

## Independent Review of Intellectual Property and Growth

### Response by LACA: the Libraries and Archives Copyright Alliance

March 2011

#### 1. Introduction

The Libraries and Archives Copyright Alliance (LACA) is a UK umbrella group convened by CILIP (Chartered Institute of Library and Information Professionals). LACA brings together the UK's major professional organisations and experts representing librarians and archivists to lobby in the UK and Europe about copyright issues which impact delivery of access to knowledge and information by libraries, archives and information services in the digital age.

The proposals set out in this document are in response to the call for evidence on Copyright with some overlap into Enforcement of Rights. Patents and Competition Law lie outside of the scope of this response and as such are not discussed. Evidence is provided in the form of reference to national and international studies and individual cases which have been supplied for the purposes of this response. Given the nature of LACA and the organisations we represent, we are primarily concerned with how the copyright framework operates for libraries and archives in both the public and private sector with a view to enabling their patrons to achieve efficient access to the information they require for their research, business, educational or recreational needs. Evidence contained in this document demonstrates where and how the copyright framework hampers innovation and impacts the production and delivery of goods and services to our patrons.

## 2. A fair and balanced copyright framework

Libraries, archives and museums play an active and significant role in the UK economy, generating up to £1.2bn every year.<sup>1</sup> The curating and management of copyright material is central to our organisations, which strive to uphold the rights of copyright holders whilst facilitating access for users. We recognise that a copyright framework is essential to encourage creative output and to support those who create the material accessible in libraries and archives, as it provides a mechanism whereby creators and other rights holders can be remunerated for their efforts.

The exclusion of ideas from the scope of copyright protection additionally encourages innovation and contributes to economic growth by allowing numerous creative outputs to be generated from one idea. Yet, whilst respecting these rights as the foundation of the copyright regime, it is vital that copyright frameworks place equal value on the importance of users' liberties to ensure a fair and balanced system, since rights owners are also users and since both sides of the scale are necessary for creativity, innovation and growth.

Users' liberties are enshrined in exceptions and limitations to copyright, which in this digital age are fundamental to the economic growth of some industry sectors, to innovation, and to the social and educational needs of citizens. When the current Copyright, Designs and Patents Act (CDPA) was drafted in the mid 1980s, legislators did not foresee the digital revolution in which copying and delivery of works is so diverse and in which users themselves become creators. As a result, the copyright framework in the UK is not fit for purpose in the twenty-first century and is in need of reform. Lobbying by rights holders and harmonisation with Europe has shifted the balance of copyright too far in favour of rights holders to the detriment of users' liberties, with limitations, exceptions and defences ill-defined in light of current and future technology and multiple digital platforms.

## 3. 'Fair use' and economic growth

Two recent studies commissioned by the Computer and Communications Industry Association (CCIA) have revealed that industries within the US and Europe which rely on exceptions and limitations

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<sup>1</sup> Collections Trust (2009). What can the UK culture sector do for Digital Britain? A response to the Digital Britain Interim Report on behalf of museums, archives and libraries  
<http://www.collectionstrust.org.uk/collectionstrust/assets/File/001186.pdf>

within a copyright framework ('fair use' industries) make a significant contribution to economic growth.

Using the World Intellectual Property Organisation (WIPO) guidelines and collating data between 2002 and 2007, Eurostat data from 27 Member States was analysed in the context of core and non-core industries. Industries whose association with copyright exceptions was weak were eliminated. Creative industries (including libraries and archives) were unfortunately excluded from the European study as a result of poor data. Industries relying on exceptions and limitations to copyright in Europe contributed to 9.3% of EU GDP, amounting to 1.1 trillion Euros in value added in 2007<sup>2</sup>. However, in the same year in the US, industries relying on fair use exceptions contributed to approximately 16.2% of US GDP, or \$2.2 billion in value added.<sup>3</sup>

Libraries and archives were included in the US study alongside news syndicates, exclusive Internet publishing and broadcasting and Web Search Portals in the industry subsector of Other Information Services as classified by the North American Industry Classification System (NAICS). This subsector was responsible for 1.02% of US GDP between 2005 and 2007; Figure 1 shows revenue and value added for which this subsector was responsible in both 2002 and 2007. No similar comparison can be drawn with the EU study, whose data for this subsector is poor and only collected for the year 2000.

	<b>2002</b>	<b>2007</b>
<b>Revenue Data (millions of \$)</b>	<b>32,982</b>	<b>37,674</b>
<b>Value Added Data (millions of \$)</b>	<b>15,489</b>	<b>17,255</b>

*Fig. 1:* Revenue and Value Added in millions of dollars from US Other Information Services industry subsector

Data from these studies conclusively demonstrates that the contribution of fair use industries to the economy is steadily growing over time. There is a recognised need for improved data reporting on the creative industries in Europe and for a deeper understanding of the connection between

<sup>2</sup> Akker, Ilan et al (2010). Economic contribution of EU industries relying on exceptions and limitations to copyright, CCIA.

<http://www.cciagnet.org/CCIA/files/ccLibraryFiles/Filename/000000000398/FairUseEUstudy.pdf>

<sup>3</sup> Rogers, Thomas et al (2010). Fair Use in the US Economy, CCIA.

<http://www.cciagnet.org/CCIA/files/ccLibraryFiles/Filename/000000000354/fair-use-study-final.pdf>

intellectual property rights and economic incentives for production and consumption.<sup>4</sup> The underlying factor in both these surveys is that copyright exceptions and limitations, within a fair and balanced intellectual property regime, allow for significant economic growth and development and must not be overlooked or diminished in favour of strengthening creators' rights.

- *“The protection afforded by fair use has been a major contributing factor to these economic gains, and will continue to support growth as the U.S. economy becomes even more dependent on information industries.”*

#### **4. The UK copyright framework and barriers to innovation**

The UK copyright framework, constructed within primary and statutory legislation and directed by precedent, is not able to adapt quickly enough to keep pace with technological advances. The creation of the Internet is a case in point: users of the Internet were infringing copyright for years before the legislation was amended to permit the act of temporary caching.<sup>5</sup> UK copyright law, despite the statutory instruments added to it since it came into force in 1989, continues to lag behind the new ways in which information and knowledge are being used, shared and created. This outdated copyright framework frustrates and hampers creative efforts in the twenty-first century by erecting needless barriers to innovation.

