

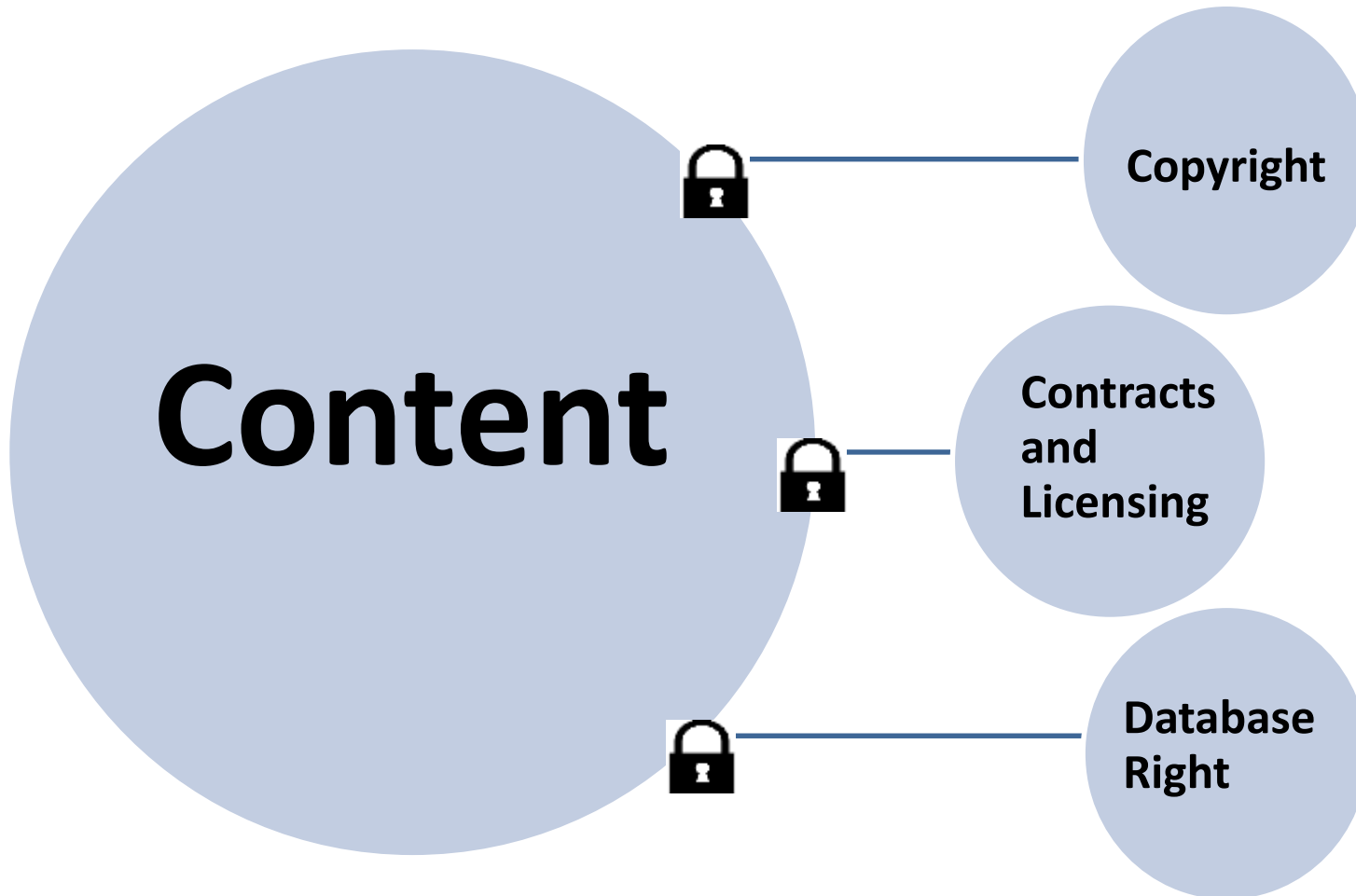


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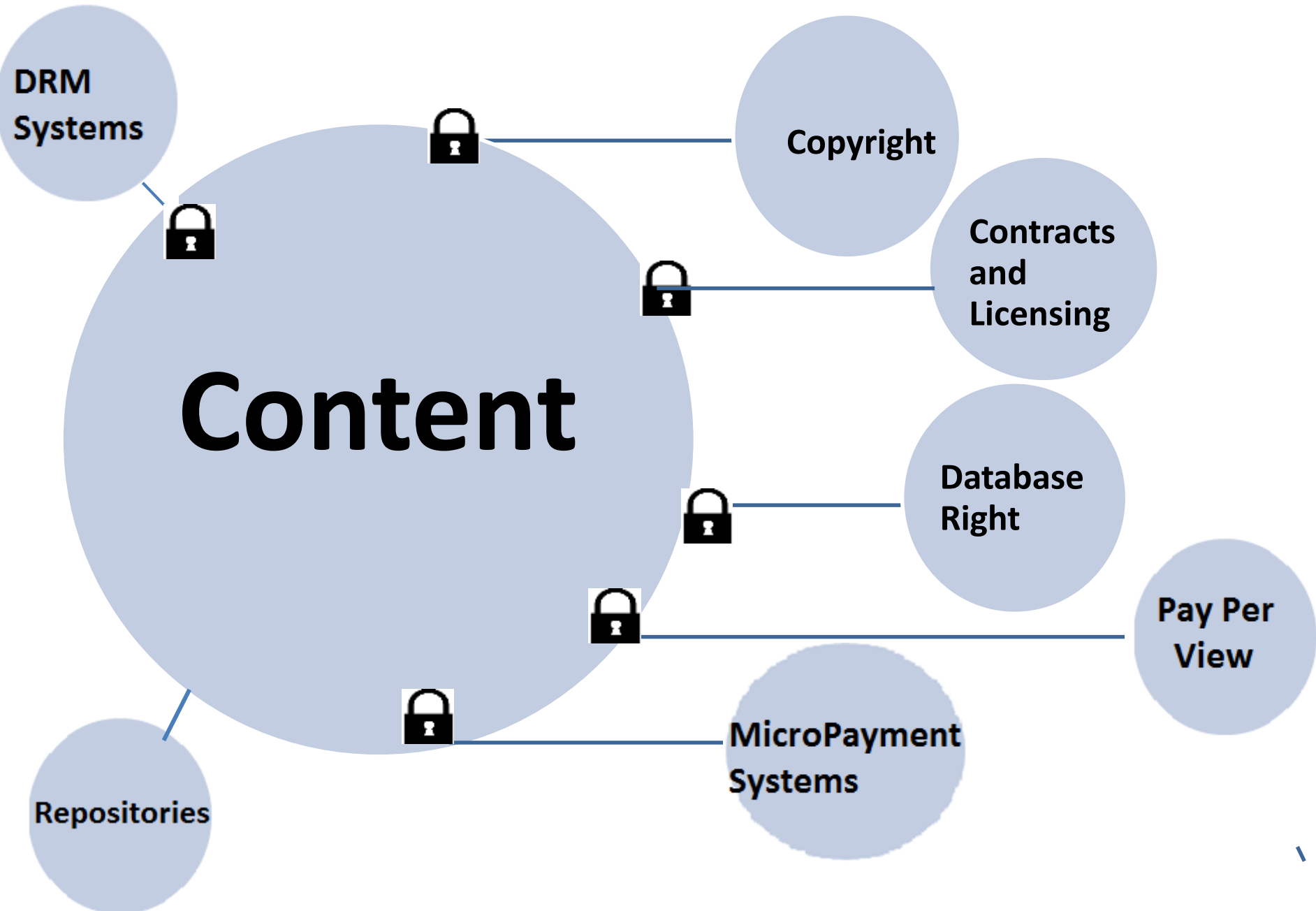
Loosening the Binds of Copyright and Licensing: How Recent Reforms to Copyright Can Facilitate Better Collection Management and Access

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Access to “Library” Content: The Triple Lock



