

GOWERS REVIEW OF INTELLECTUAL PROPERTY

RESPONSE SUBMITTED BY THE BRITISH LIBRARY

PART 1 - OVERVIEW

INTRODUCTION

1. The British Library welcomes the opportunity to contribute to the Gowers Review of Intellectual Property. The British Library plays a vital function in the life of the nation as a cultural heritage resource by managing, preserving, and ensuring access in perpetuity to the UK's national published archive and the national repository of sound. The Library is an integral component of both the national research infrastructure and the UK Science Base, and it plays a correspondingly significant role in ensuring the research excellence of the UK. The BL contains a vast array of inspirational material and expertise that support the creative industries and, through our Business & Intellectual Property Centre services, we support creative people in developing, protecting and exploiting their ideas. We operate at the fulcrum of the creative economy and recognise that the ongoing digital revolution in production and distribution technologies is causing fundamental shifts across industry business models and consumer patterns, and is raising broader questions about the traditional balance of rights in intellectual property, between the rights holder and the public good. From this perspective we believe we have a unique and valuable contribution to offer the Committee in its inquiry.

THE BRITISH LIBRARY AND ITS ROLE

2. The British Library was established by statute in 1972 as the national library of the United Kingdom. The BL is one of the world's greatest research libraries. It benefits from legal deposit and is the main custodian of the nation's written cultural heritage. It is also the national repository for recorded sound and its collections contain much image material. The Library's incomparable collections have developed over 250 years; they cover three millennia of recorded knowledge, represent every known written language, every aspect of human thought and a considerable sound, music and recordings archive. The Library is the beneficiary of legal deposit (see also Para 4 below), and it also purchases widely with a £16m annual budget for material of research value.
3. Sir Isaac Newton said: "If I have seen further it is by standing on the shoulders of giants". This is what the BL seeks to assist its users to do. In 2004/05, more than 5.25 million British Library collection items were consulted by, or loaned to, academic researchers, business researchers, and private individuals. A recent independent economic impact study commissioned by the British Library suggests that the total value added to the UK economy by the Library each year is £363m, or £4.40 for every £1 of public funding.¹

¹ *Measuring our Value: Results of an independent economic impact study commissioned by the British Library to measure the Library's direct and indirect value to the UK economy* (December 2003)

4. The Legal Deposit Libraries Act 2003 has extended the Library's legal deposit entitlement to digital items. The British Library has an ex officio seat on the Legal Deposit Advisory Panel which was established in 2005 to advise the Secretary of State on the content and timing of Regulations under the Legal Deposit Libraries Act. The Library has also played a leading role, in anticipation of Regulations, in the work of the Joint Committee on Legal Deposit (whose members include all six legal deposit libraries and seven trade associations representing publishers) in testing the technical infrastructure, mechanisms and procedures relating to the deposit, storage and preservation of electronic publishing formats. Sound recordings do not come under the provisions of the Legal Deposit Libraries Act 2003 but are collected under voluntary arrangements with the British Phonographic Industry and the Mechanical Copyright Protection Society. These arrangements work well, and the Library estimates that it receives in excess of 90% of commercially-produced audio recordings, mostly on CD.
5. The Library has decades of practical experience of operating within the library privilege and fair dealing provisions of the current copyright legislation and hence it has a keen appreciation of the complex balance of rights in copyright law. The overwhelming majority of our collection is subject to intellectual property rights of one sort or another, very few of which are vested in the Library. The Library's Chief Executive, Lynne Brindley, was a member of the commission that produced the RSA Adelphi Charter (www.adelphicharter.org) on creativity, innovation and intellectual property. The Library welcomes the Charter for raising the profile of intellectual property issues, for stimulating debate, and for articulating clearly the public interest, and commends it to the Committee. The British Library sits on the advisory panel of the Creative Archive Licence at the BBC, and is involved in looking at the issues of extending creative works into the public domain under a "one size fits all" licence. The Library has commissioned a major study with the Institute of Public Policy Research (IPPR), along with the BBC, Microsoft and News International amongst others, on the topic of "Intellectual Property and the Public Sphere."
6. The Library is also a leader in digitisation, seeing this as a critical means of enhancing, increasing, and extending access to its collection materials in the interest both of research and public understanding and engagement, without compromising their conservation. Two major digitisation projects are currently underway in the British Library, focused on sound and newspapers, and with £3.1m funding from the Joint Information Systems Committee (JISC). The first project will digitise up to 2 million pages from 19th-century British newspapers and the second nearly 4,000 hours of recordings from the Library's Sound Archive. The latter project has required extensive rights-clearance. In early November 2005, the BL and Microsoft announced a strategic partnership to digitise 25 million pages of out-of-copyright content from the Library's collections in 2006/07, with a long-term commitment to digitise still more in the future. The British Library is also a significant publisher in its own right. Our list includes sound and music (a recent example being The Essential Shakespeare Live CD, a collection of live Shakespeare recordings, the result of a joint project between the British Library and the Royal Shakespeare Company), bibliographies and large-scale bibliographic products published electronically, reference works, and general and illustrated books.

