knowing that it contains such matter, shall be punished with imprisonment for a term which may extend to 2 years, or with fine, or with both\(^{25}\).

\(^{23}\) Section 500, the Penal Code  
\(^{24}\) *Ibid.*, Section 501  
\(^{25}\) *Ibid.*, Section 502
41. The Sedition Act makes seditious words an offence: this includes motivating hostility against the government and promoting feelings of ill-will among citizens.

42. Section 2 of the Sedition Act defines ‘publication’ as including ‘all written or printed matter and everything whether of a nature similar to written or printed matter or not containing any visible representation or by its form, shape or in any other manner capable of suggesting words or ideas, and every copy and reproduction or substantial reproduction of any publication’

43. Section 4(1) states that any person ‘who prints, publishes, sells, offers for sale, distributes or reproduces any seditious publication; or imports any seditious publication, shall be guilty of an offence’. Section 4(2) further states that any person who illegally possesses any seditious publication will be guilty of an offence. Further, section 9 deals with the penalties of a newspaper that is found guilty of publishing or circulating seditious material. Though not applicable to publishers of books and materials, libraries and archives, it is a general indication of what the penalty would be for a publisher, distributor or carrier of material that are seditious in nature. Section 9 states that a newspaper found guilty of publication or circulation of seditious material will be suspended. Whenever any person is convicted of publishing in any newspaper matter having a seditious tendency, the newspaper may be prohibited from future publications, for a period of time not exceeding one year. The publisher, proprietor or editor of that newspaper may be prohibited as well from publishing, editing or writing for any newspaper, or assisting with money or money’s worth material, personal service or otherwise in the publication, editing or production of any newspaper.

44. The courts can also prevent the circulation of seditious publication. Section 10 of the Act states that the Public Prosecutor can apply to the courts to prohibit the
issue or circulation of a seditious publication if it is shown that circulation of the material, if commenced or continued, would be likely to lead to unlawful violence or appears to have the object of promoting feelings of hostility between different classes or races of the community. The courts can also require every person having any copy of the prohibited publication in his possession, power or control to deliver every the copy into the police.

h. Undesirable Publications Act 1998

45. Both the Newspaper and Printing Presses Act 2002 and Undesirable Publications Act 1998 govern the contents standards of local and foreign publications in Singapore. The Undesirable Publications Act prohibits the importation, distribution and reproduction of undesirable publications. Examples of undesirable publications include obscene publications which deprave and corrupt persons likely to be exposed to their contents, and objectionable publications which deal with matters of race or religion in a manner likely to cause ill-will or hostility between different racial or religious groups. The Act defines ‘publication’ as any of the following other than a film:

i. any book, magazine or periodical, whether in manuscript or final form;

ii. any sound recording;

iii. any picture or drawing, whether made by computer-graphics or otherwise howsoever;

iv. any photograph, photographic negative, photographic plate or photographic slide; or

v. any paper, model, sculpture, tape, disc, article or thing

1. that has printed or impressed upon it any word, statement, sign or representation; or

2. on which is recorded or stored for immediate or future retrieval any information that, by the use of any computer
or other electronic device, is capable of being reproduced or shown as any picture, photograph, word, statement, sign or representation, and includes a copy of any publication.

C. Decisions of the Courts and Settlements in Singapore

46. To-date, there are no judicial decisions in Singapore addressing publishers’ or archives’ liability with respect to allegedly offending material contained in the archives’ collections.

47. There are no known cases of libraries or archives settling a matter out of court. However, there have been known cases of newspapers settling out of court with regard to defamation suits. This is not directly related to libraries and archives, but is an example of how powerful the defamation laws in Singapore can affect publication of material and control of media.

48. In 2002, Bloomberg LP faced a Singapore lawsuit filed by several government officials. Bloomberg reached a total settlement of approximately SGP$550,000. What is extraordinary about this case is the speed by which this settlement was made and with whom. It was settled 3 weeks after publication even though the article was not published in Singapore. The article was about nepotism in Singapore and Ho Ching, Lee Kuan Yew’s daughter-in-law. However, the settlement was made with the Singapore officials excluding Ho Ching. Bloomberg's settlement was different at several levels: its speed, the lack of court proceedings; and that the person arguably most defamed, Ho - about whom it was suggested she got her job because of family connections and not ability – was not party to the action. And the article, written in the US, wasn't printed in Singapore.
49. Also, as far as we are aware, authors of the book *Escape from Paradise*\(^{26}\) have had their publication removed from shelves around the country even though it was not banned and no lawsuit was ever brought by the ‘victims’ of defamation against the authors.

D. Potential liability for publication of allegedly offending material.

50. There are no direct cases on this as yet.

51. However, as mentioned above, Singapore censorship policies have banned the circulation of certain magazines such as *Cosmopolitan* for ‘promoting sexual permissiveness’. This ban was recently lifted. The magazine is on the market again after a 22-year ban, providing it does not contain exploitative sex and nudity, as made in a statement by the MDA. Also included among the conditions is that each copy must also be shrink wrapped and the cover must feature prominently the consumer advice ‘Unsuitable for children’. According to MDA, the relaxation on the import of Cosmopolitan is in line with calls from the public for greater choice in media content\(^{27}\).