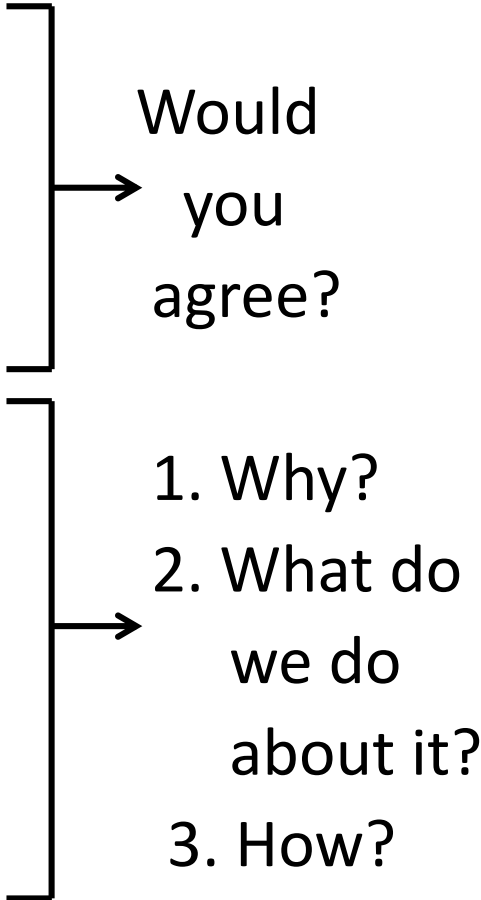
Access to Content:



Library Attitudes to Content Access

- Still very “proprietary”:
 - we need to do more to encourage users to access and use content we don’t own/license
- Still very “safe”:
 - we need to use the flexibilities offered by copyright exceptions and licensing to promote access and use
- Can we do more using copyright and licensing to:
 - “build” our collections further
 - make our collections/other resources more accessible
 - make our collections more useable
 - deliver better value-for-money to our institutions

Principal Contention of this Presentation Is...

- Libraries, other educational, heritage etc organisations have, over a long period, failed to exploit certain opportunities offered by copyright while highlighting all the problems
 - Representations were made to the IPO about certain areas which have led to reforms to the copyright framework (lobbied for by libraries, and organisations that represent them) but we are conspicuously failing to use them
- Would you agree?
1. Why?
 2. What do we do about it?
 3. How?
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Recent Reforms to UK Copyright Law Affecting



Copyright: Key Areas of Recent Change

- **Existing Exceptions:**

- Research and private study (s.29)
- Fair dealing for criticism and review (s.30)
- Making accessible copies (s.31)
- Fair dealing for the purposes of “illustration for instruction” (s.32)
- Recording and communicating TV and radio broadcasts (s.35)
- Making reprographic copies of extracts (s.36)

- Copying for other libraries (s.41)
- Copying for the purposes of preservation (s.42)
- Copying for library users (s.42A)
- Copying of unpublished works (s.43)

- **New Exceptions:**

- Text and data analysis (s.29A)
- Making works available on dedicated terminals on the premises (s.40A)

Initial Assessment

- **Issues**

- Some changes do not appear well-rooted in law:
 - e.g. private copying exception (*now over-ruled by High Court*)
- Some things may be easier:
 - e.g. “quotation” change; library copying for users
- Some things may be harder:
 - e.g. through more extensive use of the “fair dealing” test
- Will some changes have any impact – in academe anyway?:
 - e.g. caricature, parody, pastiche?; licensing?

- **Challenges**

- Taking advantage of some of the changes:
 - e.g. making copies of AV items; making works available on the premises etc
- Educating users:
 - e.g. may need a more nuanced understanding of law – such as better knowledge of fair dealing
- Compliance:
 - e.g. communicating and explaining changes; changing existing mindsets etc.

Reforms to UK Copyright Law

Exception	Before 1 June 2014	After 1 June 2014
s. 29 Research and private study <i>Broadly permits the copying of a work for the purposes of non-commercial research and private study</i>	Applied only to literary, dramatic, musical, artistic works and typographical arrangement	Now applies to all categories of copyright works - literary, dramatic, musical, and artistic works; sound recordings, films, broadcasts and typographical arrangement
	Contractual override possible	No contractual override
	Subject to fair dealing test	Subject to fair dealing test
	For non-commercial purposes	For non-commercial purposes
	Sufficient acknowledgement where possible	Sufficient acknowledgement where possible

- Extends copying for research activities to previously excluded categories of copyright works
- The permitted act cannot be overridden or restricted by a contract (e.g. an e-journal contract)
- May be interesting to see how the amendments to cover other categories of copyright work roll out in practice...