This obstruction is evidenced in the following ways:

##### **4.1 Barriers to innovative research (see Case Study 1 (Appendix 1 below))**

Researchers are continually frustrated with the limited ways in which they can access and use data and information. Technological protection measures prevent legitimate researchers from accessing the data they require; copyright permissions to use material and data for research purposes are difficult and for the most part expensive or impossible to obtain; and the tools for information analysis are under-developed as a result of their legal uncertainty (in terms of whether they infringe copyright).

This is certainly the case with a process known as text and data mining. Using a combination of machine learning, statistical analysis, modelling techniques and database technology, data

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<sup>4</sup> Akker, Ilan et al (2010). *Op cit.*

<http://www.cciaret.org/CCIA/files/ccLibraryFiles/Filename/000000000398/FairUseEUstudy.pdf>

<sup>5</sup> The Copyright and Related Rights Regulations 2003 (SI 2003/2498)  
<http://www.legislation.gov.uk/uksi/2003/2498/contents/made>

mining finds patterns and subtle relationships in data and infers rules that allow facts or hypotheses to be discovered and analysed. Data is selected and normalised (copied and format shifted) to allow computer programmes to analyse the data using text mining tools. Algorithms are programmed to look for relationships between certain facts across a wide range of data and information, for example 3000 journal articles from numerous different publishers and authors. Once the data that relates to these two facts in the articles is extracted, a derived dataset is then interrogated further and a link, fact or hypothesis derived. The process of text and data mining is not routinely permitted in contracts with university researchers and may be seen to infringe copyright and database rights. As such, the process of negotiating appropriate clauses in contracts with numerous publishers to account for text and data mining would be more arduous and complex than introducing a copyright exception to allow for this activity, particularly given that text and data mining has enormous potential to speed up scientific discovery with the extraction of facts.

The copyright framework does not only impede scientific research. In the arts and humanities, much innovative research is lost as a result of frustrated and fruitless efforts to obtain copyright permissions to use creative content. In July 2010 the British Library published a collection of essays sourced from the education and research community which highlight the ways in which the copyright framework has obstructed research in (primarily) the arts. One essay of note concerns the journal *Theatre Notebook*, whose 60-year back-file of published research on the practice of British theatre cannot be re-published online because many of the articles contain images for which the rights holders cannot be discovered. The material instead remains inaccessible to readers and researchers who would otherwise benefit from it.<sup>6</sup>

In similar instances, rights holders are large multi-million dollar organisations that charge unreasonably high fees for researchers who wish to reproduce creative material for research purposes. As a result, little or no research can be carried out on film, television, modern art or popular music of the latter half of the twentieth century. The copyright framework has therefore ceased to be a fair and balanced system and has instead become a monopoly for rights holders who unnecessarily restrict access to their material for research purposes.

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<sup>6</sup> Egan, G. (2010) Essay 5 in *Driving UK research: is copyright a help or a hindrance?* p.9, British Library. <http://pressandpolicy.bl.uk/imagelibrary/downloadMedia.ashx?MediaDetailsID=628>

## 4.2 Barriers to learning

Under the education exception (CDPA s.36), a teacher (or lecturer) may, using reprographic methods, copy a published work only within tightly constrained limits or under the terms of a licence if a licensing scheme is available, and under section 32 may copy from a published or unpublished work only if it is not done by means of a “reprographic process”. This latter exception was designed for ‘chalk and talk’ teaching. In an age where the Government specifically states that teaching must incorporate a variety of innovative learning materials in order to keep lessons varied and students engaged, this restrictive exception is a barrier to teachers who are following Government policies. Teachers will digitally copy material from the Internet for use in their lessons in order to comply with the Government’s recommendations, with little or no regard for the copyright framework in which they operate.

Under such circumstances, the onus is on the Government to amend copyright law in line with its own policies for access to culture, education, lifelong learning and research. The *Gowers Review* in 2005 recommended a number of helpful changes to the copyright exceptions, and we urge *this* Review to commend swift implementation of the long overdue recommended changes. In particular the Review may wish to consult the comments we submitted in response to the most recent consultation on implementing Gowers last year.<sup>7</sup>

## 4.3 Barriers to a competitive UK market

As noted earlier, evidence from the studies carried out by the Computer, Communications and Industry Association (CCIA) suggests that narrow fair dealing defences stifle innovation and growth. Based on these figures, it is clear that industries in Europe (and by definition, the UK) are more restricted by the copyright framework as they are less able to rely on the exceptions and limitations afforded to them. By contrast, these studies indicate that flexible exceptions in copyright law stimulate growth, creativity and innovation, particularly in the field of technology.

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<sup>7</sup> Taking forward the Gowers Review of Intellectual Property: second stage consultation on copyright exceptions. Response by LACA: the Libraries and Archives Copyright Alliance, March 2010. <http://www.cilip.org.uk/get-involved/advocacy/copyright/consultation%20responses%202009-10/pages/default.aspx> (scroll down)

## 5. Impact on provision of goods and services by current copyright framework

### 5.1 The restricted availability of cultural collections (see Case Study 2 (Appendix 1 below))

Libraries and archives in the UK supply the world with copyright material for cultural enrichment, learning and research. Cultural institutions encourage people to experience and explore the works of the past with a view to illuminating the present; such practice is fundamental to cultural growth and encouraging research. However, the ability to maximise the benefits of the digital environment is constrained by the current copyright framework, which prohibits delivery of cultural goods and services in the following ways:

1. There is no simple licensing facility for the mass digitisation of cultural artefacts still under copyright (most twentieth century items);
2. Unpublished works (a large part of the collections of most archives) are under copyright until 2039;
3. Orphan works (works for which the author is not known or untraceable) may not be format-shifted (digitised) without the permission of the rights holder and also may not be used for commercial purposes;
4. Current provision for preservation copying is inadequate and does not cover all types of material, in particular artistic works and audiovisual material. Copying for preservation purposes should be technology-neutral and carried out means possible at the time.