52. There have also been cases where the authors themselves have been *indirectly* stopped from publicising their books even though their books have not been banned here in Singapore. For example, Dr Chee Soon Juan has been arrested under the Public Entertainment and Meetings Act for speaking in public (and promoting his book) without a permit.

---

\(^{26}\) This is a book written by May Chu-Harding and her husband John Harding, about an alleged true story of a woman’s escape from an arranged marriage in Singapore. She talks about difficulties encountered with corrupt lawyers and judges in Singapore which made her divorce extremely difficult. This was further complicated by the wealth of her ex-husband, the owner X10, and the involvement of certain members of society which led to the removal of their book from the shelves of bookstores and libraries.

\(^{27}\) See discussion above on the relaxing of the ban of *Cosmopolitan*. 
E. Conclusion

53. To-date, there have been no judicial decisions made by the Singapore courts concerning the removal of material for reasons such as privacy, censorship, national security. However, we have highlighted the different areas of laws that could potentially affect a library, archive or publisher’s decision to carry on in publishing or making accessible certain material; laws such as Defamation, Undesirable Publications, Sedition Acts are examples of laws that could affect archives, libraries or publishers. Singapore has certain censorship policies in place that prevent material with undesirable content filtering out to the public. In all cases, libraries, archives and publishers are very careful as to the type of material they place on their shelves and what they publish, and will carry out all internal checks before proceeding. In most cases, books and materials are removed if they are potentially damaging, and would most often not involve the relevant authorities or the law. This is the likely reason why there are no judicial matters on the removal of material from shelves and archives as yet.
II : The Legal Treatment of Archives: Other Substantive Areas

Censorship

When asked about whether MICA provided libraries and archives with detailed guidelines or instructions for determining whether they should include materials in their collections, the National Library Board (‘NLB’) says that MDA/MICA do provide general guidelines concerning censorship from time to time.

In the National Library of Singapore which has subscriptions to third party digital materials (e.g. Lexis, Westlaw, and other databases) with objectionable materials in those collections, the material is filtered through using selection librarians who will assess as much of the content as possible prior to purchase, and filter objectionable materials from the selection. For objectionable materials, NLB may archive but block them from public access through use of metadata.

The National Library reserves the right to block access to purchase content to any target audience it deems necessary if there are objectionable content for that particular group. No particular part of the contract addresses this, as the supplier usually has a clause absolving it of any claims arising from objectionable material, thus it is the National Library’s best interests to filter the access by NLB, if needed. In web archive, NLB reserves the right to take down any material from the web archive which in its opinion, infringes Copyright or any other Intellectual Property Rights or is deemed to be illegal.

As for whether libraries and archives in Singapore reserve the right to block access to digital materials that are published and made available to people outside Singapore, based on the experience of NLB, NLB and NAS will block certain materials from public access even if they are made publicly available in overseas archives. This is to deter access instead of prevent it. One example is the Straits Settlements records, which are also found in the National Archives (UK) and India (though not identical ones). This is also to ensure sensitive and controversial information (e.g. racially or politically sensitive information) are disseminated.

Industry Standards/Accepted Practices other than Removal

With respect to industry standard or accepted practices with regard to addressing offending material contained in an archive or database, the librarians of the National Library of Singapore will seek the advice of NLB’s Legal office, as to whether to remove them from the open shelf. If they are reference titles, they are kept in the Restricted/banned collection. However, if the ‘offending’ titles are lending copies, the public libraries will discard them on the advice of the Legal office. NLB also implements disclaimers and in NORA a ‘warning’ intended to inform users of objectionable content and language used in the materials. In the case of NORA, access is not controlled due to the nature and purpose of the service. As to what to do with the offending material, this depends on the advice given by MICA/MDA and the Legal office.
If works are deemed to be ‘offensive’ and restricted from public viewing, they will no longer be retained in the public Online Catalogues (‘OPAC’) in Singapore. Reference titles may be retained in the Lee Kong Chian Reference Library (‘LKCRL’).

With regard to annotation of the catalogue for works that have been removed, if NLB is aware of why a particular reference title was withdrawn from open shelf, then NLB will indicate in the “List of Restricted/banned publication” the history of the correspondences. A file will be kept for these correspondences. Metadata will not contain annotations that express the library’s opinion of content sensitivity. The descriptions provided are directly related to the content of the material.

If the work has been removed or destroyed by the public libraries and the catalogue entry remains, NLB will remove the records from the public OPAC. NLB have their own Regulations and Policy on restricted publications.

Access

With regard to scholars having access to materials once they have been banned or removed from the library, the NLB has an access policy for these restricted and banned collections i.e. members of the public can have access to these restricted material for research purposes, based on the criteria set by MICA or the issuing organisations. Publications are to be consulted at Level 11 of the LKCRL. For restricted publications, the public has to complete and sign the “Request to Consult Restricted/Confidential Publications” which is available at the Information Counter, Level 11 LKCRL.

There is a publicly available list of publications or materials that have been banned or censored kept by the LKCRL. If a member of the public wishes to view this list, then they have to write to the Director of the National Library. Permission may be granted on a case by case basis.

