

The Libraries and Archives Copyright Alliance

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Gowers Review of Intellectual Property
Zone 4/E1
HM Treasury
1 Horse Guards Road
London SW1A 2HQ

Via gowers.review@hm-treasury.gov.uk

April 21, 2006

Dear Mr Gowers

- **Gowers Review of Intellectual Property Call for Evidence**
- **LACA/Museums Copyright Group (MCG) Joint Proposals to the UK Government for Revisions to the Copyright Designs and Patents Act 1988**

This Response is made on behalf of LACA: the Libraries and Archives Copyright Alliance in the UK. LACA is convened and supported by CILIP: the Chartered Institute of Library and Information Professionals and monitors and lobbies in the UK and Europe about copyright and related rights on behalf of its member organisations and UK users of copyright works through library, archive and information services. A list of LACA member organisations appears at the foot of this page. Our members work at the interface between users and rightholders of copyright protected materials and databases both analogue and digital, and otherwise manage the use of copyright works and databases within both public sector institutions and commercial enterprises.

The Call for Evidence coincides with the conclusion of our project to formulate proposals for amendments to the Copyright Designs and Patents Act 1988 (as amended). This project came about in response to an invitation from the Patent Office to LACA made during our extensive discussions with them in 2002-03 concerning the UK implementation of the Information Society Directive 2001/29/EC. The Patent Office recognised that there were a number of anomalies in CDPA affecting libraries and archives and other cultural institutions such as museums and galleries which needed re-consideration, and that the Act was ripe for amendment. LACA's CDPA working group was chaired by Professor Charles Oppenheim of Loughborough University Department of Information Science and it worked in close consultation with the Museums Copyright Group (MCG).

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Representing ARLIS/UK & Ireland - The Art Libraries Society of the UK and Ireland, Aslib - The Association for Information Management, AUKML - Association of UK Media Librarians, BIALL - British and Irish Association of Law Librarians, The British Library, CILIP: the Chartered Institute of Library and Information Professionals, Educational Copyright Users Forum, IAML (UK & Irl) - The International Association of Music Libraries, Archives and Documentation Centres, RNIB - Royal National Institute of the Blind, Society of Archivists, Society of Chief Librarians in England and Wales and SCONUL - Society of College, National and University Libraries.

Our Proposals are a standalone document which we will be submitting to The Patent Office. Given the timing of the Gowers Review, at the Patent Office's suggestion, **LACA and MCG are also presenting the proposals jointly to the Review in conjunction with the LACA Response** which refers to them in places. They cover the 15 broad areas listed below where we believe change is necessary in order for libraries and archives to function properly at the start of the 21st century:

- (1) Contracts and Licences
- (2) Collecting Societies and Licensing Agencies
- (3) Circumvention of Technological Protection Measures (TPMs)
- (4) General and educational exceptions to copyright
- (5) Libraries and Archives: CDPA ss.38-44 (see also SI 1989/1212)
- (6) Visual Display of Works
- (7) Database Regulations
- (8) Off-air recording of broadcasts
- (9) Disability exceptions
- (10) Rights clearance
- (11) Term of protection for copyright works
- (12) Infringement
- (13) Copyright Tribunal
- (14) Moral Rights
- (15) Development of Copyright Law

- **The LACA Response to the Gowers Review** follows below.
- The accompanying **LACA/MCG Joint Proposals to the UK Government for Revisions to the Copyright Designs and Patents Act 1988** (32pp) is attached in a separate Word file.
- **The Gowers Review Coversheet for Responses** (2pp) is attached in a separate Word file.

Please feel free to contact me for further information. LACA and MCG would be happy to meet with the Review Team to discuss our proposals further.

Yours sincerely

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Secretary to LACA: the Libraries and Archives Copyright Alliance

Libraries and Archives Copyright Alliance

Response to the Gowers Review of Intellectual Property Call for Evidence

General comments

Libraries and archives are concerned with copyright and neighbouring rights and not especially with patents and trademarks. LACA's response therefore just deals with copyright and related rights issues. In places our response refers to the accompanying document, *LACA/Museums Copyright Group (MCG) Joint Proposals to the UK Government for Revisions to the Copyright Designs and Patents Act 1988*. **This document should also be taken in its entirety as part of our Response.**

As far as copyright is concerned we challenge the view that we know is espoused by the UK Government, both at home and within the EU and WIPO, and by rightholders, and which is raised in the introduction to your Call for Evidence (p1 para 4) that "the present UK system strikes broadly the right balance between consumers and the rights-holders". Libraries and archives are being unduly restrained by copyright laws which, so far, have only addressed the digital age by tightening rightholder controls through monopoly licensing of digital material (since in the UK at least contracts and licences may override the exceptions and limitations to copyright) and by seeking to move towards increasing enforcement provisions and penalties for infringement. Users of copyright works include libraries and archives whose very mission is to promote access to knowledge for the benefit of society as a whole and they include the people who create copyright works and the entrepreneurs who invest in them. As far as user rights are concerned UK copyright legislation has been 'Luddite' in nature by manifestly failing to clarify its own legislation to establish beyond all doubt that the UK statutory exceptions and limitations to copyright apply not just to analogue works but also to digital works as provided by the WCT Article 10 and Agreed Statement¹

We believe that the generally fair balance that largely did exist prior to the erosive process which started with the European Rental and Lending Right Directive 92/100/EEC (which in the UK extended public lending right to non-book media under the copyright regime) and then was followed by the Term Directive 93/98/EEC whose implications were even more important as it extended copyright retrospectively well into a third generation of heirs, is no

¹ WCT 1996 **Article 10 Limitations and Exceptions**

(1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

(2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html#P83_10885

WCT 1996 Agreed statement concerning Article 10: It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.

It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.

http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html#P83_10885 or

<http://www.wipo.int/treaties/en/ip/wct/statements.html>

longer fair and has tipped too much towards rightholder interests. That balance has moreover become seriously undermined by the UK's implementation of the Information Society Directive 2001/29/EC which introduced the concept of commercial v. non-commercial research into fair dealing and failed to implement the full range of exceptions offered by the Directive. The balance of copyright thus urgently needs proper redress for the digital age within the scope of international treaties.

From our experience it is generally acknowledged (within the UK Government, the European Commission and WIPO) that people are generally not creative in a vacuum. Creativity depends on access to knowledge and to other peoples' ideas and this is mainly achieved through access to and use of works protected by intellectual property rights (IPRs). However, the current trend is that consumers' and researchers' rights, provided by statutory exceptions and limitations to copyright ensuring a guaranteed minimum level of access to knowledge, are in decline and the position of rightholders is being strengthened beyond what is reasonable. This affects everyone since the internet has extended the promise of information access to anyone with connectivity.

Copyright is supranational so it is not enough to talk about just the situation in the UK as on copyright matters it is bound by EU Directives. The failure of EU Member States to uniformly implement all the optional exceptions and limitations provided by the Information Society Directive has brought about further disharmony of copyright law among the Member States. Unlike other Member States, some of which did adopt new exceptions from the list provided by Article 5 of the Directive, in the UK the Patent Office maintained that the short 18 months time frame allowed by the Directive for implementation meant that it could not introduce any of the optional provisions in the Directive that did not already exist in UK law. In our view unless that situation is quickly remedied by new legislation, UK libraries and archives will be unable to fully exploit digital technologies to their users' and society's benefit and various of their services will in many respects be held back to 20th century analogue technology in order to comply with copyright law. This handicap will adversely affect the UK's competitiveness in the global knowledge economy as a major provider of information services and document supply and obstruct the transfer of knowledge in the digital age.