In addition, the ways in which these issues are currently being addressed are insufficient and in some cases severely inadequate. In the worst cases, cultural and educational organisations are faced with restrictive contracts and licences, which are in practice non-negotiable (see **Case Study 2**). A recent study analysed 100 contracts offered to the British Library and found numerous examples of the diversity of contracts and licences, as well as demonstrating that contracts and licences often override the exceptions and limitations allowed in copyright law.<sup>8</sup> This imbalance must be addressed, as licences should never substitute for legislation on core matters such as exceptions and limitations. The licensing framework now underpins much of the content online and contracts rather than copyright dictate how content can be used. Legislation must be amended to ensure that contracts are prevented from overriding copyright exceptions.

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<sup>8</sup> British Library: Analysis of 100 contracts offered to the British Library.  
<http://pressandpolicy.bl.uk/imagelibrary/downloadMedia.ashx?MediaDetailsID=691>

Furthermore, copyright exceptions should be extended so as to provide for greater scope of innovation and growth.

## 5.2 Rights clearance for mass digitisation - the role of collecting societies

(see **Case Study 3** (Appendix 1 below))

The European Commission's i2010 and Digital Agenda work programmes identified that significant societal and economic benefit can be derived from digitising the collections of national libraries, large archives and museums for the purposes of making the collections available online.<sup>9</sup> Not only is there a strong demand for access from consumers for such material (the European cultural heritage portal *Europeana* received over 13 million hits per hour at its launch<sup>10</sup>); evidence from the Comité des Sages hearing in November 2010 suggests that small and medium technology enterprises and large telecommunications companies such as Orange desire the availability of more content online so that new, innovative products and services can be built from it.<sup>11</sup> However, under the current copyright regime, the mass digitisation of cultural collections within the last 150 years is extremely difficult given the nature of the content to be digitised and the lack of adequate mechanisms to seek copyright clearance and permissions. This is reinforced by the findings of a soon-to-be-published British Library and ARROW (the Accessible Registries of Rights Information and Orphan Works towards Europeana) study on rights clearance which investigated the time and effort required to clear 140 publications with a date range of 1870-2010.

Parallel discussions in France are focused on the digitisation of the 500,000 estimated 'out of commerce' works that are currently held by the large French libraries. In essence, France proposes:

1. A statutory underpinning for collecting societies to allow them to extend their repertoire and represent all out of commerce works;

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<sup>9</sup> European Commission (05/05/2010). Digital Agenda: Commission welcomes European Parliament's support. (Ref. IP/10/538) <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/538&format=HTML&aged=0&language=EN&guiLanguage=en>

<sup>10</sup> Casey, Zoe, 'Europeana crashes to Earth.' European Voice 21.11.08 <http://www.europeanvoice.com/article/2008/11/europeana-crashes-to-earth/63159.aspx> "The site, which houses thousands of items from books to paintings from Europe's cultural history, received up to 13 million hits per hour "three times the maximum level expected by the European Commission."

<sup>11</sup> European Commission. Summary Record of the Public Hearing of the Comité des Sages on: "Bringing Europe's cultural heritage online" 28th October 2010. [http://ec.europa.eu/information\\_society/activities/digital\\_libraries/doc/refgroup/annexes/public-hearing\\_281010.pdf](http://ec.europa.eu/information_society/activities/digital_libraries/doc/refgroup/annexes/public-hearing_281010.pdf)

2. An opt-out by authors and publishers (pre-digital rights are likely to sit with the author);
3. Historical cut- off point before which this category of work can be represented collectively;
4. A presumption that the rights holder should digitise but allowing a window in which the library can.

The experiences of institutions indicate that a title-by-title rights clearance can be prohibitively costly and complex, especially in case of large scale digitisation projects

This proposed model appears to be fair, equitably balancing public and private interests and promoting the mass digitisation of content in the context of out of commerce works. Based on our own experiences and from discussions with other cultural sector bodies, it is worth stressing that any attempt to clear rights en masse for the purposes of communication to the public is extremely complex.

In order to facilitate the mass clearance of rights, not only in the publishing trade but also in the area of sound recordings and film, some form of effective collecting and management of rights similar to schemes currently being discussed in France, Germany and Belgium is required. Given the layers of intellectual property rights (and therefore number of potential rights holders) that can exist within a single copyright work, particularly a film or sound recording, the only solution for the mass clearance of rights lies in compulsory licensing or extended collective licensing. Without a collective management approach to mass digitisation, or the issuing of compulsory licences for certain specific uses, it is impossible to envisage how the mass digitisation of UK cultural goods can become a reality given the immensely high transaction costs of rights clearance on a right by right basis (see **Case Study 3**). We therefore believe that in order to encourage the mass digitisation of content, and the social and economic innovation that will ensue, the Government should through statute facilitate the mass clearance of out of commerce rights for cultural sector institutions.

### 5.3 Prohibitive copyright duration for unpublished works

Another factor that contributes to the restrictions on the availability of archival collections is the duration of copyright. In the UK, unpublished literary, dramatic and musical works and anonymous artistic works that have never been made available to the public are protected by copyright until the end of 2039 (50 years after the CDPA came into force), regardless of the

date of their creation or the date of death of their author. This creates barriers to the use of those works, as evidenced by the case of the poetry of John Clare (1793-1864) who wrote in the region of 3000 poems during his lifetime. However, only 300 of his poems were published, and the rights to his unpublished poems belonged to his publisher who sold them in the 1960s to an American professor. He subsequently refused to grant permission to other academics to publish any part of the unpublished poetry, even for literary criticism, and pursued one unauthorised publishing of an unpublished Clare poem in 2003.<sup>12</sup>

The duration of copyright varies by country depending on amendments made to national copyright laws, but one country, which has a substantial competitive knowledge advantage, is the USA. All books published before 1923 are in the public domain, yet as some are still in copyright in Europe, it is estimated that 500,000 books are being blocked from view in Europe due to the longer period of copyright for historical material.<sup>13</sup> This extends even to the absurdity that books digitised by Google in the UK are not available to UK users.<sup>14</sup> The duration of copyright has also led to the significant problem of works becoming 'orphaned', whose authors and creators can no longer be traced or identified as a result of the amount of time that has passed.