Library-Initiated Databases

With regard as to whether a library’s or archive’s potential for liability is increased if it makes material publicly available selectively, in the case of web archive, NLB will always seek the permission of the owner to archive and make it available for public access if permission is given.

III Report on The Legal Treatment of Archives Under Contract Law

Contract Related to Digital Materials

Yes there are contracts between ‘online legal resources’ or databases referred to as part of the library’s collection.
In respect of whether these contracts address the issue of removing a work from the National Library’s collection, the amount of digital files in subscribed databases is too large for the selection librarians to go through individually and therefore this is carried on a case to case basis. The vendor is informed of the offending material and the material is then removed or blocked.

In respect of LexisNexis’ contracts with libraries to address the issue of removing a work from the collection, the commercial contracts entered into by LexisNexis and another party offer access to news, business and archived information on a subscription or pay as you go basis. The information uses a LexisNexis interface and is hosted in Dayton, USA. The libraries or any paying parties are only able to access the information purely for research purposes. They are only permitted to download, store, reproduce, transmit, display, copy, distribute or use materials from the online services for strictly research purposes. Work cannot be removed because such functions are not available to the customer/libraries. Customers are only permitted to print or download materials using the printing or downloading command.

With regard to contracts addressing labelling, hyperlinking or any other means of dealing with the offending materials other than removing it, NLB find that contracts with publishers usually have a clause with responsibility for removal of offending material to the supplier, with some specifying a time line (e.g. 24 hours) for the removal.

LexisNexis do not allow libraries any right to deal with materials because they are not copyright owners of the materials. Any hyperlinking, labelling or taking down of the material will have to be undertaken jointly by LexisNexis and the copyright owner/licensor of the materials.

**Removal of Material**

At the time of the interview with NAS, the contributor may request the right to have his/her contribution expunged from the record at any time. A contributor can at any time request this.

**Preservation / Retention and Access to Objectionable Material**

With respect to objectionable material in the warehouse, the restricted titles do not appear in the library’s public OPAC.

**Contract between Publishers, Databases and Libraries/Archives**

The NLB have encountered some database providers (for example Proquest) that send materials in CDs (together with the online database). NLB have to enter into a separate contract if they wish to keep these materials in an archive.
In the case of web archives, NLB seek the website owner’s permission to create an archive in order to make the archive available from the NLB portal. In this case, the archiving is done for the purpose of future access. There are cases where some information cannot be released due to security reasons or sensitivity of the issues. However, they are still archived. In future, they may be reviewed for public access when the issue is no longer a security threat or not so sensitive.

With regard to provisions which would allow a library or archive to make a back-up copy of materials, or which guarantee long term access to previously licensed materials even if a subscription is terminated, NLB has for example, contracted with NetLibrary to access the eBooks for perpetuity by paying a Lifetime Service Fee. This guarantees perpetual Internet access to the appropriate eBooks. However, this does not give NLB rights to archive or make back-up copies of the materials.

**Integrity of Archives**

The answers for the questions in this section are the same as above.

**Statutes**

**National Heritage Board Act (‘NHB Act’)**

In respect of the National Heritage Board Act, it does not contain any specific provisions (not mentioned in the report) relating to the libraries and archives’ abilities to retain copies of works in their collections or to prevent the removal of works from their collections.

However it does make provisions for public records to be transferred to the National Archives for archiving purposes. S19 NHB Act states ‘[a]ny public records which, in the opinion of the Board, are of national or historical significance shall be transferred to the care and control of the National Archives … as may be agreed on between the Board and the public office or person responsible for the public records.’. Further, the National Heritage Board (‘the Board’) can take steps to secure the return of any public record belonging to the Singapore Government that has been illegally removed from official custody (S20). No public records can be disposed of or destroyed without the authorisation of the Board (S21(1) and (2)) and the Board has the right to inspect these records before making a decision (S21(3)).

Access to public records is allowed only if you are an officer of the National Archive (S22(1)). A member of the public may be allowed to inspect public records which are made available to the public for research or reference (subject to conditions imposed by the officer in charge of the public records and the director of National Archives) and with the written authority of the director of the National Archives (S22(1) and (2)).
National Library Board Act (‘NLB Act’)

The NLB Act provides that the Board shall, inter alia, provide a repository for library materials published in Singapore, acquire and maintain a comprehensive collection of library materials relating to Singapore and its people as well as to compile and maintain a national union catalogue and a national bibliography; and (S6(c), (d) and (g)). It has the power to take appropriate measures to maintain and preserve library materials deposited with the Board under S10 NLB Act (Deposit of Library Materials as mentioned the report)

S11 further provides for the establishment of an up to date national union catalogue by requiring that all publicly funded libraries contribute their cataloguing and holding records, whether original or derived from other sources.
MEMORANDUM, APRIL 2006

MEMORANDUM

TO:      LEE SU FERN AND NG-LOY WEE LOON
FROM:    JUNE BESEK
SUBJECT: REPORTS ON THE LEGAL TREATMENT OF ARCHIVES
DATE:    4/3/06

Thank you for your reports on the legal treatment of archives in Singapore, which we found very helpful and extremely interesting. We’re sorry for the delay in responding; Margo Crespin, who was coordinating the responses of our foreign correspondents, has been on an extended leave of absence.