Copyright is also international. As various LACA member organisations are also members of IFLA: the International Federation of Library Associations and Institutions² which is a permanently accredited NGO observer at WIPO, we would like to see the UK working in support of redressing the lost copyright balance by supporting initiatives at WIPO (and as the EU works as one on copyright matters within WIPO, persuading the EU group in WIPO to do so) such as Chile's proposals on the public domain³ and on a study of exceptions and limitations to copyright⁴ and supporting proposals by developing country WIPO Members for a Development Agenda including an access to knowledge treaty.⁵

² See IFLA –CLM (Copyright and other Legal Matters Committee <http://www.ifla.org/III/clm/copyr.htm>)

³ WIPO PCDA/1 http://www.wipo.int/meetings/en/details.jsp?meeting_id=9643: PCDA/1/2 Proposal by Chile http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=55592

⁴ WIPO SCCR/13 21-23/11/2006 http://www.wipo.int/meetings/en/details.jsp?meeting_id=9289: SCCR/13/5 Proposal by Chile on the Analysis of Exceptions and Limitations http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=53350

⁵ WIPO IIM/1-3 (11/04-13/04/2006, 20-22/06/2005, 20-22/07/2005) and PCDA/1 (20-24/02/2006): Revised Draft Report IIM/1/6 PROV.2 http://www.wipo.int/meetings/en/details.jsp?meeting_id=8486; IIM/2 Report IIM/2/10 http://www.wipo.int/meetings/en/details.jsp?meeting_id=7522; IIM/3 Report IIM/3/3 http://www.wipo.int/meetings/en/details.jsp?meeting_id=8487; and Draft Report PCDA/1/6 PROV. http://www.wipo.int/meetings/en/details.jsp?meeting_id=9643

Intellectual property operates on a global scale and this is reinforced by the digital environment whereby the internet has created a global village. While information and knowledge resources are often available globally, they are becoming locked up by rightholder monopolies and their electronic licences duly enforced by digital rights management systems (DRMS) and their technological protection measures (TPMS). As that trend continues and analogue forms of information are abandoned by publishers⁶, despite increased availability of works on the internet, the minimum rights of access and use guaranteed by statutory exceptions and limitations to copyright are becoming eroded because some national laws, including the UK's, allow contracts and licences to override statutory exceptions and limitations. This too needs urgent redress.

Digital technologies are moving very fast indeed. Only this week has the proposition of 'digital paper' achieved reality.⁷ It may have some way to go yet, but this technology is likely to replace paper in many reading products which means that we will be renting access to even more information and knowledge which is currently published in printed books, journals, magazines and newspapers, through licensing ultimately from a monopoly provider, not buying it or borrowing it. Developments in technology such as this, and the many more to come, make it all the more urgent that the UK have more robust statutory safeguards in place to provide workable exceptions and limitations to copyright appropriate for copyright **users'** needs in the digital age which can not be diminished by licences and contracts. Only then can a balance be restored to copyright in these new media.

GENERAL QUESTIONS

1. How IP is awarded

(a) Are there barriers to obtaining IP rights due to system complexity? What could be done to improve this situation?

Copyright arises automatically without any formal registration as soon as a work of the mind is fixed. There are therefore no barriers in obtaining copyright.

(b) How easy is it to find out about obtaining IP rights? What could be done to improve awareness for businesses and innovators? Is there sufficient awareness of the need to protect IP internationally?

Most people are unaware that they automatically acquire copyright in their work, nor do they know how the right should properly be exercised for the benefit of both rightowner and user of copyright works. However those engaged in the creative industries generally find out quickly about copyright and neighbouring rights from their agents or the representative organisations they generally belong to. Generally most government and international intellectual property (IP) education programmes appear to emphasise only what is not

⁶ British Library predicts 'switch to digital by 2020'. BL Press Release 29 June 2005

<http://www.bl.uk/news/2005/pressrelease20050629.html> "Lynne Brindley, Chief Executive of the British Library, today predicted a switch from print to digital publishing by the year 2020. Speaking at the launch of the Library's [new three-year strategy](#), Lynne Brindley said: "... by the year 2020, 40% of UK research monographs will be available in electronic format only, while a further 50% will be produced in both print and digital. A mere 10% of new titles will be available in print alone by 2020."

⁷ BBC Technology News (broadcast on BBC Television News at 10 19/04/2006) [Print revolution: Tech firms invent devices to replace paper](#) [redacted] Currently (20/04/2006) available at <http://news.bbc.co.uk/1/hi/technology/default.stm>

allowed and the enforcement of rights. They tend to ignore or gloss over the importance which a robust regime of statutory exceptions and limitations to copyright has for the proper function of a democratic society and to national economies, yet the job of government is to represent the interests of *all* citizens not just the direct interests of creators and of industry. All citizens are involved in the economy and in society in different ways. Those working in not-for-profit activities such as education and research, health or society based activity are contributing in an important way to the economy, in particular to the UK's economic and social infrastructure, and their interests with regard to copyright and access to and use of information need to be better supported by the Government.

Rightholders are perfectly aware of the need to protect IP internationally and until recently their organisations formed the bulk of NGO representation at WIPO meetings. Users need to be much more aware of the need to protect and promote their interests in copyright at both national and international level.

The Government's IP portal at www.intellectual-property.gov.uk contains a lot of useful information for rightholders but not so much for users. It is not well publicised as an information resource and in our experience its maintenance does not include annual checks that contact details listed are still correct, as would be normal with any commercial directory. Some of the information on the site appears to be out of date. Nor is The Patent Office's own enquiry service well publicised.

2. How IP is used

(a) What types of IP does your organisation use and why?

Libraries of all kinds in all sectors of economic and cultural activity deal with copyright all the time since they handle analogue and digital versions of published and unpublished documents and other media.

(b) To what extent do you seek multiple overlapping forms of IP protection?

Libraries have to cope with the overlapping protection of copyright works which are contained in databases which in turn are protected by *sui generis* right and whose use is further restricted by licences and DRMS to the detriment of users' interests. Libraries would therefore seek to diminish the complexities caused by overlapping forms of protection.

(f) How well does the UK IP system promote innovation?

Copyright protects the results of innovation. It is perhaps a misplaced assumption that it also promotes innovation. Often it is the decision of inventors and creators not to protect their rights which results in the promotion of innovation e.g. Tim Berners-Lee's gift of WWW software to the world which has led to an explosion of innovation leading to new business and educational models, and has changed lives beyond recognition

(i) Do you have any evidence as to the static or dynamic costs that IP rights (as statutory monopolies) impose on the economy?

The costs to libraries of clearing rights due to extensive searches to trace and then negotiate with rightowners are difficult to estimate. An indication of the problems faced by all libraries and their users when seeking clearance is shown by Elizabeth Gadd's research report on copyright clearance in the higher education sector⁸. The problems faced by higher education

⁸ Gadd, Elizabeth. Clearing the way: copyright clearance in UK libraries. LISU, 2002. 190178651X

institutions (HEIs) apply equally to libraries in other sectors, both commercial and not-for-profit and often, according to anecdotal evidence, to a similar scale. Like HEIs, many of these need to seek clearance direct from both UK and foreign publishers. Gadd's research shows that the mean time to obtain clearance was one month but that waiting for two or three months was not uncommon, and for some the wait was in excess of three months. 90% of the respondents had to chase for the permissions. The average number of chases performed per annum was 315 and the median figure for the number of chases per item was 2. The mean percentage of items requiring chasing was 35% (median figure 30%). The average number of items chased per institution per annum was 97 (median figure 40). The mean proportion of requests never answered was 12.5%, while the median was 5%.

One of Gadd's respondents suggested that "*Clearance is very costly in administrative terms. Agencies and owners should look at streamlining applications through Websites or agencies and go for standard pricing. Reduced prices would expand the market, and revenue flows – read Adam Smith!*"

Users need access to the material within a very limited time frame and can not wait months for it or it ceases to have value. The withdrawal of fair dealing and library privilege copying for research for a commercial purpose combined with the inadequate coverage of licensing schemes (e.g. the Copyright Licensing Agency (CLA) only has reciprocal agreements with 22 other countries and not all US publishers) means that libraries now have to carry out even more rights clearances abroad in order to copy. In these circumstances depriving users of access until permission might be obtained does the UK economy considerable harm and will affect the quality of research.