#### 5.4 Excessive cost of obtaining permissions for orphan works

According to a study carried out by the Collections Trust and the Joint Information Systems Committee (JISC) in 2009, the average proportion of orphan works in collections across the UK public sector was 5-10%; this proportion was found to be higher in archives.<sup>15</sup> Orphan works cannot be digitised or copied without the permission of the copyright holder, yet libraries and archives wish to make them available to the public for cultural use as they have great historical value.

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<sup>12</sup> 'Clare's rights'. Guardian Letters, 1 February 2003.

<http://www.guardian.co.uk/books/2003/feb/01/featuresreviews.guardianreview27>

<sup>13</sup> White, Ben (2009). Orphan Works. Paper given at European Commission Public Hearing on Orphan Works, Brussels 26/10/09. [http://ec.europa.eu/internal\\_market/copyright/docs/copyright-info/orphanworks/White\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/copyright-info/orphanworks/White_en.pdf) Located at [http://ec.europa.eu/internal\\_market/copyright/copyright-info/copyright-info\\_en.htm](http://ec.europa.eu/internal_market/copyright/copyright-info/copyright-info_en.htm) (scroll down)

<sup>14</sup> The Bodleian Library made books available using a 120-year copyright cut-off but Google displays that material to EU states using a 140-year cut-off.

<sup>15</sup> Korn, Naomi (2009). In From the Cold: An assessment of the scope of 'Orphan Works' and its impact on the delivery of services to the public, JISC. <http://www.jisc.ac.uk/media/documents/publications/infromthecoldv1.pdf>

- *“What was initially a cultural project quickly became a minefield of legalities, permissions and detective work.”*

Jez Collins & Andrew Dubber, Birmingham City University; Ruth Daniel, Fat Northerner Records and Un-Convention

Evidence from a European Commission report, completed in May 2010, to assess the cost for rights clearances of orphan works showed that rights clearance is costly and cumbersome to cultural institutions.<sup>16</sup> The study gathered facts and concrete data from actual digitisation projects to illustrate the scope of the problem of orphan works and the time and effort involved in rights clearance of types of material (such as text and audiovisual material) in different cultural institutions. 22 responses for information were received from UK and European cultural institutions, which had previously digitised cultural material, as well as from member institutions of LIBER (Association of European Research Libraries) and CENL (Conference of European National Librarians).

The study found that the prohibitive costs of clearing rights (often several times the cost of digitising the material in the first place) as well as the time and effort to obtain licences to digitise works had resulted in numerous projects being scrapped. The result is that libraries and archives hold large amounts of material, which they cannot make available, and the public who do wish to have it made available cannot access it. This causes frustration for all involved, particularly as without these restrictions documentary films and books could be produced to contribute to the growth of the economy, thereby showcasing the wealth of valuable historical material in the UK's archives.

- *“In the absence of efficient sources of rights information to works (such as book rights registries), it can take from several months to several years to clear permissions for only a limited numbers of works. Sometimes it is impossible to clear the rights at all.”*

Access to the works of the past is prevented because the works may not be digitised and made available on-line. Use of works of the past by new authors, researchers, designers and creators is therefore severely restricted because the necessary permissions cannot be obtained (see examples in **Case Study 3**). The European Commission recently awarded a contract to Deloitte to undertake an assessment of the impact of the digitisation of cultural heritage in the

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<sup>16</sup> Vuopala, Anna (2010). Assessment of the orphan works issue and costs for rights clearance, European Commission.  
[http://ec.europa.eu/information\\_society/activities/digital\\_libraries/doc/reports\\_orphan/anna\\_report.pdf](http://ec.europa.eu/information_society/activities/digital_libraries/doc/reports_orphan/anna_report.pdf)

European Union. The work will last for 10 months, and the final report is expected at the end of October 2011. This study will provide valuable concrete evidence of the direct and indirect impact of the digitisation of cultural heritage on economic, social and environmental variable using cost-benefits analysis and return on investment techniques.<sup>17</sup>

- *A UK project digitising posters from the 1980s spent £70,000 in transaction costs for clearing the rights for just 1400 posters.*
- *As part of a major digitisation project of (audio-) visual material in the Netherlands (Beelden voor de Toekomst), the total cost of handling rights clearance for 500 000 photographs and 5000 films has been estimated to be 625 000 Euros - 3 people will be clearing rights for 4 years in this project.*
- *In a Dutch project dealing with the digitisation of 1000 Dutch history handbooks, only 50 books were cleared in a period of 5 months. At this speed, clearing the rights for the whole set of handbooks would take more than 8 years.<sup>18</sup>*

## 6. Impact on preservation

The UK copyright framework in its current incarnation poses a significant threat to the business of libraries, archives and cultural institutions. There is currently no provision for format-shifting (e.g. analogue to digital) for the purposes of preservation, which is crucial to the business objectives of academic and research libraries, and archives in particular.

Preservation is not only essential for the survival of material such as sound recordings and films, whose hardware becomes redundant, but it also prevents issues of storage and risks to health and safety (for example, potential spontaneous combustion of nitrate film stock). Other countries have been much more astute at recognising this problem and implementing solutions; Australia, for example, introduced the *Copyright Amendment Act 2006*<sup>19</sup> which introduced important exceptions such as private copying, format-shifting (copying from CD to iPod and similar), and parody. The amendment also quantified fair dealing for the use of research and private study, and, crucially,

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<sup>17</sup>ARROW (2011) <http://www.arrow-net.eu/news/study-digitisation-cultural-heritage.html>

The study will be based on empirical data directly or indirectly collected by the contractor about ongoing digitisation projects and digital libraries, mainly within the European Union, but will also take into account some cases with an extra-European dimension.