Below, we have identified questions concerning areas where we need clarification, as well as questions prompted by the responses we got from our consultants in other countries. We would appreciate it if you could respond to these questions. We apologize for any repetition in the questions, but sometimes the same question arose in different contexts.

I. Report on The Legal Treatment of Archives Under Copyright Law

General Understanding of Archives

The report addresses the questions regarding the definition of archives under copyright law. We would also be interested in your response to the following question:

   “Is there otherwise a general understanding in Singapore of what an archive is, and if so, what is that understanding and what does it derive from? (E.g., does it derive from judicial decisions, industry practice, etc.?)”

For this report, which reviews the privileges and limitations granted or imposed by the Copyright Act on archives, what is critical would be the statutory definition of the term ‘archive’ provided by the Copyright Act (see s 7(1) and s 7(4) set out in Annex A of the report). It is not immediately obvious to me the relevance of finding out if there is ‘otherwise’ a general understanding in Singapore of what an archive is. Sorry about this, but if you could enlighten me on the reason for this question, I’ll then be able to see how best to answer it.

Right of Archives to Make Copies of Works – Specific Provisions

On page 3, concerning the heading “Keeping of records of declarations”: We assume you mean declarations pursuant to section 45, but please confirm.
On page 3 of the report, it was stated that this requirement to keep records of declarations apply “in most of these exceptions”. These exceptions are those in s 45, s 46, s 48 and s 113 (see s 45(1)(b), s 46(7) and s 48(3), and s 113(3) set out in Annex A of the report).

Therefore, the reply to your question would be as follows: in the heading “Keeping of records of declarations” on page 3 of the report, the reference to ‘declarations’ is not limited to those pursuant to s 45.

Judicial Decisions

Your report states that “there are no judicial decisions in Singapore on the scope of the various provisions specifically addressed to archives nor on whether the new ‘fair dealing’ defence is applicable to copying by archives.” It is our understanding therefore that there are no judicial decisions that touch on the following question, but please confirm. Would you be asking if there are any judicial decisions on the question set out below? If so, I confirm that there are no judicial decisions (on copyright) where limits or privileges have been placed by our courts on or provided to archives with respect to the activities in (a) – (c) enumerated below.

What limits or privileges, if any, have courts in your country placed on or provided to archives with respect to:

a. acquisition of material
b. maintenance and updating material
c. making material available to the public
i. as physical copies (original or facsimile)
ii. in digital form

Removing Material to Avoid Liability for Copyright Infringement

The report on The Legal Treatment of Archives – Other Substantive Areas indicates that at least some libraries/archives in Singapore review the works in their collections and may remove a work in question based on guidelines from The Ministry of Information, Communication and the Arts (MICA) or for other reasons related to national laws and censorship policies. The Report related to copyright does not mention whether this has been the case with regard to works that (allegedly or actually) infringe copyright. Could you please respond to this question: “Have publishers or archives in your country sought to avoid potential liability by removing material that may infringe copyright, without waiting to be notified (or sued) by persons claiming to be injured by the material?” It is unclear whether you meant to imply that you are unaware of any such situation. Please clarify.
I’ve contacted Su Fern about her report on “The Legal Treatment of Archives – Other Substantive Areas”. She confirms that she did not have in mind copyright law when she was reporting on archives’ removal of a work from their collection because the work is an infringing work under copyright law. Judging from her interviews with personnel of the archives and publishers, she believes that they are more concerned about defamation law.

In any event, I can confirm that, on my end, I am unaware of any situation in Singapore where the archive or publisher has sought to avoid potential liability by removing material that may infringe copyright, without waiting to be notified (or sued) by persons claiming to be injured by the material.

Moral Rights

With regard to question 4, “Does your country’s copyright law, or other law (whether statutory or case law) provide any moral rights such as a ‘right of withdrawal’ that could affect archives’ ability to retain an author’s work?,” you responded that Singapore copyright law provides no moral right to withdraw or retract. You state that the limited moral rights found in the Copyright Act deal with “false attribution of authorship.” Could these rights affect an archives’ ability to retain the work in its original form?

In my opinion, the rights to stop ‘false attribution of authorship’ would not affect an archive’s ability to retain the work in its original form. Let me elaborate by, first setting out the critical parts of the provisions in the Singapore Copyright Act on ‘false attribution of authorship’. They are in ss 189 – 190:

s 188:
(1) A person (referred to in this subsection as the offender) shall, by virtue of this section, be under a duty to the author of a work or a performer of a performance not to —
(a) insert or affix another person’s name in or on the work or a recording of the performance, or in or on a reproduction of the work or recording, in such a way as to imply that the other person is the author of the work or the performer of the performance;
(b) publish, sell or let for hire, by way of trade offer or expose for sale or hire, or by way of trade exhibit in public, the work or recording of the performance with another person’s name so inserted or affixed, if the offender knows that the other person is not the author of the work or the performer of the performance;
(c) do any of the acts mentioned in paragraph (b) in relation to, or distribute, reproductions of the work or recording of the performance, being reproductions in or on which another person’s name has been so inserted or affixed, if the offender knows that the other person is not the author of the work or the performer of the performance; or
(d) perform in public or communicate the work as being a work of which another person is the author, or make available to the public the recording of a performance as being a recording of a performance of which another person is the performer, if the offender knows that the
other person is not the author of the work or the performer of the performance.