Reforms to UK Copyright Law

Exception	Before 1 June 2014	From October 2014
s. 30 Criticism, Review, Quotation and News Reporting <i>Broadly permits the copying of a work for the purposes of non-commercial research and private study for the purposes stated</i>	Applied only to literary, dramatic, musical, artistic works and typographical arrangement	Now applies to all categories of copyright works - literary, dramatic, musical, and artistic works; sound recordings, films, broadcasts and typographical arrangement
	Contractual override possible	No contractual override
	Subject to fair dealing test	Subject to fair dealing test
	Work must have been made lawfully available to the public	Work must have been made lawfully available to the public
	For non-commercial purposes	For non-commercial purposes
	Sufficient acknowledgement where possible	Sufficient acknowledgement where possible

- For the purposes of *quotation* is the key change
- Will make the use of extended quotations in academic works, on VLEs etc easier/safer
- No more of the copyright work should be used than is required by the specific purpose for which it is used

Reforms to UK Copyright Law

Exception	From 1 June 2014	
<p>s. 31A Disabled persons – making copies of works for personal use</p> <p><i>Broadly permits making copies of a work by, or for, a disabled person</i></p>	Applied to individuals with a visual impairment	Applies to any disability that prevents equal enjoyment of a work
	Applied to literary, dramatic, musical or artistic work	Now applies to all categories of copyright work
	Disabled person must have “lawful access” to the work (by possession or use of)	Disabled person must have “lawful access” to the work (by possession or use of)
	Copying must be for personal use for non-commercial purposes	Copying must be for personal use for non-commercial purposes
	Commercial copy must not be available on “reasonable terms”	Commercial copy must not be available on “reasonable terms”
	Charges must not exceed the costs of making the copy	Charges must not exceed the costs of making the copy
	Transfer or other use of the copy becomes an infringement unless authorised separately by the copyright owner	Transfer or other use of the copy becomes an infringement unless authorised separately by the copyright owner
	No contractual override	No contractual override

- Does not address the problem of works protected by DRM/TPM
- Separate provision deals with making copies by an “authorised body”

Reforms to UK Copyright Law

Exception	Before 1 June 2014	After 1 June 2014
<p>s.32 Illustration for instruction</p> <p><i>Broadly permits the copying and use of copyright works for the “sole purpose of illustration for instruction...”</i></p>	Literary, dramatic, musical, artistic works: limited application to films, sound recordings and broadcasts	Literary, dramatic, musical, and artistic works; sound recordings, films, broadcasts
	Reprographic copying prohibited	No restrictions on form of copying
	Covered commercial and non-commercial purposes	Fair dealing test now needs to be applied to all copying
	Previous wide latitude for “examination” purposes (but did not include copying of sheet music)	Narrowing of what is covered by “examination” purposes
	Copying must be by a person giving or receiving instruction (or preparing for giving or receiving instruction)	Copying must be by a person giving or receiving instruction (or preparing for giving or receiving instruction)
	Sufficient acknowledgement unless not feasible	Sufficient acknowledgement unless not feasible

- “...for the sole purpose of illustration for instruction...” is a clumsy formulation
- Introduction of a fair dealing test potentially narrows the previous examination section under which “anything” could be done for the specified purposes without infringing copyright

Reforms to UK Copyright Law

Exception	Before 1 June 2014	After 1 June 2014
<p>s.35 Recording by educational establishment of broadcasts</p> <p><i>Broadly permits the recording of TV and radio broadcasts...</i></p>	<p>Previously, communication to the public over a network (e.g. VLE) was confined to those on the premises of the institution</p>	<p>Communication off the premises is now permitted if made by means of a secure electronic network accessible only by the institution's students and staff</p>
	<p>Non-commercial educational purposes only</p>	<p>Non-commercial educational purposes only</p>
	<p>Section is <u>dis-applied</u> if a licensing scheme is in operation</p>	<p>Section is <u>dis-applied</u> if a licensing scheme is in operation</p>
	<p>ERA licence required</p>	<p>ERA licence required</p>