<sup>18</sup> All evidence extracted from Vuopola, Anna (2010) *Op cit.*

[http://ec.europa.eu/information\\_society/activities/digital\\_libraries/doc/reports\\_orphan/anna\\_report.pdf](http://ec.europa.eu/information_society/activities/digital_libraries/doc/reports_orphan/anna_report.pdf)

<sup>19</sup> <http://www.comlaw.gov.au/Details/C2006A00158/Html/Text#param91>

introduced an exception for libraries, archives and cultural institutions to be able to make preservation copies of all material they housed. The *Gowers Review* recommended a provision in UK copyright law for format-shifting for preservation purposes, and we whole-heartedly commend its implementation as soon as possible, as without the collections of cultural institutions, there can be no digitisation or cultural benefit. Once an artefact is lost, it is lost forever.

The issues surrounding the prohibition on the circumvention of technological protection measures (TPMs) are complex. LACA and the British Library presented evidence of how TPMs impair digital preservation to the All Parliamentary Internet Group (APIG) Inquiry into Digital Rights Management in 2006.<sup>20</sup> While Norway<sup>21</sup>, Finland<sup>22</sup> and Denmark<sup>23</sup> have made effective post Information Society Directive provisions in their copyright laws to mitigate these problems, the UK has yet to identify helpful solutions. Meanwhile, as time goes on the risk of losing parts of our digital heritage are exacerbated.

## 7. Proposed Solutions: Non-legislative changes

We propose the following solutions in terms of non-legislative changes:

### 7.1 Establishing a neutral forum

The Government should set up an open forum where the various interested parties - rights owners, users, intermediaries such as library professionals and Internet Service Providers - could meet on neutral ground to communicate fully and frankly with each other. A Minister, a senior civil servant or other respected figure could facilitate meetings. This forum's objectives should include the commissioning of research to discover innovative technical solutions to problems, surveying public attitudes and uses of copyright material, and promoting educational campaigns on copyright and licensing. Communication and education is crucial where copyright is involved, and parties have for a long time been held at odds with one another as a result of confusion over current copyright law.

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<sup>20</sup> <http://www.apicomms.org.uk/apig/current-activities/apig-inquiry-into-digital-rights-management.html>

<sup>21</sup> NORWAY. Copyright Act 1961 (as amended). Act No. 2 of 12 May 1961 relating to Copyright in Literary, Scientific and Artistic Works, etc., with subsequent Amendments, latest of 17 June 2005 Chapter 6a ss.16, 53a and 53b. [http://portal.unesco.org/culture/en/ev.php-URL\\_ID=15319&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/culture/en/ev.php-URL_ID=15319&URL_DO=DO_TOPIC&URL_SECTION=201.html)

<sup>22</sup> FINLAND. Copyright Legislation 2010 s.50a(3). Unofficial Translations in English. Ministry of Education and Culture Finland <http://www.finlex.fi/en/laki/kaannokset/1961/en19610404>

<sup>23</sup> DENMARK. Consolidated Act on Copyright 2010 (Consolidated Act No. 202 of February 27th, 2010) s.75d <http://kum.dk/Documents/English%20website/Copyright/Consolidated%20Act%20on%20Copyright%202010%5B1%5D.pdf>

## 7.2 Initiation of a Copyright Advisory Board

We would support the creation of a Copyright Advisory Board by the Intellectual Property Office in order to redress the balance between rights holders' and users' needs in relation to copyright. The Board should include fair representation from all stakeholders, including intermediaries such as representatives from the cultural and education sectors, and would advise on copyright strategy.

## 7.3 Facilitate mass digitisation in the cultural sector

We would recommend to the Government, echoing the Comité des Sages report, *The New Renaissance*<sup>24</sup>, the importance of collective management in facilitating mass digitisation, in particular in the area of out of commerce works. As far as orphan works are concerned, LACA still supports the text of the Digital Economy Bill as it pertained to the statutory and collective licensing of orphan works and we wish to see this implemented.<sup>25</sup>

## 7.4 Enable innovative research through the legitimisation of text and data mining

If a new copyright exception for text and data mining (see point **8.7** below) is not considered feasible, we strongly commend the Government formally confirms that the use of text and data mining for non-commercial research is always acceptable, and explicitly permits the exploitation of public sector information for both commercial and non-commercial text and data mining. Without so doing, the use of text and data mining by, for example, large pharmaceutical companies for the development of life-saving and life-changing drugs will be severely restricted.

## 8. Proposed Solutions: Legislative Changes

It is highly unlikely that the UK will be able to unilaterally adopt a 'fair use' model similar to that of the US due to its integral relationship with the EU. The EU framework constrains UK copyright exceptions to an inflexible, exhaustive list in Article 5 of the Information Society Directive (see **Appendix 2**) which cannot adapt to new circumstances (such as orphan works and mass digitisation). In any case, fair use has the advantage of broad interpretation as it is not tied to specific purposes, but holds a major disadvantage in that it is sufficiently vague to invite numerous court cases. In light

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<sup>24</sup> European Commission (2011). *The New Renaissance: report of the 'Comité des Sages'*. [http://ec.europa.eu/information\\_society/activities/digital\\_libraries/doc/reflection\\_group/final-report-cdS3.pdf](http://ec.europa.eu/information_society/activities/digital_libraries/doc/reflection_group/final-report-cdS3.pdf)

<sup>25</sup> Clause 43 removed in the pre-General Election 'wash-up' <http://www.publications.parliament.uk/pa/cm200910/cmbills/089/10089.49-55.html> (scroll down)

of this, we urge the Government to consider making the following minor legislative changes, which fall within the scope of existing legislation in the EU copyright *acquis*:

**8.1 Adopt and implement all the *Gowers Review* Recommendations concerning copyright exceptions with immediate effect.**

In particular:

1. Exceptions **permitting educational use for distance learning and on whiteboards**;
2. Exceptions **permitting preservation copying of all kinds of work in the permanent collections of libraries, archives, museums and galleries**, so long as the work does not thereby become available to more readers at any one time than had access before; and
3. **Exceptions permitting copying for users for purposes of non-commercial research or private study of artistic works, films and sound recordings** in the permanent collections of libraries and archives.

