Appendix E

PHASE I REPORT

Copyright and Archives: The UK Position

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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 1988 (as amended). Sections 37-44A contain a range of exceptions to the exclusive rights conferred on a copyright owners (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(v) supplying copies of unpublished works by libraries and archives (section 43);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’.

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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

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\(^6\) 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.\(^8\) However, it would not appear to be possible to rely on this section to place a copy of a work onto the Internet (\textit{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 \textit{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’.\(^9\) (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.\(^10\) 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).\(^11\) 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}

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}

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

\textsuperscript{12} Laddie \textit{et al}, 3\textsuperscript{rd} ed., para. 33.37.

\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.’

\textsuperscript{14} CDPA 1988. s. 61
\textsuperscript{15} CDPA 1988. s. 75
\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).
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’\(^\text{17}\)

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.\(^\text{18}\) It also maintained section 7 of the 1956 Act, as regards works created before 1\(^\text{st}\) August, 1989.\(^\text{19}\)

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
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.
APPENDIX 2

Copyright Act 1956

Section 7

(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 sub-paragraphs (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
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
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

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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.
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.
PHASE II REPORT

MELLON STUDY: THE INTEGRITY OF ARCHIVES PHASE II
QUESTIONNAIRE

Lionel Bently, Paul Mitchell and Robert Burrell*

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

* 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).

² CDPA, s. 84.
³ CDPA ss. 80-83.
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’. 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.

- 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 a(n 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

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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, they are of limited duration and the right of attribution is only enforceable in cases where the author has taken positive steps to assert her or his rights. 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. 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

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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

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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.\(^\text{13}\)

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.\(^\text{14}\)

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.\(^\text{15}\)

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

\(^\text{13}\) CDPA 1988, s 19.
\(^\text{14}\) CDPA 1988, s 44A.
\(^\text{15}\) 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. 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. 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. 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’, language which may or may not be sufficient to cover a copy held by a library or archive.

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

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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’.

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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} \textit{Thorley 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\textsuperscript{31}.

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\textsuperscript{32}, 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”\textsuperscript{33}, 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\textsuperscript{34}. The section has been little used\textsuperscript{35}, 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.’\textsuperscript{36} 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

\textsuperscript{32} Derry v. Peek (1889) 14 App Cas 337.
\textsuperscript{33} Official Secrets Act 1989 s5(2).
\textsuperscript{34} Official Secrets Act 1989 s5(3).
\textsuperscript{35} See further Robertson and Nicol, Media Law 4\textsuperscript{th} edn (London: Penguin, 2002) 553-568.
\textsuperscript{36} See further ibid. 155-178.
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 \textit{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}
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]”40 (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”41. 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 defence42. 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”43. 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 concerned44. 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).
the statutory section was based\(^{45}\). For instance, the defendant should check trade publications for information about defamatory works\(^{46}\), and should have some system in place for removing defamatory statements efficiently\(^{47}\).

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 *Emmens v. Pottle*\(^{48}\) 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”\(^{49}\). In *Goldsmith v. Sperrings Ltd*\(^{50}\), 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”\(^{51}\).

However, he continued, “very strong evidence”\(^{52}\) 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”\(^{53}\). 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


\(^{46}\) Vizetelly v. Mudie’s Select Library Ltd [1900] 2 KB 170.

\(^{47}\) Sun Life Assurance Company of Canada v. WH Smith and Son Limited (1933) 150 LT 211.

\(^{48}\) (1885) 16 QBD 354.

\(^{49}\) Ibid at 358.

\(^{50}\) [1977] 1 WLR 478.

\(^{51}\) Ibid. at 488.

\(^{52}\) Ibid.

\(^{53}\) 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 motive\(^5^4\).

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 interests\(^5^5\). 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 privilege\(^5^6\). 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 Ltd\(^5^7\). 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:

\(^{55}\) Watt v. Longsdon [1930] 1 KB 130.
\(^{56}\) Bryanston Finance Ltd v. de Vries [1975] QB 703.
\(^{57}\) [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.\(^{60}\)

It would appear, therefore, that limited accessibility is a prerequisite if an archive wishes to rely on qualified privilege\(^ {61}\).

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}\(^ {62}\) 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}\(^ {63}\) 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’

\(^{60}\) \textit{Loutchansky} v. \textit{Times Newspapers Ltd (Nos. 4 and 5)} [2002] 2 WLR 640 at 665.

\(^{61}\) See also \textit{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”.

\(^{62}\) (1849) 14 QB 185.

\(^{63}\) [2002] 2 WLR 640.
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.\textsuperscript{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.\textsuperscript{65} In \textit{Vizetelly v. Mudie’s Select Library Limited}\textsuperscript{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 \textit{Publishers’ Gazette} (a trade newspaper) and the \textit{Athaeneum} (“a well-known medium of communication among literary people”).\textsuperscript{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 \textit{Martin v The Trustees of the British Museum}\textsuperscript{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.’\textsuperscript{69}

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{64} No injunction would have been available at the time of the decision in \textit{Duke of Brunswick}: P Mitchell, \textit{The Making of the Modern Law of Defamation} (Oxford: Hart Publishing, 2005) ch 4.
\item\textsuperscript{65} Law Commission, \textit{Defamation and the Internet: A Preliminary Investigation} (London, 2002) at 3.15.
\item\textsuperscript{66} [1900] 2 KB 170.
\item\textsuperscript{67} Ibid. at 171.
\item\textsuperscript{68} (1894) 10 Times LR 338.
\item\textsuperscript{69} Ibid, 339.
\end{itemize}
\end{footnotesize}
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\(^70\), 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\(^71\). 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\(^72\) prompted an Internet service provider to remove material from a website immediately\(^73\).

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\(^74\). One service provider reported ten complaints a month. The standard response of the service provider is to close the site to avoid an action\(^75\). 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 a rare. However, one famous example can be highlighted. In *Aldington v. Tolstoy*\(^76\) 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*, 22\(^{nd}\) December 2003).
\(^73\) *Private Eye*, 1\(^{st}\) 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, 30\(^{th}\) 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

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\(^79\) 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*, 9\(^{th}\) 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, 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. 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.

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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^], 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

[^83^][2002] 2 WLR 640.
[^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.
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.