Reforms to UK Copyright Law

Exception	Before 1 June 2014	After 1 June 2014
s.36 Copying and use of extracts of works by educational establishments	Covered making reprographic copies of passages from published literary, dramatic or musical works	Now applies to all copyright works other than a broadcast, or an artistic work which is not incorporated into another work
<i>Broadly permits the limited copying of extracts from some categories of copyright works</i>	No more than 1% of a work could be copied in any quarterly period of the calendar year	No more than 5% of a work could be copied in any quarterly period of the calendar year
	Non-commercial educational purposes only	Non-commercial educational purposes only
	Must be done by, or on behalf, of an educational establishment	Must be done by, or on behalf, of an educational establishment
	Sufficient <u>acknowledgement</u>	Sufficient <u>acknowledgement</u>
	No contractual override	No contractual override
	Section is <u>dis-applied</u> if a licensing scheme is available	Section is <u>dis-applied</u> if a licensing scheme is available

- s. 35 and s.36 are rendered unavailable due to the existence of the educational recording Agency and Copyright Licensing Agency licensing schemes
- s. 35 operates with s.34 – on playing a work in course of the activities of educational establishment
- HEIs will continue to need licences to undertake these purely educational activities

Reforms to UK Copyright Law

Exception	Before 1 June 2014	After 1 June 2014
s.41 Copying by librarians: supply of single copies to other libraries <i>Broadly permits the copying of a single copy of a published copyright work by one library for another</i>	Supply of a single journal article; or of the whole or part of a single published literary, dramatic, musical or artistic work to another library	Supply of a single copy of a published work to another library
	Library was expected to recover the costs of making the copy plus a general contribution to upkeep of the library	Library not obliged to charge: if it does charges must be calculated by reference to the costs attributable to the production of the copy
	Contractual override	No contractual override

- Now includes previously excluded categories of copyright works
- Charging requirements no longer compulsory – reduced bureaucracy for libraries

Reforms to UK Copyright Law

Exception	Before 1 June 2014	After 1 June 2014
<p>s.41 Copying by librarians etc: replacement copies of works</p> <p><i>Broadly permits the copying by a library to replace works in its own permanent collection; or to supply copies of works to another library where an item has been lost, damaged or destroyed</i></p>	Applied only to "prescribed libraries"	Now permits libraries, archives or museums to copy an item in the permanent collection to preserve the item; or to replace an item damaged, lost or destroyed in the collection of another library, archive or museum not conducted for profit
	Applied to literary, dramatic or musical work; any illustrations accompanying such a work; and to typographical arrangement of a published edition.	Applies to any type of copyright work
	The item is in the part of the permanent collection wholly or mainly for the purposes of reference on the premises; or is an item in the permanent collection of the library or archive which is available on loan only to other libraries or archives	The item is to be included in a mainly reference-only collection; or in a part of the collection not accessible to the public; or available on loan only to other libraries, archives or museums
	Payment for the copy of a sum not less than the cost (including a contribution to the general expenses of the library or archive) attributable to its production	If a charge is made charges to be calculated by reference to the costs attributable to the production of the copy
	The other receiving prescribed library or archive to provide a written statement that the item has been lost, destroyed or damaged and that it is not reasonably practicable to purchase a copy of that item	No equivalent requirement
	Must not be reasonably practicable to purchase a copy of the item in question to fulfil that purpose	Not reasonably practicable to purchase a copy of the item to achieve either of the specified purposes
	Contractual override	No contractual override

Exception	Before 1 June 2014	After 1 June 2014
s.41 Copying for other libraries	Supply of a journal article; or the whole or part of a literary, dramatic, musical or artistic work	Supply of journal article; or whole or part of any published work
	Included accompanying illustrations Contractual override	Now includes films, sound recordings and broadcasts No contractual override

- Increases research access to previously excluded works

Exception	Before 1 June 2014	After 1 June 2014
s.42 Copying for library and archival preservation	Could make a single copy of an item in the permanent collection	Copying an item in the permanent collection
	Only literary, dramatic or musical works Contractual override	Now covers all copyright works including films, sound recordings and broadcasts No contractual override

- Again increases research access to previously excluded works

Exception	Before 1 June 2014	After 1 June 2014
s.42A Copying for library users	Applied to “prescribed libraries”	Not for profit library
	Article in a periodical, or part of a literary, dramatic or musical work	Reasonable proportion of a copyright work
	Non-commercial purposes or private study	Non-commercial purposes or private study
	Prescribed statutory Declaration Form	Declaration required but not so prescriptive
	User to pay supply costs Contractual override	User does not have to pay supply costs No contractual override