**8.2 Expand the defences in UK copyright law to include *all* exceptions and limitations delineated in Article 5 of the EU Information Society Directive (see Appendix 2)**

**8.3 Expand section 34(1) in the CDPA to include artistic works for pedagogical use.**

**8.4 For unpublished works in copyright until 2039: apply the standard terms applicable to published works universally.**

This has been done in other European countries, including Ireland where (until recently) unpublished literary works had perpetual protection as they did in the UK until 1989.

**8.5 Expand the current provision in the CDPA for orphan works created before 1989.**

**Schedule 1 paragraph 16 of the CDPA** permits the making of a copy of an unpublished literary, dramatic or musical work (together with any illustrations) that is available to the public in a library, museum or other institution (such as an archive), that is at least 100 years old and whose author has been dead for at least 50 years, for the purposes of research or private study or with a view to publication. It also permits a single publication of the work so long as

the identity of the copyright owner is not known to the publisher and the subsequent broadcasting, performance or recording of the work.

This provision should be **amended** so as:

- to apply to artistic works, films and sound recordings;
- to apply to unpublished works earlier than 100 years after creation (70 years, in line with duration periods);
- to apply to published works that have not been commercially available for 20 years;
- to apply expressly to online publication; and
- to permit second and subsequent publications, so that a work may be published online by, for instance, a library or archive and then be re-used by a user.

A dual track approach which, on the one hand implements the extended provision proposed here and, on the other hand permits the licensing provisions that had been proposed in the Digital Economy Bill, would go a long way towards a solution for orphan works to the benefit of Europe's online culture and heritage.

#### **8.6 Amend copyright legislation to include a clause stating that contracts and licences should not adversely override exceptions.**

1. This type of clause already exists in Irish<sup>26</sup>, Portuguese<sup>27</sup> and Belgian<sup>28</sup> copyright law.
2. Early in 2010 the Intellectual Property Office (IPO) held a meeting between LACA and publishers. The publishers hoped to stave off criticisms of their licences by suggesting that we should work together on standard contractual wording, which they said would obviate the need for any change to the law. However, from experience we know that the voluntary solution takes many years, by which time the Government has changed and the whole process has to start again. Crucially in this matter, a voluntary solution is no use for the following reasons:

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<sup>26</sup> IRELAND. Copyright and Related Rights Act, No. 28 of 2000 **Part I: s.2(10)**  
<http://www.irishstatutebook.ie/2000/en/act/pub/0028/index.html>

<sup>27</sup> PORTUGAL. Lei n<sup>o</sup> 16/2008 Lei n<sup>o</sup> 16/2008 **Art.75(5)** [http://portal.unesco.org/culture/en/ev.php-URL\\_ID=15320&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/culture/en/ev.php-URL_ID=15320&URL_DO=DO_TOPIC&URL_SECTION=201.html)

<sup>28</sup> BELGIUM. Loi relative au droit d'auteur et aux droits voisins 1994 (as amended) **Art. 23bis**  
[http://suisse.juridat.be/cgi\\_loi/loi\\_F.pl?cn=1994063035](http://suisse.juridat.be/cgi_loi/loi_F.pl?cn=1994063035)

- Totally standard contractual wording is more or less outlawed by competition law;
- A voluntary solution would not achieve 100% adoption in the UK;
- A voluntary solution worked out in the UK would have no effect at all on the many foreign contracts that the cultural and education sectors have to deal with.

#### 8.7 Create an exception in the CDPA for text and data mining (see also point 7.4 above).

#### 8.8 Make certain actions criminal offences under law:

1. **Unjustified threats of legal action from individuals or organisations that do not own the copyright in question should be made an offence.**

The wording of section 70 of the Patents Act 1977, amended to reflect copyright terminology, could be used.<sup>29</sup> The actions of firms such as ACS Law, recently ruled upon in the Patents County Court, is just one example of our concerns about increasing opportunist unfounded copyright infringement litigation and threats of litigation.<sup>30</sup>

2. Under clause 296ZE(6) of the CDPA, instead of, as now, forcing the complainant to sue the rights holder in court; **a breach by a rights owner who fails to lower a Technical Protection Measure (TPM) following a complaint by a user that their use of a copyright work falls under an exception, should be made a criminal offence under the Act.**
3. **Amend clause 296ZE(9) so that it is possible to make a complaint if the terms of the licence are unreasonable.** This should apply only where material has been offered

<sup>29</sup> Patents Act 1977 s.70 <http://www.legislation.gov.uk/ukpga/1977/37>

70 Remedy for groundless threats of infringement proceedings.

(1) Where a person (whether or not the proprietor of, or entitled to any right in, a patent) by circulars, advertisements or otherwise threatens another person with proceedings for any infringement of a patent, a person aggrieved by the threats (whether or not he is the person to whom the threats are made) may, subject to subsection (4) below, bring proceedings in the court against the person making the threats, claiming any relief mentioned in subsection (3) below.

(3) The said relief is-

- (a) a declaration or declarator to the effect that the threats are unjustifiable;
- (b) an injunction or interdict against the continuance of the threats; and
- (c) damages in respect of any loss which the plaintiff or pursuer has sustained by the threats.

<sup>30</sup> Media CAT Ltd v Adams & Ors [2011] EWPC 6 (08 February 2011)  
<http://www.bailii.org/ew/cases/EWPC/2011/6.html>

under a licence whose terms have been approved by the Copyright Tribunal or other authorised body. This would allow for the independent oversight of licences.

Response prepared by Emily Goodhand on behalf of LACA: the Libraries and Archives Copyright Alliance <http://www.cilip.org.uk/laca>

March 2011

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## Appendix 1

### Three Case Studies

#### Case Study 1

How the current copyright framework impacts the production and delivery of goods and services that consumers want

Text and data mining has allowed the potential for faster and more extensive research. Researchers must make entire copies of data and text first in order to analyse it, using algorithms to abstract content.

Below, one music researcher known to LACA discusses the problems faced by those using text and data mining methods for research purposes:

“In our field one of the main things we do is create and use algorithms to extract musical information from audio. For scientific research, we want publicly available datasets for reproducibility, and a problem in our field is that the best audio data comes from commercial recordings, which can't be freely redistributed.