s 189:
Where a work in which copyright subsists or a recording of a performance in respect of which the protection period has not expired has been altered by a person other than the author of the work or the performer of the performance, a person shall be under a duty to the author or performer not to —
(a) publish, sell or let for hire, or by way of trade offer or expose for sale or hire, the work or recording as so altered as being the unaltered work of the author or as an unaltered recording of the performance; or
(b) publish, sell or let for hire, or by way of trade offer or expose for sale or hire, a reproduction of the work or a recording of the performance as so altered as being a reproduction of the unaltered work of the author or an unaltered recording of the performance by the performer, if, to his knowledge, it is not —
(i) the unaltered work or a reproduction of the unaltered work, as the case may be, of the author; or
(ii) the unaltered recording or a reproduction of the unaltered recording, as the case may be, of the performance by the performer.

s 190:
A person shall, by virtue of this section, be under a duty to the author of an artistic work in which copyright subsists not to —
(a) publish, sell or let for hire, by way of trade offer or expose for sale or hire, or by way of trade exhibit in public, a reproduction of the work, as being a reproduction made by the author of the work; or
(b) distribute reproductions of the work as being reproductions made by the author of the work, where the reproduction was, or the reproductions were, to his knowledge, not made by the author.

In the scenario that you are interested in, namely, an archive’s ability to retain a work in its original form, the offender for the purposes of ss 189 – 190 is not likely to be the archive. Let’s assume that there is a work which was published under the name of a person who turns out not to be the author of the work (the ‘infringing work’). Here, the offender who may have breached the duty in s 188(1)(a) would be the publisher of the infringing work, and not the archive who has obtained a copy of the infringing book (either through purchase or otherwise) and is merely retaining such copy.

Further, this retention of the infringing work would also not fall within the ambit of s 188(1)(b) which essentially catches commercial exploitation of the infringing work if the offender knows that the other person is not the author of the work.

Finally, this retention of the infringing work would not be caught by s 188(1)(c) which sets out the duty not to, inter alia, “communicate the work as being a work of
which another person is the author” if the offender knows that the other person is not the author of the work. The word ‘communicate’ is defined as follows:

"communicate" means to transmit by electronic means (whether over a path, or a combination of paths, provided by a material substance or by wireless means or otherwise) a work or other subject-matter, whether or not it is sent in response to a request, and includes —
(a) the broadcasting of a work or other subject-matter;
(b) the inclusion of a work or other subject-matter in a cable programme; and
(c) the making available of a work or other subject-matter (on a network or otherwise) in such a way that the work or subject-matter may be accessed by any person from a place and at a time chosen by him.

S 188(1)(c) and the definition of ‘communicate’ were added to the Copyright Act via an amendment in 2004. You would no doubt appreciate that this paragraph and definition use the language of the ‘right of communication to the public’ right in the WIPO Copyright Treaty 1996 – a right intended to apply to dissemination or communication of copyright works via the Internet.

As stated earlier, I do not think that an archive, by retaining a copy of the infringing work in its original form, would be caught by s 188(1)(c) because the mere retention of the work does not involve ‘communicating’ the work as defined in the Copyright Act, in particular, making available the work itself on a network. Let’s assume that the archive not only retains the infringing work in its collection, but it also inputs details about the infringing work (eg. its title, author) in its electronic database which is used by its patrons to search for works in its collection. This cataloguing of a work does not, in my opinion, amount to ‘communicating’ the work itself on a network. Therefore, even if the electronic database displays the wrong person as the author of the infringing work – as a result of the archive following the attribution as it appears on the book as published – the archive would not have breached the duty in s 188(1)(c).

If so, could you please address the following questions:

4 b. “Have there been any disputes between authors and publishers (or between authors and libraries/archives) regarding the author’s moral rights in which the author wishes to remove a work from the archives’ collection, to alter the way in which the work is displayed or accessed, or to alter the work itself? If so, how have the parties resolved such disputes?”; and

4 c. “Can any such moral rights be contracted away?”

You may have meant to imply that no such disputes exist or that the moral rights are so limited that they do not affect the collection of archives or libraries, but we would appreciate it if you could clarify.
I confirm as follows:
1) Subject to paragraph (2) below, Singapore does not have moral rights in the form of the right of paternity/attribution and the right of integrity set out in Art 6bis of the Berne Convention (even though Singapore has been a member of the Berne Union since 1998). Singapore also does not have the other moral right of retraction/withdrawal known in some other countries like France.
2) The only moral right that Singapore provides is the right against false attribution of authorship, as elaborated above. This right has hardly any application to archives, as explained above.
3) I do not know of any disputes described in 4(b) in Singapore.
4) The answer to question 4(c) is as follows: the right against false attribution of authorship can be contracted away. This is the effect of s 191, which provides, inter alia, that there is no breach of duty if there is ‘express or implied’ permission from the author.