- Will increase access to research works
- Reduce costs and burden of administration

Exception	Before 1 June 2014	After 1 June 2014
s.43 Copying of unpublished works	Applied to literary, dramatic or musical works only	Extended to cover all types of copyright work

- Increases types of works researchers have access to

New Exception	After October 2014
s.30A Fair dealing for the purposes of caricature, parody, pastiche	Cannot be overridden by contract

- May benefit some aspects of research – e.g. user-generated content

New Exception	After 1 June 2014
s.40B Making works available on dedicated terminals on the premises	For a <u>publically</u> accessible library, museum or archive
	Items in collection can be viewed on dedicated terminals, on-site
	Works must have been lawfully acquired
	For research or private study ***
	Access must comply with licensing terms where they exist

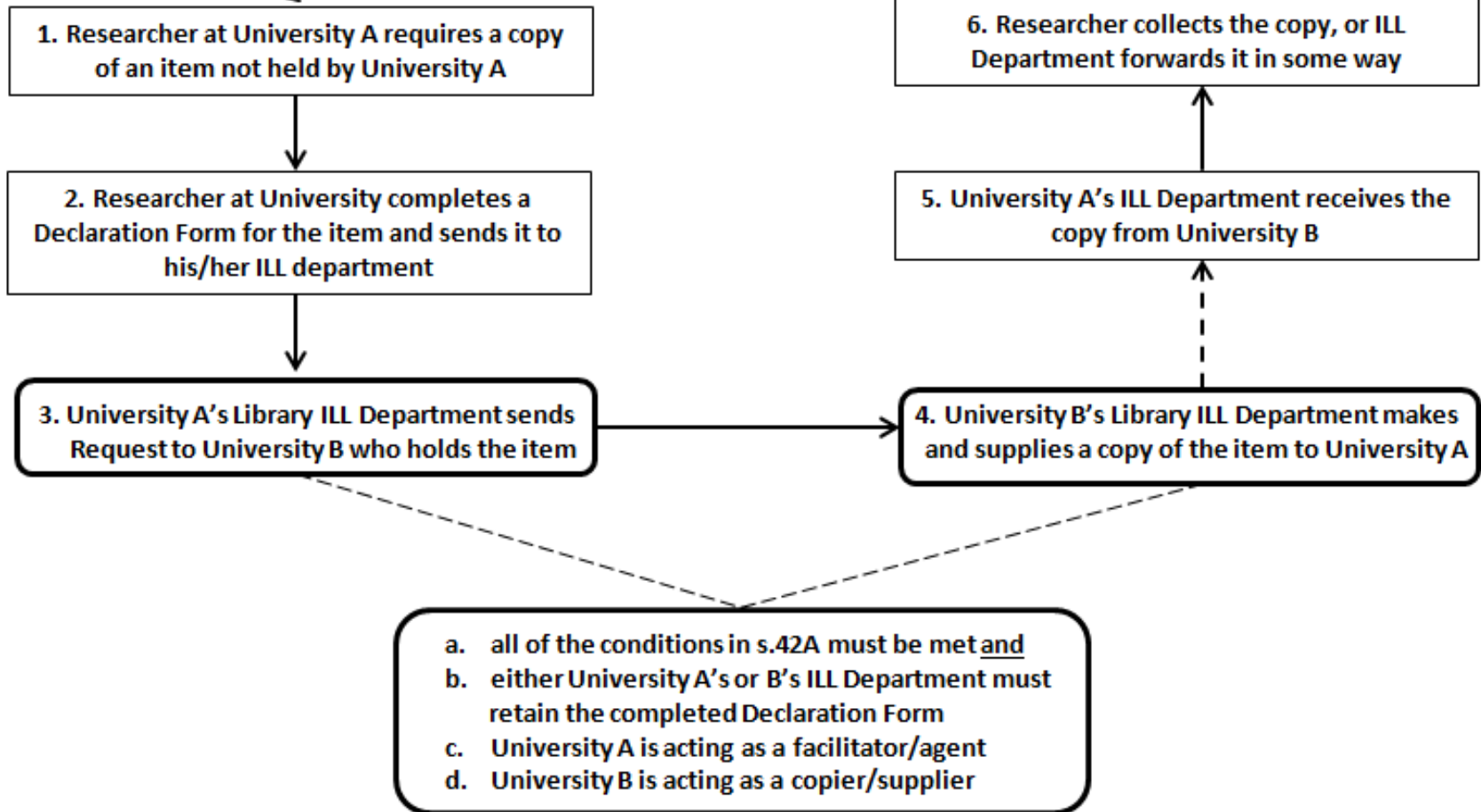
- Will increase access to works for researchers; and increase the number of researchers who have access to works
- ***The commercial/non-commercial scope of this exception is unclear