Examples include:

- Research which specifically analyses The Beatles' entire output as a corpus. While we can't redistribute it, it's very well-known so it's not impossible for people to obtain a similar dataset. However, not all Beatles datasets are the same! When tracks get re-mastered they change in subtle ways.
- The Real World Computing (RWC) music database <http://staff.aist.go.jp/m.goto/RWC-MDB/> is a large audio+MIDI database which was recorded at a university lab. It is licensed for research only; it's a well-known and important dataset, but doesn't cover all possible pieces of research, and it doesn't include chart songs.
- For my research I collected a small dataset of amateur beatbox recordings over the web, getting explicit permission for Creative Commons licensing. This approach generally works

but it's hard to get big and/or professional-quality datasets. One more well-known example, the "FreeSound" database is CC-licensed and it's fairly large but the content is amateur and often poor, and its coverage is quixotic.

- I've been talking about audio, but we also do "symbolic" analysis on things like music scores, guitar tabs. They're commercially bound too so there aren't many good datasets for mining.

And of course most research doesn't directly turn into money in a way that can be pinned down. Some numbers that might help:

- The kind of research we do is similar to music-recommendation technology used at last.fm, which was a London startup (not university-based) and then was bought by CBS Corporation for £140 million in 2007, "the largest-ever UK Web 2.0 acquisition".
- A Stanford research group very similar to ours developed the "I am T-Pain" voice-interactive iPhone music app, which took \$1 million in its first month <http://tinyurl.com/tpain300k>
- The RockBand game made \$1 billion in its first fifteen months [http://rockband.com/news/one\\_billion\\_dollars](http://rockband.com/news/one_billion_dollars) and uses algorithms similar to the type that we work on, to track if the voice is in tune or a guitar is playing the right note.

None of these come directly from our group's research, I should emphasise. But these are the kinds of things you can do, and more could come (faster) if we had more access to good, large, professional-quality datasets."

## Case study 2

### Contracts and licences overriding permitted acts under the CDPA

Libraries and educational establishments are regularly faced with contracts and licences that prohibit them from carrying out permitted acts under copyright law. Some anonymised examples of how this is happening have been provided by LACA members for this case study.

## Education

Methods of delivering examinations and assessed work are constantly adapting to the needs of students based off-campus.

Under section 32(3) of the CDPA, "*copyright is not infringed by anything done for the purposes of an examination by way of setting the questions, communicating the questions to the candidates or answering the questions, provided that the questions are accompanied by a sufficient acknowledgement.*"

Several examinations, particularly in the subjects of law, business and psychology, are based on case studies or articles. These case studies or articles are uploaded and stored on a secure server (i.e. not accessible by anyone other than the students and lecturer on that course/module) for a three week period to enable the students to study the case in depth prior to sitting the exam.

Publishers, and in particular newspaper publishers, do not recognise this as a 'traditional' exam process and claim that this practice falls outside of the confines of the examination exception. As such, they charge the educational establishment a substantial fee for supplying the file to be made available online (even internally and securely).

Articles and case studies could be scanned but the quality is poor and detrimental to the student trying to follow it. It is often the case that the same articles and case studies are available elsewhere on the Internet for free, but as these may be infringing copies, educational establishments avoid them and, rather than risk losing their licence, instead incur high charges for using material which they are permitted to use without infringing copyright under the CDPA.

## Libraries and Archives

A call for evidence in February 2010 for examples of restrictive licences held by libraries and archives by publishers unearthed the following clauses from a range of licences:

- "Users may access the Service only for use in the internal operation of the Customer's business. Users may not... copy the Service or elements thereof, alter, modify or adapt the Service, including but not limited to, translating, de-compiling, disassembling, distributing or creating derivative works, or make the Service available for loan... Users shall be permitted,

from time to time, to distribute small portions of the Information to the Customer's employees. The amount of such information distributed shall be insubstantial in nature in comparison with the database from which the Information is extracted."

- "Users shall be permitted to display, and subject to individual publishers' restrictions, download, copy, or print out, for Users' own research or study only, e-Content from the applicable [e-library] site(s) accessed hereunder." **Individual publisher restrictions can apparently over-rule the licence agreement but these can be difficult for us to identify.**
- "[e-library] reserves the right to automatically suspend the access of any User if at any time any User downloads or prints out a portion of any individual title in violation of any usage restriction imposed by the applicable [e-library] site(s) or the applicable [elibrary] site(s) accessed hereunder."
- **Thus access is cut off if [e-library] thinks any user has gone over whatever quota it decides is appropriate for that title. In practice it is not the user that is cut off but all users of that title until it has been reinstated.**
- **Authorized use:** "You may only access the Online Services, print limited copies of the materials from the Online Services, and make limited local electronic copies of select materials from the Online Services through the save feature within the Online Services, for the Authorized Use. The Authorized Use expressly excludes: (i) redistribution, retransmission, publication, transfer or commercial or other exploitation of the materials from the Online Service, in whole or in part; (ii) preparation of derivative works or incorporation of the Online Services materials, in whole or in part, in any other work or system; (iii) reverse engineering, decompiling or modification of the Online Services, in whole or in part; **(iv) incorporation of any part of the Online Services materials in printed or electronic Course or Study Packs;** and (v) uploading, downloading, copying or redistributing the Online Services materials in their entirety or lengthy sequence, including, but not limited to, creating an archive of Online Services materials."
- **Limited access:** "Any access or attempt to access for any reason areas of the [distributor's] computer system or other information thereon (except for the limited portions of the Online Service that you have expressly been provided access to pursuant to a License Agreement) is

strictly prohibited. **You agree that you will not use any robot, spider, other automatic device, or manual process to "screen scrape," monitor, "mine," or copy the Web pages on the Online Service or the content contained herein in whole or in part."**

Some of the major problems with the terms of contracts and licences are:

a) **Differing set of variables for permitted acts within contracts**

Examples include:

- Printing
- Downloading
- Printing and sending to a third party
- Putting in a Virtual Learning Environment
- Students' access
- Printing multiple copies
- Use in a lecture or for teaching
- Circulating internally
- Extracting content

Theoretically this gives rise to potentially **over 16 million possible combinations of permissions**. Most universities have in the region of 150 electronic subscription resources.

b) **Jurisdictions vary according to resource licensed**

Examples include:

- **American Mathematical Society:** "This Agreement will be governed by the laws of the State of Rhode Island applicable to agreements entered into and fully performed in the State of Rhode Island. Any action arising out of or relating to this Agreement or AMS electronic journals may be brought in courts situated in Rhode Island, and the parties consent to the jurisdiction of such."
- **Kluwer Law International:** "11.5 These Terms and Conditions are governed and construed in accordance with the laws of The Netherlands. The sole jurisdiction and venue for any action that may arise under or in relation to the subject matter hereof shall be the courts of The Netherlands."