In 2002 LACA conducted an informal survey⁹, through the pages and web site of the journal *Managing Information*, of commercial company libraries and prescribed not-for-profit libraries (not including public libraries) providing a document supply service for commercial uses which revealed that, although hard to estimate, on average this non-scientific sample of libraries incur costs in staff time in administering licences and clearances ranging from £400-£70,000 pa. Many commented that clearance time is unacceptable and causes conflict between the library and their users.

Some of the typical answers

"The last time I had to search for permission clearance (photocopy of an out of print book) it took about 2 hours of my time and the conclusion was 40 USD was too expensive and we would not go ahead. There are two and a half staff in the Information Centre. I have an impatient bunch of users who will not like being told (3-5 days on British Library delivery is hard enough) that they must wait for me to get written permission. I can't imagine that the publishers are going to be staffed sufficiently to deal with requests promptly and so we will sit in limbo land for ages. I think my hourly rate is about £35."

"If we had to do this meticulously we would need another employee spending half a week doing this. So about £10,000."

"Additional administration of interlibrary document supply of copies would probably cost £250 pa; for internal copying presently under fair dealing approximately £1250 pa."

⁹ Reported in LACA's Response of 09/10/2002 to The Patent Office consultation on the UK implementation of EC Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society (closed 31/10/2002).

“This is open-ended, I have known an American copyright query to take three months to clear, apart from the staff time contacting the organisation, we also have to add telephone bills to this. The total cost could match the copyright costs and in some organisations overtake it.”

“Potentially: one full-time member of staff clearing permissions and dealing with general licensing issues. Assume a mid-grade 1/2 Academic & Related staff salary of £25,000 (including LW) plus associated costs plus increased telephone costs etc - total cost £35,000 pa.; a loss of business due to time taken clearing permissions - incalculable but could be a sizeable proportion of income, say around £35,000 pa.; and the loss of goodwill and support from commercial institutions, e.g. for future building or research project support - difficult to say but potentially a very sizeable cost.”

Additionally, results from this survey indicated that libraries estimated the average **additional** costs of compliance for obtaining copyright cleared document supply from other libraries after the UK implementation of the Information Society Directive (due to the withdrawal of commercial research from fair dealing and library privilege copying) would be in the region of an average of £6,595 pa. Costs for extra permission seeking so that commercial libraries could copy for users beyond the scope of their copying licence were estimated to be on average an extra £1,300 pa.

(j) Have you encountered patents or other IP rights being used defensively, i.e. obtained not to develop products, but only to prevent others from doing so? Under what circumstances do you consider this acceptable?

We recall the ‘John Clare’ case¹⁰, which we know is referred to in detail in the National Archives submission to the Review. Furthermore it can happen that an author’s estate refuses permission for the author’s work to be used for educational or research purposes, particularly if the estate believes that adverse criticism or unwanted revelations about the author may result. Since the implementation of the Information Society Directive, literary estates have been able to refuse to allow the copying of unpublished works, whether or not they are in their possession, for research where the purpose is to publish for payment and is therefore a ‘commercial purpose’, since in the UK unpublished works are, regardless of age, protected to 31/12/2039.¹¹ These defensive uses of copyright are unacceptable where research is concerned and serve to repress free speech and the advancement of research and knowledge by refusing access to and use of primary sources.

3. How IP is licensed and exchanged

(a) How easy is it to negotiate licences to use others’ IP for commercial or non -profit purposes?

(b) What mechanisms do you use for finding potential licensing partners?

Libraries usually have great problems negotiating licences for electronic works because they are usually the weaker side, especially if they really need to have access to a particular journal or suite of journals (the ‘right’ journals). This situation is only ameliorated to some extent where the library is, like The British Library, a very big client of the publisher, or where it is through sector affiliation a member of a major national consortium such as JISC

¹⁰ See <http://www.johnclare.info/copyright.htm>

¹¹ Copyright law changes could hamper the press. Press Gazette 05/12/03 p9

(The Joint Information Systems Committee) which through its JISC Collections programme¹² negotiates licences for digital resources for higher and further education establishments. UK further and higher education technology and software licences are negotiated by Eduserv.¹³ If the library is an English public library the MLA (Museums Libraries and Archives Council)¹⁴ negotiates e-content for the People's Network. If it is a developing country national or university library and a member of a purchasing consortium which is also a member of charitable foundations such as INASP¹⁵ and eIFL.net¹⁶, its electronic licences will be negotiated internationally by these bodies who work on behalf of consortia in a number of developing countries and countries in transition. The big players such as the BL, JISC, MLA, INASP and eIFL.net can afford to hire lawyers to negotiate terms and prices. Even then, these large organisations informally report difficulties with suppliers.

Otherwise the supplier, as the copyright holder and a monopoly provider, is in a position to impose non-negotiable terms which smaller libraries have to take or leave in the form of off-the-shelf standard licences. Because smaller libraries outside the large consortia can not afford legal advice for licence negotiation and do not have the commercial clout to insist on negotiating their licences, they take these licences at their peril as they have no consumer protection and are often unaware of the full implications of the terms of some of these licences, particularly where the licences remove the statutory exceptions and limitations to copyright or impose use of foreign law in the event of disputes.

This can work severely to users' disadvantage. For instance most biomedical libraries in the NHS are now fully integrated with university libraries yet what they can offer to users in terms of e-journal and database access or what can be copied by licence will depend on where the user is coming from so the librarians have to operate two concurrent licensing regimes. This applies to CLA copying licences where the Higher Education licence has significant differences from the NHS licence. Even more bizarre is that an NHS library user for example might be denied access to certain password protected electronic resources present in the library because he or she is not entitled to use electronic resources licensed for use by university staff and students and vice versa. This and other similar problems are described in some detail in the report by the House of Commons Science and Technology Select Committee Report *Scientific publishing: free for all?*¹⁷

Moreover, in the case of e-journals it is not always a case of subscribing to this or that title and paying accordingly. Some publishers impose a suite of titles and make libraries pay for the suite when the library may not want the bundle (sometimes known as 'the Big Deal') on offer but can not otherwise get access to the 'right' journal it actually wants. Subsequently the bundle may change as publishers sell or acquire journals.

¹² <http://www.jisc.ac.uk/index.cfm?name=coll>

¹³ www.eduserv.co.uk

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[http://www.mla.gov.uk/webdav/harmonise?Page/@id=73&Document/@id=18626&Section\[@stateId_eq_left_h_and_root\]/@id=4332](http://www.mla.gov.uk/webdav/harmonise?Page/@id=73&Document/@id=18626&Section[@stateId_eq_left_h_and_root]/@id=4332)

¹⁵ International Network for the Availability of Scientific Publications (INASP) <http://www.inasp.info/>

¹⁶ Electronic Information for Libraries (eIFL.net) www.eifl.net

¹⁷ *Scientific publishing: free for all?* House of Commons Science and Technology Committee, 10th Report of Session 2003-04, HC 399-1, Volume 1, Chapter 3 paras 34-44, pp 23-27 (pdf pp 27-31).

<http://www.publications.parliament.uk/pa/cm200304/cmselect/cmsctech/399/399.pdf>

(c) How easy is it to use others' IP for research purposes? Have you experienced difficulty around research exemptions?

Library users have no difficulty in understanding and using the fair dealing exception for research except with regard to knowing whether or not the purpose is 'non-commercial', a restriction introduced by the UK implementation of the Information Society Directive in 2003. This restriction takes no account of the nature of research in that often the outcome, and whether or not there will be a commercial application, can not be known at the time the research is done. An example is 'library privilege' document supply requests under CDPA ss.38-40 via NHS biomedical libraries by medical staff, where the purpose may be for both a doctor's NHS work and his or her private medical practice. Librarians simply can not distinguish between these uses. The restriction also fails to take account of the nature of scholarly communication where research results may be shared between the commercial and academic sectors through journal articles and conference papers and a number of hybrid-funded projects exist. The narrowing of the fair dealing copying for research exception in this way failed to take account of the true nature of scientific research and communication which at the pure research stage is not confined to boundaries such as 'commercial' or 'non-commercial'.