Inter-Library Loans

“If possible, could you shed some light on whether the new exceptions mean that licensed e-books or e-journals can be used to fulfil interlibrary loan requests, even if the contract with the publisher or vendor prohibits this type of use. Are there any exceptions?”

1. Can licensed e-resources be used to fulfil ILLs?
2. What if a contract, or vendor, prohibits this?
3. Are there any exceptions?

Typical Inter-Library Loans Process



Inter-Library Loans

- s. 41 allows one library to copy for another library though it is silent on purpose
- and 42A permits the making of single copies of published works for individuals under conditions:
 - one article in any one issue of a periodical, or
 - a *reasonable* proportion of *any other published work*
 - a declaration in writing is still required though simplified
 - if you charge for the copy then only costs attributable to the costs of production of the copy can be recouped
- the section contains the contract override provision
- s.43 allows for the making of single copies of unpublished works

Some Points

- periodical articles are clearly covered by the section
- what is a *reasonable* proportion of any other published work?
- what is actually covered by a *any other published work*?
- if you charge - what could be included in the “costs attributable to the costs of production”
- the contract override provision is available – does it apply retrospectively...to contracts already signed for licensed e-resources?
 - remembering that some existing licences already permit ILL supply anyway

Can you supply ILLs from existing licensed e-resources?

I have a licence granted under the old law, what happens under the new law?

If your licence grants wider permissions than the new law then nothing changes. Under the new law, you cannot be made to comply with existing licence terms that would stop you copying material, as long as you are copying for the right purpose and obey the conditions set out in this guidance. However, all other terms of your contract that are unrelated to copyright - including those covering how much material you can access - will be unaffected.

- 3.2 This Licence shall be deemed to complement and extend the rights of the Institution and Authorised Users under the Copyright, Designs and Patents Act 1988 and the Copyright (Visually Impaired Persons) Act 2002 and nothing in this Licence shall constitute a waiver of any statutory rights held by the Institution and Authorised Users from time to time under these Acts **or any amending legislation**.

What Can We Do Now With Our Collections That We Could Not Do 2 Years Ago?

- Copy sound recordings, films and broadcasts for non-commercial, personal research or private study
- Conduct text and data analysis for non-commercial research
- Quote more freely from in-copyright works (for commercial or non-commercial uses)
- Use works for purposes of caricature, parody, or pastiche
- Use works more easily (including online) if for “illustration for instruction”
- Copy up to 5% of any work not included in a collective licensing scheme, in a 12 month period
- Make works available on “dedicated terminals” in the building
- Use electronic resources for document supply

Recent Orphan Works Schemes

- **UK licensing scheme:**

- *The Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014: No. 2863*
- applies to use in UK only
- applies to all categories of work
- for both commercial and non-commercial uses
- renewable, non-exclusive licences of up to 7 years
- depends on a diligent search which meets published IPO guidance and criteria
- application and licence fees
- a licence cannot be terminated by a rightsowner

- **EU licensing scheme:**

- based on *Directive 2012/24/EU on certain permitted uses of orphan works*
- implemented by *The Copyright and Rights in Performances (Certain Permitted Uses of Orphan Works) Regulations 2014: 2861*
- for publicly accessible universities, libraries, museums, some heritage institutions etc
- applies in countries of the EU
- applies to certain copyright works
- for non-commercial uses only
- diligent search required

Just Like Buses...two schemes Came Along at Once

- UK scheme came into force on 29th October 2015
- EU Directive came into force on 29th October 2015
 - Directive allowed Member States to preserve any pre-existing domestic OW schemes that they already had rather than have to implement the Directive to the letter
 - IPO regards the UK scheme as a “pre-existing scheme”
 - but there are important differences between the two legislative instruments

**Are we really using these reforms
to our users' maximum
advantage?!!!**