- **Brepols:** “Belgian law is applicable to these Terms & Conditions. The Courts of Turnhout (Belgium) have jurisdiction in case of a conflict in this matter.”

c) **Insufficient information given in some cases**

Examples include:

- “Source OECD. No information but based in Paris.”
- “Zhurnal’nyi zal (all in Russian) no information on terms and conditions”

### Case Study 3

Individual examples of how the complexity and cost of obtaining permissions from existing rights holders constrains economic growth<sup>31</sup>

“The cost of trying to track down rights owners [invariably] far exceeds the monetary value of the work..ITN did a project called News Film Online - 3,000 hours of video from the archives of ITN, which went on stream last year - and because there was a lot of material there where rights owners couldn’t be tracked down, audio and video had to be blanked out because it was more expeditious to blank out the clip than to track the rights owner. So you will get bits being blanked out, and it will reappear again when the orphaned bit has gone.”

*Stuart Dempster, Director, Strategic Content Alliance*

“About 85 per cent of our holdings comprise commercially issued material, where we can track the copyright owners; but the other 15 per cent is disproportionately valuable to scholarship, and a lot of those are Orphan Works, that commerce isn’t interested in. We have to identify and contact each rights owner, and in large digitisation projects there can be many different individuals concerned. This makes such projects extremely costly. It’s a double whammy: most of our holdings are in copyright, and a high proportion of the most interesting material is Orphan Works.”

*Richard Ranft, Head of the Sound Archive, National Sound Archive*

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<sup>31</sup> All evidence except final paragraph taken from Korn, Naomi (2009) *Op cit.*  
<http://www.jisc.ac.uk/media/documents/publications/infromthecoldv1.pdf>

“For an archive, the value is the comprehensiveness of a collection. What you are finding in the archive sector at the moment is, say someone wants to digitise a photograph collection; if an archive has to trace the owners of every photograph then in most cases they won’t even start the project as just mounting a small proportion of the photos does not make the collection accessible. We see this all the time with really good ideas stopping at first base, because the chances of getting the full clearance required is low, or zero.”

*Natalie Ceeney, former CEO, The National Archives*

“Most of the artists we cannot find are not well-known. In those cases where we have tracked them down at a later stage post publication, they have always been grateful for the publicity.”

*Andy Ellis, Director, The Public Catalogue Foundation*

“It is believed that the vast majority of all recorded works ever released...are not currently commercially available in any form...Fat Northerner label have been working on a project to rework John Cooper Clarke’s poetry by contemporary artists. Tracking down rights-holders has proved incredibly difficult. We approached the Performing Rights Society (PRS) who advised us that some of the tracks may be owned by EMI. We approached EMI who advised that they only own some of the tracks. After months of searching, we still cannot find the copyright owners to the majority of John Cooper Clarke’s catalogue which is threatening the project and the work that 30 artists have put in. What was initially a cultural project quickly became a minefield of legalities, permissions and detective work. We are still not totally sure of the legal situation if the album is released.”<sup>32</sup>

*Jez Collins & Andrew Dubber, Birmingham City University; Ruth Daniel, Fat Northerner Records and Un-Convention*

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<sup>32</sup> British Council: Is copyright a barrier to creativity? <http://www.counterpoint-online.org/is-copyright-a-barrier-to-creativity/>

## Appendix 2

### European Information Society Directive provisions for copyright exceptions and limitations

Excerpt from Article 5 of Directive 2001/29/EC

1. Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable:

(a) a transmission in a network between third parties by an intermediary, or

(b) a lawful use of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.

2. Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:

(a) in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, provided that the rightholders receive fair compensation;

(b) in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned;

(c) in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage;

(d) in respect of ephemeral recordings of works made by broadcasting organisations by means of their own facilities and for their own broadcasts; the preservation of these recordings in official archives may, on the grounds of their exceptional documentary character, be permitted;

(e) in respect of reproductions of broadcasts made by social institutions pursuing non-commercial purposes, such as hospitals or prisons, on condition that the rightholders receive fair compensation.

3. Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:

(a) use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved;

(b) uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability;

(c) reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character, in cases where such use is not expressly reserved, and as long as the source, including the author's name, is indicated, or use of works or other subject-matter in connection with the reporting of current events, to the extent justified by the informatory purpose and as long as the source, including the author's name, is indicated, unless this turns out to be impossible;

(d) quotations for purposes such as criticism or review, provided that they relate to a work or other subject matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose;

(e) use for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings;

(f) use of political speeches as well as extracts of public lectures or similar works or subject-matter to the extent justified by the informative purpose and provided that the source, including the author's name, is indicated, except where this turns out to be impossible;

(g) use during religious celebrations or official celebrations organised by a public authority;

(h) use of works, such as works of architecture or sculpture, made to be located permanently in public places;

(i) incidental inclusion of a work or other subject-matter in other material;

(j) use for the purpose of advertising the public exhibition or sale of artistic works, to the extent necessary to promote the event, excluding any other commercial use;

(k) use for the purpose of caricature, parody or pastiche;

(l) use in connection with the demonstration or repair of equipment;

(m) use of an artistic work in the form of a building or a drawing or plan of a building for the purposes of reconstructing the building;

(n) use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections;

(o) use in certain other cases of minor importance where exceptions or limitations already exist under national law, provided that they only concern analogue uses and do not affect the free circulation of goods and services within the Community, without prejudice to the other exceptions and limitations contained in this Article