Librarians who supply 'library privilege' copies to users against a signed declaration form under CDPA ss.38-44 have to rely on the user making a true declaration that the research is for a non-commercial purpose. By signing the copyright declaration Form A or B the user takes all responsibility to himself or herself exonerating the librarian, but as it can in some circumstances be quite unclear what may or may not be regarded as a commercial purpose, the user may wittingly or unwittingly make a false declaration. In situations where the library serves a closed community and librarians are therefore likely to know their users' general purposes quite well this can lead to difficult situations. We have heard of one major professional body which as a result decided it can not be put in such a situation as it had reason to believe that the majority of the demand for library document supply would be for a commercial purpose, but that due to confusion about what is commercial the copies would still be requested as library privilege copies. The society therefore decided not to offer any library privilege copying whatsoever and to supply everything copyright cleared under a document delivery licence regardless of the user's purpose.

Another consequence of the narrowing of the exception for fair dealing for research has been that all libraries (apart from public libraries which only deal with walk-in users and therefore do not have copying licences but rely on the fair dealing and library privilege copying exceptions) have acquired significant additional administrative burdens as a result of having to take additional licensing. Libraries within many not-for-profit membership organisations such as professional bodies and learned societies, which previously needed no licensing but relied on the exceptions to copy, now need, if they provide a document supply service, to take a CLA document delivery licence so they can continue to copy for members whose purpose may be 'commercial'. With the licence comes the administrative burden of reporting usage data which for small libraries which do a lot of document supply is quite onerous.

A possibly unintended consequence from this restriction to fair dealing for research, but a significant one nonetheless, is that not-for-profit organisations which have some commercial activity, such as for example a publishing arm or training department (both extremely common activities for professional bodies and some charities) in order to earn funds to augment their income which is otherwise derived from membership fees or donations, now also need to have a CLA business licence and maybe an NLA (Newspaper Licensing Agency) licence to cover copying by all staff in the organisation because a small proportion

of staff copying or copying by the library for staff may be for a 'commercial purpose'. This seems to apply even when all, if any, profits from the publishing or training activity are paid into the general-purpose funds of the not-for-profit charity or organisation in order to extend the reach of its core activity. Before the UK implementation of the Information Society Directive all staff ad hoc copying in such not-for-profit institutions and charities would normally have been covered by the fair dealing exception for research.

The reporting burden required by the copying licences is significant. Collecting societies say they need this detailed data in order to distribute royalties equitably to their rightholders. For example the CLA Business Licence provides that "CLA may, no more than once in each year, require the Licensee to participate in a data collection exercise such as, but without limitation, a survey, a record keeping exercise or an Information Audit."¹⁸ A CLA Information Audit¹⁹ for example requires licensees to supply detailed data (title, publisher, ISBN/ISSN and number of copies held) of the stock of published books and journals held by the organisation (not just its library) which leads to difficulties in data collection and collation of information which has to be obtained from staff workstations and bookshelves. The NLA's approach is different: it only seeks to audit systematic copying (as opposed to ad hoc copying) once a year for a fortnight though licensees have to keep records of what is copied systematically throughout the year and be able to produce it and or the cutting to NLA on demand.²⁰

Using the fair dealing for research exception with regard to database content is inextricably complicated by the database right exceptions which only allow extraction and re-utilisation of insubstantial amounts or the extraction but not re-utilisation of substantial amounts for the purpose of illustration for teaching or research and not for any commercial purpose. Unravelling database right from copyright in databases is too complicated for most people so database right tends to be ignored. Access to most commercial databases is governed by licences which may override the fair dealing exception and allow more or less than does the exception.

(d) Are there specific barriers to licensing in the main forms of IP currently used: patents, copyright, trade marks, and designs?

(f) Are there specific barriers to licensing IP in your sector?

Some rightholders choose not to make use of all the rights the law may grant them. We support movements such as Creative Commons²¹ and derivatives such as the BBC Creative Archive Licence²² since the purpose of the licensing starts from the premise of making the works as widely available as possible, generally with the minimum restrictions on non-commercial uses. It is however difficult for a creator to offer a free copyright licence or a Creative Commons Licence for certain uses of the content of a commercially published work where the copyright and related rights have not been assigned to the publisher (leaving the publisher only with typographical copyright for 25 years), since collecting societies collect royalties for the group they represent as a whole. This is not always justified i.e. a creator

¹⁸ CLA Business Licence Terms and Conditions, clause 11.1 <http://www.cla.co.uk/support/business/Business-Terms-and-Conditions.pdf>

¹⁹ See Guide to Information Audit Forms and Information Audit Form (Part 2) which can be downloaded from <http://www.cla.co.uk/support/business/index.html>

²⁰ NLA Standard Licence clauses 4.6-4.7, 9.6. and its Guidance Notes paras 3-4. Other NLA licences have similar clauses. <http://www.nla.co.uk/> Click on Licensing Forms, then select Standard Licence and/or Audit Form.

²¹ Creative Commons UK <http://www.creativecommons.org.uk/>

²² Creative Archive Licence Group <http://creativearchive.bbc.co.uk/>

should be able to formally opt out and exclude his or her commercially published works from collecting society representation. Collecting societies do not seem to like free licensing by individual rightholders even when these people are not members of the society - we are aware of licensing talks in progress (initiated by the would-be licensees) where the society concerned is seeking to require the potential licensees to give up the free licences they have acquired over the years from various creators in return for a sector-wide digitisation licence. The licensees are extremely unwilling to do so as they find the free licences to be of great value to their not-for-profit public interest objectives.

It can be difficult for libraries and their individual users to obtain licences from individual rightholders where collective licensing is unable to offer a satisfactory solution. Rightholders are often difficult and administratively costly to trace and the effort may result in refusal or an unreasonable demand for compensation even when the use requested is of low value and unlikely to harm the rightholder. At the same time a quick solution is needed – the researcher (whether academic or commercial) can not wait weeks and months for clearance when he or she has a submission deadline.

Additionally collective licensing does not always cover materials published in other countries so national, learned society and university libraries which have a significant stock of foreign materials have immense difficulties seeking to clear those rights for copying for purposes not covered by an exception to copyright. There is no indemnity or insurance scheme provided by the CLA licence for copying foreign materials not covered by the licence after the library has made due enquiry and either has not been able to trace the rightholder (rendering the work ‘orphan’) or has not succeeded in getting a response from them (perhaps because they did not understand the enquiry). We understand that CLA currently has reciprocal agreements with only 22 foreign reproduction rights organizations (RROs).²³

There has been pressure from libraries for years for digitisation licences, allowing not only digitisation of works but for them to be made available on the intranets, extranets or websites of educational and cultural institutions for not-for-profit purposes. This is coming very slowly but there has been deep reluctance from rightholders. Currently the Museums Copyright Group (MCG) has been in discussion with DACS for such a digitisation licence for about 16 months (including a 9 month pause in order for MCG to conduct and analyse a survey of museums and libraries) and it is still not yet known when or if there will be a successful conclusion to the talks. ARLIS UK & Ireland (Art Libraries Society) and LACA have from time to time over the past 2½ years been seeking a meeting with DACS (with whom we normally enjoy cordial relations) to initiate discussions for a digital ‘slide collection’ licence for HE and FE libraries to augment or replace the existing analogue slide collection. The latest request was made on 22/03/2006, which was acknowledged, but at the time of writing a month later DACS has continued to not offer a date.