Section 48 (2) of the Singapore Copyright Act
We were interested to learn from your report that Section 48 (2) of the Singapore Copyright Act provides that “The copyright in a work that is held in the collection of a library or archives is not infringed by the making, by or on behalf of the officer-in-charge of the library or archives, for a purpose other than a purpose for which a copy may be made under subsection (1) of a single copy of the work so held.” Do libraries and archives regularly rely on this provision to make back-up copies of digital or physical works in the collection? Does the provision allow officers-in-charge of libraries and archives to make a copy of a work for any “other purpose”? Under what circumstances do officers-in-charge rely on this provision?

Yes, this particular provision is indeed interesting because it appears to give archives a carte blanche to copy the works in its collection (see page 3 of the report). Unfortunately, there are no further details that I can provide about its usage amongst libraries/archives: there are no judicial decisions on the scope of this provision, and I am not aware of any dispute between libraries/archives and publishers/authors in relation to the former’s usage of this provision.

II. The Legal Treatment of Archives: Other Substantive Areas

Censorship
We were particularly interested to learn about censorship measures and related statutes and policies in Singapore, as these laws and policies do not exist in the United States. Based on your report, it appears that, in response to these laws, objectionable material is often not published in the first instance; thus the issue of removing offensive or undesirable material from a publication does not usually arise. Nevertheless, it seems (as indicated in the report on The Legal Treatment of Archives Under Contract Law) that there are cases in which the objectionable or undesirable material does get published and must be addressed at a later point, either by the libraries and archives or by the publishers.
Any further information you could provide related to the policies and laws that deter the publication or dissemination of objectionable content or that could influence a library/archives, publisher, or database to remove such material from their collections would be appreciated. For example, your report refers to guidelines promulgated by The Ministry of Information, Communication and the Arts (MICA). In addition to the list of books and other banned materials, does MICA provide libraries and archives with detailed guidelines or instructions for determining whether they should include materials in their collections? Any further information related to MICA and the Media Development Authority (MDA)’s role in censorship would be greatly appreciated.

Similarly, we would greatly appreciate it if you could provide us with any other examples of works that have not been published in Singapore or have been removed from the collections of libraries and archives. In libraries and archives with subscriptions to third party digital materials (e.g., Lexis, Westlaw, and other databases) how are the objectionable materials in those collections filtered, if at all? Is this issue addressed in the contracts with these databases (e.g., does the library reserve the right to prevent access to certain online materials to children or all library patrons)? Do libraries and archives in Singapore reserve the right to block access to digital materials that are published and made available to people outside of Singapore?

**Other reasons for removal of material**

Two other reasons why a publisher or archives may seek to remove or block access to material that have come to our attention in our study are (1) personal privacy; and (2) factual error. Could you also include a brief discussion of potential liability of publishers, libraries and archives in these areas? With respect to the latter we are interested in potential liability for mistake of fact in a journal article, how-to guide, or the like. (In the U.S., for example, the publisher of a book or article containing a factual error is generally held not liable for any resultant harm – e.g., poisoning due to mushrooms erroneously identified in a book as safe to eat – due to the “chilling effect” this might have on speech; however, there is a narrow line of cases dealing with air navigation charts where publishers have been held liable.)

**Industry Standards/Accepted Practices Other than Removal**

In question 6 we asked, “Are there any industry standard or accepted practices, other than withdrawal of an article, for addressing offending material contained in an archive or database? For example, are there any practices concerning legends or disclaimers accompanying offensive material in order to continue to make it available?” The report refers to the case of *Cosmopolitan* being offered in cellophane wrap and a disclaimer on it. This example is both interesting and informative for purposes of the study, but could you please also address the question above, which focuses on practices in the context of libraries/archives and in the context of digital materials? It would seem, based on the report, that libraries are more likely to pull articles or not include them in a collection at all, rather than place some sort of legend or disclaimer on the articles (but again, further clarification would be greatly appreciated). Would this be true regardless of the reason for removal (e.g., defamation, factual error)?
Similarly, page 5 of the report on The Legal Treatment of Archives Under Contract Law indicates that “there are no stringent guidelines concerning the erasing of records from their catalogues/database should there be materials they wish to remove from their shelves.” What if the work is retained? Do the libraries annotate the catalogue in any way (e.g., to identify that the material contains an inaccuracy or was in any way objectionable)? What happens if the work has been removed to a warehouse or destroyed and the catalog entry remains?

Access
In Singapore, are there ways that scholars may access materials once they have been censored or removed from library/archives’ collections? Do libraries/archives hold onto banned materials, and if so, what happens to those materials (who, if anyone has access to them)? Alternatively, is there any publicly available list of publications or materials that have been banned or censored?

Library-Initiated Databases
One of the things we’re looking at is whether a library’s or archive’s potential for liability is increased if it makes material publicly available selectively, e.g., if it were to put up on its server material that had been removed by the publisher or intermediary with whom it has contracted for access. (For example, if the library learned that a publisher had removed a potentially libelous or factually incorrect article from its own publicly available database, and the library then obtained the article from a back-up copy or alternate source, and put the article on its own server for scholarly use.) Is there anything in your laws that shed light on this scenario?