The licence for each of the electronic journals and databases, or for a suite of products bought from an aggregator which will then have its own licence, is different and librarians have to understand and comply with all of them (even where there is a DRMS in place - to ensure that the DRM complies with the licence and is working properly). However such products are not the only resources for which libraries need licences. There is a plethora of other licences libraries usually need to obtain from a number of collecting societies and agencies, all of which are organised differently with different terms and conditions and procedures written in legalese which librarians have to be able to interpret in order to comply, all of which brings an overwhelming administrative burden. Most commonly, educational establishment

²³ CLA Annual Review 2005 p8 (pdf p10) last para <http://www.cla.co.uk/about/review-05.pdf>

libraries need licences for off-air recording²⁴, and libraries in educational establishment, government departments, plus many research organisations, learned societies, professional bodies, and all commercial organisations need licensing for photocopying and scanning from hard copy text and images.²⁵ Many learned society libraries are major document suppliers and also need licensing in order to copy to supply to users whose purpose is commercial.²⁶ All, from time to time, may need licensing for public performance of recorded music²⁷ or film.²⁸

It can be difficult to find out where to get a licence for the first time as there is no web portal dedicated to copyright licensing. It seems that in the case of online music, getting a licence has the potential to become even more complex since rightholders may be able to choose their collecting society from anywhere within the EEA.²⁹ As there may in future be no national based logic to follow as to where to apply for a licence, the collecting societies must cooperate on a web portal where one can at a click find out which collecting society the rightholders connected to a particular recording are with.

(e) Are there barriers to licensing IP on grounds of cost? What drives these costs?

Licensors have a monopoly on their ‘product’ and this inevitably affects the costs of copyright licences. Detailed evidence of these costs and their effect on libraries is discussed by the Report mentioned above of the House of Commons Science and Technology Select Committee Inquiry into Scientific Publishing in 2004.³⁰

4. How IP is challenged and enforced

(a) Are there specific problems with enforcing the main different forms of IP: patents, copyright, trade marks, and designs?

Please see our answer below (pp21-24) to the **Specific Issues Question on IP Enforcement**.

(b) Are there barriers to challenging infringement and enforcing your IP rights on grounds of cost? What drives these costs?

It is not just a case of rightholders ‘enforcing... IP rights’. Users too have ‘rights’ provided by statutory exceptions and limitations to copyright and organisations have a right to be treated fairly by contracts and licences. Libraries and archives are very risk averse and do not have spare funds for litigation on copyright and licensing. It was extremely unusual for university and colleges to litigate against the CLA and they only did so because the costs and

²⁴ Educational Recording Agency (ERA) <http://www.era.org.uk/>, Open University Worldwide Ltd <http://www.ouw.co.uk/info/record.shtm>

²⁵ Copyright Licensing Agency (CLA) www.cla.co.uk, DACS (Design and Artists Copyright Society) www.dacs.org.uk; Newspaper Licensing Agency (NLA) www.nla.co.uk

²⁶ www.cla.co.uk

²⁷ PRS (Performing Right Society) and MCPS (Mechanical Copyright Protection Society) Alliance <http://www.mcps-prs-alliance.co.uk/>, Phonographic Performance Ltd (PPL) <http://www.ppluk.com/>

²⁸ Filmbank is the main UK distributor of film and video for performance in non-theatrical venues such as libraries <http://www.filmbank.co.uk/default.asp> and provides licensing for public performance of its films in such venues. Another major licence provider for public performances of sell through (domestic market) DVDs and video is the Motion Picture Licensing Company <http://www.mplcuk.com/>.

²⁹ Commission Recommendation...on collective cross-border management of copyright and related rights for legitimate online music services (2005/737/EC) (and Corrigenda) at http://europa.eu.int/comm/internal_market/copyright/management/management_en.htm#20051012

³⁰ Scientific publishing: free for all? House of Commons Science and Technology Committee, 10th Report of Session 2003-04, HC 399-1, Volume 1, Chapter 4 pp29-48 (pdf pp33-52). <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmsctech/399/399.pdf>

issues of principle they were facing by CLA's action over their copying licence were so great and because the service they had received as customers from CLA hitherto was so poor, as was revealed by the library evidence to the Copyright Tribunal.³¹ Although this action only went before the Copyright Tribunal it appears the costs of the action to CLA was in excess of £1m.³² It is generally understood that the universities incurred similar costs of which 25% were paid by the CLA by court order.³³

e) Are there barriers to using such methods to settle IP disputes without recourse to litigation? How might they be removed?

We make suggestions concerning this in our accompanying document, *The LACA/MCG Joint Proposals to the UK Government for Revisions to the Copyright Designs and Patents Act 1988 (Proposal 13 and Justification p31)*.

SPECIFIC ISSUES

- **Current term of protection on sound recordings and performers' rights**

Background: The Review will fulfil the Government's commitment to examine whether the current 50 year term of protection on sound recordings and performers' rights in sound recordings is appropriate, in the light of its extension to 95 years in a number of other jurisdictions.

(a) What are your views on this issue?

(b) Is there evidence to show the impact that a change in term would have on investment, creativity, and consumer interests?

(c) Are you aware of the impact that different lengths of term have had on investment, creativity, and consumer interests in other countries?

LACA fully supports the position of The British Library and the International Association of Music Libraries (IAML UK & Irl) as submitted in their evidence to the Gowers Review that there is no justification in extending the term of copyright in the entrepreneurial work that is the sound recording nor in the performances in the sound recording.

For our justification for this view **please refer to our accompanying document, *The LACA/MCG Joint Proposals to the UK Government for Revisions to the Copyright Designs and Patents Act 1988 (Proposal (11)(d) and Justification pp26-28)***.

³¹ Universities UK v Copyright Licensing Agency (CLA) [Intervenor: Design and Artists Copyright Society]. See Patent Office Copyright Tribunal page with links to the ruling and hearings transcripts

<http://www.patent.gov.uk/copy/tribunal/tribnews4.htm> See also 'Universities UK welcomes Copyright Tribunal ruling.' UUK Media Release 13/12/2001 <http://www.universitiesuk.ac.uk/mediareleases/show.asp?MR=280>

³² CLA Annual Review 2003, Income and Expenditure Account... Year ended 31 March 2003, Operating Expenses p27 (pdf p29): Exceptional item – copyright tribunal – (2002) £1,162,376; CLA Annual Review 2001, Income and Expenditure Account Year ended 31 March 2001 p15 (pdf p16): Exceptional Copyright Tribunal and Survey costs (2001) £379,900.

³³ <http://www.patent.gov.uk/copy/tribunal/uukvclacosts.pdf> (p5 item 15)

(d) Are there alternative arrangements that could accompany an extension of term (e.g. licence of right for any extended term)?

Whether or not the term is extended for sound recordings and performances in sound recordings, we wish to see the library and archive copyright exceptions (CDPA ss.38-44) extended to allow prescribed libraries, archives and museums to copy sound recordings.

Please refer to our accompanying document, *The LACA/MCG Joint Proposals to the UK Government for Revisions to the Copyright Designs and Patents Act 1988 (Proposal (5) and Justification pp11-19)*.

(e) If term were to be extended, should it be extended retrospectively (for existing works) or solely for new creations?

Legislation is not usually applied retrospectively for good reason. To do so may cause untold confusion and disarray to existing arrangements in conditions where it can become impossible to make new arrangements because the past is history and the relevant people may be dead or disappeared. Term should never be extended retrospectively for existing works regardless of the circumstances: libraries and archives, museums and galleries have already had full experience of this when implementation of the Term Directive³⁴, with its by its retrospective extension of term by 20 years, brought back into copyright published works which had been in the public domain in some cases up to nearly the full 20 years. Not only did it cause untold confusion to users and librarians, archivists and curators alike, but it necessitated a further expenditure of scarce (often public) funds on library and archive administration of rights clearances or licensing for various copying purposes not covered by the copyright exceptions and for digitisation projects, including often futile quests in search of rightholders of orphan works.

• Copyright exceptions - fair use / fair dealing

Background: There are a number of exceptions to copyright that allow limited use of copyright works without the permission of the copyright holder.

(a) What are your views on the current exceptions in copyright law?

(b) Could more be done to clarify the various exceptions?

(c) Are there other areas where copyright exceptions should apply?

(d) Are the current exceptions adequate or in need of updating to reflect technological change?

LACA supports the views of The British Library, The National Archives, SCONUL (Society of College, National and University Libraries) and the International Association of Music Libraries (IAML UK & Irl), as submitted in their evidence to the Gowers Review. We all believe that change is needed to improve the exceptions to copyright to make them fit for the digital age and to iron out existing illogicalities and anomalies in the exceptions and limitations regime.

We have made our own proposals concerning the exceptions to copyright in **our accompanying document, *The LACA/MCG Joint Proposals to the UK Government for Revisions to the Copyright Designs and Patents Act 1988 (Proposal 4 and Justification p11, Proposal (5) and Justification pp11-19, Proposal (6) and Justification pp19-20, Proposal (8) and Justification p20, Proposal (9) and Justification pp20-22)*.**

³⁴ 93/98/EEC http://europa.eu.int/comm/internal_market/copyright/term-protection/term-protection_en.htm

(d) Are the current exceptions adequate or in need of updating to reflect technological change? For example copyright law in the UK does not currently have a private “fair use” exception. Such an exception might allow individuals to copy music CDs onto their PC and MP3 player for their personal use.

With regard to the specific example in Q(d) concerning private copying of music CDs, we would support this. The UK is unusual in that its legislation does not allow this. Ordinary people who legitimately purchase music can not see why platform shifting should be forbidden (if they know that it is). Since they have already purchased the material online or in a handheld format they think it unreasonable not to be able to transfer the material to play on different platforms in a domestic setting (including in their car or on an MP3 player or other portable device for private use). They, and we, see no real hurt to rightholders ensuing from this as they are not going to purchase more copies of the same work in different formats.

People will continue to do this anyway as they know it is unlikely they would be found out. They would only be prevented by TPMs and it would be impossible to police illegal off-line circumvention of TPMs in the private domain. The consumer has already shown the record industry that he or she resents and will try to avoid purchasing CDs and DVDs with TPMs that prevent them from copying to play the discs on different platforms (or even from just playing the discs in a computer DVD drive). The Sony BMG rootkit debacle³⁵ has also warned the consumer off products with DRMS and TPMs.

While legal music downloads have now superseded purchase of handheld media³⁶, people will continue to consider that they have bought a copy of the tune rather than a licence to use it, and that they should be able to privately copy it for domestic convenience and play it on whatever platform they choose.

If private copying of music were to be permitted then it would be illogical not to extend the exception to other multimedia such as film, so that film can be moved from VHS to DVD as people upgrade their players from VHS to DVD players. There will be further upgrades to home entertainment equipment and formats (e.g. DVDs and recorders/players are about to change due to the advent of High Density televisions³⁷) and the law should allow people to take advantage of hardware technology upgrades without having to repurchase their whole private collection of recorded music and film.

Given that the fair dealing exception already allows a certain measure of private copying of literary, dramatic, musical (printed) and artistic work for the purpose of private study, it would also seem illogical that if a private copying exception were introduced for other media to not also extend it to the above classes of works but perhaps with a proviso to inhibit the copying of whole printed editions of literary, dramatic and musical works. It would be pointless to try and impose further restriction than that for private copying since it will simply not be understood or adhered to by the public. Thus whole works like knitting patterns,

³⁵ 'Music industry asks whether fair use is fair play.' FT 29/11/05 p14 <http://news.ft.com/cms/s/2594a9f8-603a-11da-a3a6-0000779e2340.html>; 'Intrusive DRM: The cases of Sony BMG, StarForce and Microsoft.' INDICARE Monitor Vol. 2 No. 9, 25/11/05 http://www.indicare.org/tiki-read_article.php?articleId=155; 'Vaudeville offers a music lesson for Sony BMG.' FT 12/12/05 p19

³⁶ 'Legal music downloads reach record level in UK.': Legal music downloads have outsold vinyl, cassettes and DVD for the first time, the British Phonographic Industry (BPI) reported on Monday. Figures from the Official Charts' Company show that over 150,000 downloads were sold in January, with 50,000 sold in one week alone. Out-Law News 13/02/04 <http://www.out-law.com/page-4288>

³⁷ 'Next-generation DVD battle begins': The first HD DVD players and discs have gone on sale in the US. BBC Technology News 19/04/2006 <http://news.bbc.co.uk/1/hi/technology/4921784.stm>

recipes, printed photographs and artistic works reproduced in books and journals may be copied in confidence that it is not an infringement to do so.

(e) How would you see content owners being compensated for such use?

There does not appear to be any evidence in the public domain that private copying of purchased CDs and DVDs for domestic use by the owner of the medium or his/her household results in any loss of sales to rightholders. This practice has been going on since it became possible to copy media at home. Users' budgets for entertainment are finite and they are unlikely to purchase new formats of the same work. The threat of continued piracy within the UK from the sale of inferior quality copied CDs and DVDs at car boot sales and markets will diminish as more people download instead. With regard to print media the same applies – there is no loss of sales as the user will already have legitimately purchased or borrowed the work and is unlikely to buy again unless he or she is so impressed with the item copied that perhaps he or she then buys other works by the creator in question. Rightholders therefore will not lose significant sales, are therefore not harmed under the provisions of the Berne Three Step Test³⁸, and do not need compensation for such a 'fair use' exception.

(f) To what extent has technological change presented difficulties in use of copyrighted material in the field of education?

The education sector is (and indeed should be) always pushing at the frontiers of technological development and exploitation of electronic media, but the sector is being prevented from taking its proper place in the vanguard of technology use and development by the Government's failure to ensure that copyright exceptions and limitations clearly apply fully to digital media.

Despite the possibilities afforded by the further development of information technology in the 21st century which everyone (users, intermediaries such as libraries and archives and rightholders) wants to exploit, educational establishments in particular (at all levels from schools to universities) are being held back by out of date copyright exceptions which prevent them from making full use of the technologies available.

Below are just three examples of what educational establishments currently need to be able to do in order to deliver education in a manner which makes appropriate use of information technology:

- Extend the CDPA s. 32 exception for inclusion of third party copyright material in examination paper questions and answers to allow an educational establishment to be able to include extracts from copyright works without seeking further permission in digital versions of its own examination papers.

Digital examination papers are placed on secure intranets and could also be used in examinations. While currently UK educational establishments still conduct many examinations, even at higher education level, in completely analogue form with printed papers and handwritten answers, there is a trend for examinations to be completed by computer in countries such as the USA. S.32 therefore should clearly apply to digital versions of exam papers.

³⁸ Berne Convention **Article 9(2)**: "It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author." http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P140_25350

- Put extracts from published works on the establishment's VLE (virtual learning environments).³⁹

Universities and colleges have had to obtain a digital copying extension to their CLA Licence in order to do this. This has involved, in the case of universities, protracted negotiation over some years and the university licence is still on trial. The reporting burden on libraries is great as every licensee institution has to keep records of every extract from copyright copied for every distinct student group. This level of data collection is clearly driven by rightholder fear of digital on-copying through it is unclear what would be the student's motivation for doing so or why universities can not be trusted (as CLA's major licensing customers) to effectively police potential infringements themselves.

- Digitise photographic slides for use for teaching purposes. Educational establishments' use of images on slides is trapped in a mid 20th century time warp and over the years the transport and use of slides around the premises of a busy teaching institution means that these fragile media are degrading from wear and tear. However there is no suitable licence and none seems to be forthcoming. As mentioned above (p10 para 4) ARLIS and LACA have been trying without success for years now to get an initial meeting with DACS to discuss a slide digitisation licence for educational establishments.

(g) Are there issues concerning the archiving of material covered by copyright?

LACA fully supports the British Library's views concerning archiving copyright materials. In particular we agree with The British Library that there are deep-seated problems with current legislation (CDPA s. 42) which limits copying for preservation to only a single Copy and then only in "cases where it is not reasonably practicable to purchase a copy of the item in question to fulfil that purpose."⁴⁰ In the digital world multiple copying is a necessity in order to preserve, reformat and move the work to new platforms. The Act furthermore excludes the copying of non-print media (sound, film, broadcast works) for preservation purposes, and prevents format shifting for long-term preservation.