III. Report on The Legal Treatment of Archives Under Contract Law

Contracts Related to Digital Materials
Annex A, on page 4 of the report states that “There is no contract between the C J Koh Library and the publisher of any book.” But what about contracts with regard to the “online legal resources” or databases referred to as part of the library’s collection? Do such contracts exist between the libraries and database publishers or providers? If so, could you please respond with regard to those contracts to the questions in the questionnaire (including the first question, “Do contract provisions between archives and publishers in your country commonly address the issue of removing a work from the collection? If so, how do they do so? Do they address labeling, hyperlinking or any other means of dealing with the offending material other than removing it?”).

Removal of Materials
On page 2, the report states that sometimes, “Even after giving their account of the past, contributors (to the Oral History Centre of NAS) may request that NAS erase all traces of the audio tape.” On page 9, the report further indicates that the contributor may request certain portions of the audio tape be edited before the public release of the materials and that NAS will keep the unedited version. Is there any indication to the library patron in these cases that portions of the interview have been removed? Who, if anyone other than
library staff, may access the unedited version? If the contributor requests the tape be removed, does the library make a transcript but erase the tape? It appears from Annex A that the contributor may request the entire record be expunged, though this is unclear. Does the contributor reserve the right to have his/her contribution expunged from the record at any time? So, for example, could a contributor come back 5 years from the date of her interview and request the tape and any transcripts be destroyed? Is there any record that a recording was made and later removed?

Preservation/Retention and Access to Objectionable Material
The report indicates that NLB retains objectionable material in its warehouse. Who may access these materials? Who, if anyone, would know of the existence of these materials, other than the library’s staff? What does the catalog show for such materials?

Contracts Between Publishers, Databases and Libraries/Archives
The report states that for the most part, no contracts exist between publishers and libraries. But, for example, what about their contracts (if such contracts/subscription agreements exist) with Lexis or the other online databases such as HeinOnline identified as part of the C J Koh Law Library? Similarly, could you please respond directly to question 4 of our questionnaire: “To what extent do contracts in your country between publishers, databases and libraries allow libraries to create their own archival or preservation copies of material to which libraries have access through databases?”

If such contracts exist, please describe any provisions which would allow a library or archives to make a back-up copy of materials, or which guarantee long term access to previously licensed materials even if a subscription is terminated. Similarly, please describe any agreements between the library/archives and third party content providers (including databases) that reserve rights of the library/archives to censor or block access to materials the library or archive objects to or that has been banned under Singapore law. The report states on page 2 that once materials are acquired, they are “seen as the property of the library or archive and will be used as the institution sees fit.” This appears to focus on physical materials. Have libraries and archive in Singapore encountered the problem of databases removing articles from the database’s collection?

Publisher control
If publishers contract with an archive for long term preservation and electronic dissemination of their materials, can they structure their legal relationship in such a way that any problematic material would not have to be withdrawn from the archive if material the publisher had published and transferred to the archive were adjudicated defamatory, infringing, etc.? (We have in mind here an archive such as JSTOR.)

Internal Library Policies
The purpose of our study is to determine how an archive can best equip and structure itself to prevent or avoid the removal of documents from its collection. To that end, we would appreciate further information regarding how libraries in Singapore decide internally to remove materials from their collections. In addition to responses to external laws and policy, what criteria are libraries using to filter works? Do they have a specific
set of guidelines which they use to determine whether or not to include a work in the collection? Do they use the same internal policies for digital materials as for physical ones? (Please see the related questions in the section above regarding control over access and availability of digital materials). A focus of the study is to enable libraries and archives to structure their operations in such a way as to minimize legal risks. Any further information related to NLB’s internal evaluation process would be helpful.

**Integrity of Archives**

As our study seeks ways to ensure the preservation and integrity of archives, could you please explain what happens to a work, digital or physical, once it is pulled from a library or archives’ collection in Singapore? (Our question here is similar to the one we raised concerning the report on Other Substantive Areas.) The report on The Legal Treatment of Archives Under Contract Law indicates on page 5 that “there are no stringent guidelines concerning the erasing of records from their catalogues/database should there be materials they wish to remove from their shelves.” Does this mean the library erases all traces of the record from the catalogues or do they indicate that the work was removed and if so why the work was removed? Would a library patron have any idea that a work was removed from the catalogue or would he/she just be unable to locate it or know it ever existed? Do libraries and archives keep certain materials for archival purposes that are not accessible to the general public? Do archives and libraries keep a “dark archives” (one which only library personnel may access but exists to preserve the cultural record) or restricted access archives of certain materials? If they keep restricted archives, is there a point at which restrictions are lifted as to particular works? If they do not currently do so, would libraries/archives be willing/interested in doing so? What legal ramifications would ensue?

**Statutes**

Do the National Heritage Board Act and the National Library Board Act, mentioned in the Bibliography of the report, contain any specific provisions (not mentioned in the report) of relevance to libraries and archives’ abilities to retain copies of works in their collections or to prevent the removal of works from their collections? Does Singapore law contain specific provisions relating to the obligations of archives to conserve and provide access to public records?
RESPONSE TO ADDITIONAL QUESTIONS,
MAY 2007

Singapore:

1. You mention that those who claim they innocently published allegedly defamatory materials may attempt to negotiate a private settlement with the defamed. If these efforts are rebuffed it is my understanding that the defendant may use his offer as a defense. How much weight does this offer carry? Also, you note that words are treated as published innocently if the publisher did not know them to be libelous. Can you please clarify this? Is the publisher expected to do some diligence before printing? If so, how much?