The legislation for library and archive exceptions needs to take account of the facts of life concerning digital content: it is licensed and subject to contract, and therefore not bought but 'rented'. Since, as has been said above in a number of contexts, in the UK contracts may override the statutory exceptions to copyright, and can do so in a manner which is detrimental to libraries and their users, the result is a worsening of conditions of access which impacts on the archiving digital content. The British Library's concerns as to what comprises a

³⁹ VLEs are secure intranets only available to registered students and staff taking the course or module in question.

⁴⁰ CDPA 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.

‘permanent collection’ under CDPA s.42 /SI 1989:1212 Reg. 6 is very valid in this context: it is necessary to ensure that a ‘permanent collection’ is defined to include digital resources of all kinds including copies of websites.

Libraries and archives are respectable and trusted institutions and should not have to constantly seek permission from rightholders to do this (with all the administrative burden and frustration that this often entails) but it should be clear in the library and archive exceptions that they have carte blanche to use any means available to them to carry out archiving or preservation and conservation of all types of media, including conversion to different formats and platforms in order to preserve the content or save the original from wear and tear. It is in the UK’s interests to take urgent action to facilitate this. As The British Library indicated in its submission to APIG, already some digital content is being lost due to obsolete TPMs preventing access to works and conversion for platform shifting.

Please refer to LACA’s Proposals in **our accompanying document, *The LACA/MCG Joint Proposals to the UK Government for Revisions to the Copyright Designs and Patents Act 1988***. Of particular relevance to archiving, preservation and conservation are **(Proposal (1) and Justification pp4-5, Proposal (3) and Justification pp7-11, Proposal (5) (a)(b)(c)(e)(f)(g)(h) and Justification pp11-19)**. The following Proposals will also be relevant in the event that the issue concerning contract law overriding copyright exceptions is not addressed satisfactorily and if the copyright exceptions themselves are not extended and clarified as we have asked **(Proposal (10) and Justification pp23-26, Proposal (11) and Justification pp26-28, Proposal (12) and Justification pp28-30)**.

Copyright – digital rights management

Background: Increasingly digital media content is distributed with digital rights management (DRM) technologies that can enable rights-holders to track usage and prevent unlicensed copying by technological means. However concerns have been raised about interoperability and that such technologies may impair the content consumer’s legal rights. For example they may be unable to take into account exceptions to copyright, the ultimate expiry of copyright term, or the future evolution of technology. They may therefore undermine legitimate rights to access digital content, now and in the future. (NB: We are aware of all formal submissions that have been made to the All Party Parliamentary Internet Group on this issue.)

(a) Do you have a view on how the use of digital rights management technologies should be regulated?

LACA made a formal submission⁴¹ to the recent APIG Inquiry into DRMS which closed in December 2005 and together with The British Library gave evidence to APIG at its hearing on 2nd February 2006. The APIG Report on the Inquiry is due out at the end of April 2006. **We refer you to our submission, which you indicate above is already in the Review Team’s possession.**

In terms of regulation of DRM technologies, we would like to make clear that while in our APIG Response we drew attention to the US system of triennial hearings and reviews, it was by way of example, not necessarily to advocate an identical system. However the current implementation of Information society Directive Article 6(4) in CDPA s. 296ZE and the lack

⁴¹ <http://www.cilip.org.uk/professionalguidance/copyright/lobbying>

of a procedure to apply the section is wholly unsatisfactory and we know from what the Patent Office told us at a meeting in January 2006 that it had by then only received one informal approach which was not pursued by the complainant. It would seem that lack of publicity about a complaints scheme (since there is no 'scheme') and, for those who do know there should be one the knowledge that it will take a long time, has served to stifle complaints. We would like to see a proactive system of regular government reviews of DRMS/TPMs and a swift well-publicised simple 'small claims' type of complaints procedure with legally enforceable outcomes (which is why we have asked that CDPA s.296ZE (6) be amended so that failure to undertake the duty defined in 296ZE (5) becomes an offence that then, in turn, is listed in CDPA ss.107-110 i.e. to render the principal officers of the corporate rightholder of the electronic work liable for infringement and to treat the work as prohibited goods.⁴²)

Please also refer to our Proposals concerning DRMS and TPMs in **our accompanying document, *The LACA/MCG Joint Proposals to the UK Government for Revisions to the Copyright Designs and Patents Act 1988. (Proposal (3) and Justification pp7-11).***

Copyright – orphan works

(a) Have you experienced any difficulties in identifying the owners of copyright content when seeking permission to use that content?

(b) Do you have any suggestions on how this problem could be overcome?

Orphan works pose a **major** problem to libraries, archives and museums and galleries and they are discussed at length in **our accompanying document, *The LACA/MCG Joint Proposals to the UK Government for Revisions to the Copyright Designs and Patents Act 1988. (Proposal (10) and Justification pp23-26).***

- **Copyright - licensing of public performances**

(a) Have you encountered problems with the system of licensing and paying royalties to collecting societies for public performance of music and/or sound recordings?

(b) Could the system be clarified or simplified, and if so how do you see this working?

Libraries, archives and museums and galleries need to be able to play recorded music, film and broadcast media in conjunction with displays and exhibitions. Such exhibitions are a major way to communicate the content of their holdings to the public for the general benefit of society and to meet national cultural and educational objectives.

Please refer to our Proposal in **our accompanying document, *The LACA/MCG Joint Proposals to the UK Government for Revisions to the Copyright Designs and Patents Act 1988. (Proposal (5)(d) and Justification pp11-19)*** in which we ask for a new exception to allow libraries, archives and museums and galleries to perform, play or show a sound recording or film held in their permanent collection to visitors to their premises and to make a single copy of such works held in their permanent collection for the same purpose.

⁴² CDPA s.110 **Offence by body corporate: liability of officers...**
CDPA s.111 **Infringing copies may be treated as prohibited goods...**

- **Legal sanctions on IP infringement**

(a) Are you aware of any inconsistencies or inadequacies in the way the law applies legal sanctions to infringement of different forms of IP or to different circumstances?

(b) For example, should criminal sanctions on online infringement be the same as those relating to physical infringement?

We were concerned by the European Commission's initial attempts to criminalize all infringement of IP in the early drafts of the Enforcement Directive 2004/48/EC (implemented in the UK on 18/04/2006⁴³) as it passed through the co-decision procedure. This did not succeed partly because the Commission had not introduced criminal measures under the Justice pillar of the Community. However, in 2005 there began another move by the Commission, this time via DG Justice, Freedom and Security to introduce measures to criminalize any intentional infringement of IP via a proposed second Enforcement Directive and a Council Framework Decision.⁴⁴ These new proposals are currently being reconsidered by the Commission and European Parliament and Council and are expected to resurface during 2006.

In our view the scope of these proposals **as published in July 2005**, constitute yet another legal measure, following a number in recent years, which further erodes the public domain in information, in this case by increasing the protection of IP rights (IPRs) to an unprecedented level by introducing far more rigorous criminal penalties than hitherto for each and every deliberate infringement on a commercial scale regardless of the circumstance. This attempt to make 'one size fit all' has the effect of a sledgehammer to crack a nut. Copyright and its related rights are much more complex IPRs than patents or trademarks. It is much easier to intentionally infringe copyright and neighbouring rights on a commercial scale without knowingly doing so and without infringing in a commercial manner or with criminal intent. **Copyright infringements need to be handled quite differently and much more sensitively.**

Article 1 of the proposed new Directive, extends the scope of criminal sanctions for infringement beyond that of TRIPS Art. 61 to all IPRs covered by Community law, criminalizing 'intentional infringement' on a 'commercial scale'. We feel this is unnecessary except in circumstances where public health and safety or organised crime are involved.

Article 2 subjects both corporate entities as well as natural persons to criminal liability, although interestingly it exempts 'States or any other public bodies acting in the exercise of their prerogative of public power, as well as public international organizations.' This suggests that only non-governmental and commercial organizations and their staff might be criminally liable, which seems unfair.

With regard to the proposed penalties in **Article 4** of the **Directive** and **Article 2** of the **Framework Decision**, we are of the view that custodial sentences are inappropriate except in the most serious of cases involving organized crime and threats or harm done to public health

⁴³ Intellectual Property (Enforcement, etc.) Regulations 2006 SI 2006/1028

http://www.opsi.gov.uk/si/si2006/uksi_20061028_en.pdf

⁴⁴ Proposal for a European Parliament and Council Directive on criminal measures aimed at ensuring the enforcement of intellectual property rights. Proposal for a Council Framework Decision to strengthen the criminal law framework to combat intellectual property offences COM(2005)276 final, 2005/0127(COD), 2005/0128(CNS) dated 12.7.2005 http://europa.eu.int/prelex/detail_dossier_real.cfm?CL=en&DosId=193131

and safety and that this should be more clearly specified. Other penalties in **Directive Art.4 (2)** such as ‘total or partial closure, on a permanent or temporary basis, of the establishment used primarily to commit the offence;... a permanent or temporary ban on engaging in commercial activities;... judicial winding-up;... a ban on access to public assistance or subsidies;’ also should only be imposed in similar serious cases.

However at the heart of the proposals is the requirement of the proposed Directive’s Article 3 (Offences) that ‘Member States shall ensure that all intentional infringements of an intellectual property right on a commercial scale, and attempting, aiding or abetting and inciting such infringements, are treated as criminal offences.’ The explanatory text about Article 3 (p3 of the document) confirms that this means that the Article ‘obliges Member States to consider all intentional infringements of an intellectual property right on a commercial scale as a criminal offence. It also covers attempting, aiding or abetting and inciting such offences.’ Consequently these proposals appear to aim to require Member States to, without exception, launch criminal prosecutions with regard to *all* intentional infringements of intellectual property rights on a commercial scale. LACA is concerned that these proposals remove all discretion concerning whether or not an IPR infringement ‘on a commercial scale’ is a criminal offence or not. These proposals go far beyond the TRIPS Art. 61 provisions for criminal procedures ‘at least in cases of trade mark counterfeiting and copyright piracy’, since they cover *all* intentional infringements on a commercial scale of intellectual property rights without regard to the actual circumstance *and* the proposed Framework Decision introduces compulsory standards into the penal codes of Member States. This is highly unusual since Europe very rarely attempts to interfere in the detail of the criminal law of Member States.

A major concern to us is that the criminalized acts in the proposals include some which are difficult to exactly define: e.g. ‘attempting, aiding or abetting and inciting infringements’. Additionally it is unclear how national courts would interpret infringement on a ‘commercial scale’.

We do not feel it appropriate that ‘intentional’ infringements on a ‘commercial scale’ of economic or moral rights should be made criminal offences rather than civil offences in each and every circumstance. To do so results in the expense of public resources to prosecute, and if successful, possibly hand down custodial sentences, to be implemented at public expense, for matters that largely benefit private enterprise. Indeed giving potential litigators increased access to national enforcement services together with increasing the penalties for intentional IPR infringements on a commercial scale, creates a climate in which rightholders will be encouraged to use litigation as a commercial tool. In the context of IPR infringement, such measures should be reserved to fight organised crime and to protect the public good or health and safety.

We believe that these proposals, if enacted, will inhibit the development of new methods of information distribution. An example of this already is the current contested legal action alleging copyright infringement, by UK scientific, medical and technical publishers against some German academic and research libraries involved in document supply through Subito (a document delivery company set up by an initiative led by the German Ministry for Education and Research and the German Länder) - an activity likely to be regarded as being on a commercial scale, though it remains to be seen if it is found to involve intentional

infringement as the court cases are set to run for some years through the appeals process.⁴⁵ If it had already been possible to criminalize the Subito suit the prospect of punitive fines for libraries might have arisen. Similar situations could arise in future.

The proposals will also have a negative impact on library users' freedom of action within libraries since librarians' attitudes towards user freedoms are likely to change. The fear of criminal prosecution, personal and corporate liability, punitive fines and perhaps even a custodial sentence (the latter is not exclusively reserved by **Framework Decision Art. 2** to offences of the gravest nature) will incline them to restrict activities to an unnecessary degree just in case users might from time to time infringe. Where infringements are alleged to be 'intentional' and on a 'commercial scale', these proposals potentially could criminalize librarians for 'aiding and abetting' if they are not sufficiently aware of infringements occurring in their libraries and/or do not take positive action against apparent infringements. In the UK it had been generally privately recognised for many years by UK rightholder organisations and by the Government that where libraries provide self-copying facilities (and these currently would include photocopiers, scanners, printers, disk, CD and DVD writers) librarians should not be held responsible for user actions on their premises since they are impossible to police. This view is further reinforced by a ruling in 2004 by the Supreme Court of Canada.⁴⁶

Many of the institutions in which libraries are located, especially educational establishments, are also Internet Service Providers and potentially libraries, including public libraries, could become ISPs. These proposals reduce the legal protection offered to ISPs as 'mere conduits' by the e-Commerce Directive (and as enacted in the UK) because the definition of 'commercial scale' is broader than the definition of 'e-commerce' and therefore increases the risk of legal action against ISPs concerning infringements by users. It is illogical to undermine the 'mere conduit' status of ISPs so recently established in Community law and the law of Member States.

Criminalization to the degree set out by these proposals will have a stifling effect on innovation in the development of information services, both analogue and digital. This will reduce choice, narrow the user's freedom of action and reduce access to information. It is difficult to see how that will benefit innovation, the economy, or the citizen's right to fair access and fair use of information. We remind the Government that all innovators and creators of works protected by IPRs are also users of information, and where the research is

⁴⁵ Rosemann, Uwe. Subito and German Developments in Copyright Law. World Library and Information Congress (WLIC), Oslo, 14-18 August 2005. <http://www.ifla.org/IV/ifla71/papers/097e-Rosemann.pdf>; Subito, a Documentation Delivery Service in Trouble. Goethe Institut Internet Dossier, August 2004 <http://www.goethe.de/wis/int/dos/en151095.htm>

⁴⁶ CCH Canadian Ltd v. Law Society of Upper Canada [S.C.R. 339, 2004 SCC 13 (CanLII)] <http://www.canlii.org/ca/cas/scc/2004/2004scc13.html>: "The Law Society did not authorize copyright infringement by providing self-service photocopiers for use by its patrons in the Great Library. While authorization can be inferred from acts that are less than direct and positive, a person does not authorize infringement by authorizing the mere use of equipment that could be used to infringe copyright. Courts should presume that a person who authorizes an activity does so only so far as it is in accordance with the law. This presumption may be rebutted if it is shown that a certain relationship or degree of control existed between the alleged authorizer and the persons who committed the copyright infringement. Here, there was no evidence that the copiers had been used in a manner that was not consistent with copyright law. Moreover, the Law Society's posting of a notice warning that it will not be responsible for any copies made in infringement of copyright does not constitute an express acknowledgement that the copiers will be used in an illegal manner. Finally, even if there were evidence of the copiers having been used to infringe copyright, the Law Society lacks sufficient control over the Great Library's patrons to permit the conclusion that it sanctioned, approved or countenanced the infringement."

for a non-commercial purpose they rely on the Government to robustly defend the exceptions and limitations to copyright set out in international, supranational and national law.

Since these proposals introduce an unprecedented level of criminal sanctions into IPR protection, we strongly urge the Government as a matter of priority to actively seek to remove from the scope of the proposals the offences of ‘attempting’ and ‘inciting’ infringements, and to seek to further restrict the range of infringements within the scope by limiting them to infringements which assist organised crime or which threaten or compromise health or safety.

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