How much weight does this offer carry?

The defence of unintentional defamation is a complete defence. If the elements of this defence are proven, as with all civil actions, on a balance of probabilities, the defence succeeds and there will be no liability.

It should be noted that Section 7 of the Defamation Act provides that the offer to settle is only one limb of the defence of unintentional defamation. Failure to prove the other limbs of the defence will render the defence inoperative regardless of the offer to settle. Another limb of the defence is that the publication must be innocent.

Words are treated to be published innocently if the publisher did not know them to be libelous?

The publication of the defamatory materials must be proven to be innocent.

“Innocent” is defined for the purposes of the act in Section 7(5). It provides (as stated in the report) as:-

(a) that the publisher did not intend to publish them of and concerning that other person, and did not know of circumstances by virtue of which they might be understood to refer to him; or
(b) that the words were not defamatory on the face of them, and the publisher did not know of circumstances by virtue of which they might be understood to be defamatory of that other person;
and in either case that the publisher exercised all reasonable care in relation to the publication; and any reference in this subsection to the publisher shall be construed as including a reference to any servant or agent of his who was concerned with the contents of the publication.
As the 2nd limb of Section 7(5)(2) provides that the publisher must exercise all reasonable care in relation to the publication, due diligence is required of a publisher.

Ultimately, whether or not the publication is considered “innocent” and whether “all reasonable care” was taken pursuant to Section 7 depends entirely on the facts and various factors including, the level of control that the publisher has on the defamatory material.

You should also note that the defence of intentional defamation has another limb. Section 7(6) of the Defamation Act provides “that (the defence) shall not apply in relation to the publication by any person of words of which he is not the author unless he proves that the words were written by the author without malice”.

2. In your discussion of the common man’s perception of defamatory words, I am confused. You use the term “fair-minded” and “right-thinking”. Are they the same standard? If not, can you please differentiate?

The term “right thinking” is used with reference to establishing that a particular statement is defamatory (Para 16). This is part of one limb of the cause of action.

Conversely, the term “fair minded” is used with reference to the defence of “fair comment”.

In actuality, these two terms refer to an objective standard of proof used by the courts. That being said, the term “fair minded” has also been used by the Singapore courts to establish if a particular statement is defamatory. Hence, the courts have used the terms interchangeably.

3. Regarding defamation – you mention that the publisher is liable. Would a library or archive be also liable for holding the allegedly defamatory materials in their collection? What is considered publication?

“Publication” is defined as “The making known the defamatory matter after it has been written to some person other than the person of whom it is written. If the statement is sent straight to the person of whom it is written, there is no publication of it; for you cannot publish a libel of a man to himself.” (Pullman v. Hill & Co [1891] 1 QB 524 at 527)

Also, “The essence of tortious defamation lies in the communication of the disparaging statement to someone other than the person defamed”. John G Fleming, The Law of Torts (9th ed, LBC Information Services, 1998) p 593.

The mere holding of defamatory materials is not considered “publication”. However, the making of, or exhibiting, the defamatory materials available to third parties, i.e. the general public would be considered defamatory.
Those who are merely involved in circulating or distributing material have also been held to be publishers. Thus, in relation to printed material, circulating libraries, wholesalers and retailers have all been held to be publishers. For example, in Emmens v Pottle it was agreed that newspaper vendors were *prima facie* liable for defamatory material included in newspapers sold by them. Likewise, in Vizetelly v Mudie’s Select Library Ltd it was held that a circulating library that lent and sold books was liable for defamatory material found in the books. Those with even less involvement in publication have also been found to be publishers. For example, in the early case of Day v Bream, it was held that a porter who did no more than deliver parcels containing defamatory handbills was liable for publishing the material. Moreover, in the old case of R v Clerk, a printer’s servant, whose only role was to ‘clap down’ the printing press, and who was not found to know the nature of the publication, was held responsible for seditious libel. It is also generally assumed that someone who passes on a copy of a defamatory book or article to a friend will be liable.

4. Also, the Chen Cheng v. Christian Central Church case refers to comments made by a “fair-minded” person. Is that the same standard as the “reasonable” person who is the standard person courts look to when deciding if a comment was defamatory?

Yes, as stated above, these terms including “fair minded” is used by the courts to describe an objective standard of proof, i.e. a reasonable man. However, in defamation cases, the courts have chosen to specify that a reasonable man is also a “fair minded’ man who is “The ordinary reader had to be fair-minded and not avid for scandal. He should not be duly suspicious. The ordinary reader had to have rational grounds for his belief that the words refer to the plaintiff.” (Lee Kuan Yew v Davies & Ors [1990] 1 MLJ 390). [See also, Arul Chandran v Chew Chin Aik Victor JP [2000] SGHC 111 which provides “In my opinion, the ordinary, reasonable and fair-minded reader, having read each of the defendant’s publications in their entirety but without any meticulous analysis of the passages or the words used in the publications, will come to understand the offending words in their context to bear the meanings defamatory of the plaintiff as set out at the paragraphs 124 to 127, 130 and 131 below.”]