THE CURRENT DEBATE

7. The British Library is principally concerned in this review with copyright and associated moral rights and performance rights and has no particular comments on patents, design rights and trademarks. In our detailed submission we do, however, comment on database rights. Copyright law has traditionally sought to strike an appropriate balance between, on the one hand, the rights of creators to be recognised and rewarded for their work; and on the other, the public interest in ensuring access to information and ideas as the basis for developing new knowledge. The purpose of intellectual property law has been - and should be in the future - to balance the sharing of knowledge and the rewarding of innovation; such balance being essential to sustain a healthy creative economy and an informed citizenry.
8. A successful national research base is dependent on timely and effective access to the information, knowledge and ideas produced by other researchers, past and present. Success in innovation is dependent upon the effective flow of knowledge from the research community and the science base to SMEs and industry in general. Ensuring that these information flows - scholarly communication and knowledge transfer - work as effectively and efficiently as possible is central to the Government's aim for the UK to develop its position as a key global knowledge hub.
9. Under the current legislation, the creators' right of ownership (copyright) is assured until a period after their death, when their work passes fully into the public domain. During the copyright period, further opportunities are available for legitimate public good access through 'fair dealing' and 'library privilege'. The British Library believes that 'digital is not different' and that the same principle of balance should be sustained regardless of format of work for the digital age.
10. As the UK's national library, the BL has a de facto leadership role across the wider UK library and information community based on our extensive practical experience. We have a particular interest in articulating and interpreting library privilege and fair dealing considerations in the digital environment. In so doing we take a best practice approach and have an attitude of full respect for copyright limitations. Because we deal with 'the world's knowledge' and because of our strong European and other international connections, we are very aware of the global nature of the IP challenges that are emerging, for example in the European Commission's vision and plans for a European digital library. The Library's Chief Executive sits on the High Level Expert Group on Digital Libraries established by the EU Commission and chaired by Viviane Reding, Commissioner for Information Society and Media. In summary, we believe we are well placed to act as informed 'honest broker' between the various stakeholders and are uniquely placed to appreciate and balance the requirements of both copyright owner and copyright user.

PREPARING OUR DETAILED SUBMISSION

11. In preparing its submission to this Review, the Library has been guided by the following overarching principles and key objectives:

The British Library believes:

- there is an absolute need for modernisation of copyright for the digital age;
- there is need to protect and reinterpret statutory exceptions and limitations for the digital age;
- there is need, in the interest of supporting creativity and innovation, for more efficient and effective mechanisms for rights clearance.

The Library will:

- show strong respect for rights within a healthy copyright regime;
- maintain a balanced view between extremes in the debates on rights protection;
- apply a public interest test to its positioning on the issues to be raised with the Gowers Review.

12. The British Library has also in this context taken an active co-ordination and leadership role in the wider library and archive community in order to ensure that the community's views and concerns are effectively presented to the Review. The key points emerging from these discussions, and which have informed the preparation of the submissions of both the British Library and other representative bodies in the community, are as follows:

- Copyright legislation must reflect the reality of the digital age; digital is not different, conceptually at least.
- Technology should not drive regulation, but rather the regulation should mirror the needs of society.
- Intellectual Property is a mechanism and not an end in itself; thus the public policy purpose of IP must be articulated.
- Intellectual Property must not hinder research and innovation.
- Intellectual Property must not undermine social inclusion by preventing print-disabled and other disabled persons from legitimate access to information
- Libraries and archives serve the public interest and play to the current public value agenda, including by taking a long-term view.
- Libraries and archives are often rightsholders as well as facilitators of access to content belonging to others; therefore they can see both sides of the question.

SUMMARY OF SUBMISSION

13. The Library's detailed submission addresses the following issues.

Maintenance of statutory exceptions and limitations. The balance of fair dealing and library privilege exceptions within copyright law has worked well in the analogue age, creating the necessary structures for creativity to be unlocked and flourish. This balance must be maintained in the digital age, updated to cover explicitly digital copies in all types of works with a technologically realistic definition of copying for supply and preservation purposes. This is the key challenge and is affected by the development of DRMs and the contract methods used in emerging business models.

Digital Rights Management (DRMs) and Technical Protection Measure (TPMs). The emergence of DRMs (software that can be embedded in a work to manage use of an item) and TPMs (software embedded to control and

limit the use of an item) are powerful new tools now at the disposal of the creative industries. (The two types of software are often confused and there is distinct lack of clarity in the debate about when each term is relevant). DRMs are given total protection under EU Directive, with no exceptions for legal circumvention in the interests of disabled access, long-term preservation or where the DRM prevents fair-dealing use. DRMs do not have to expire, and can effectively prevent the work reverting to the public domain at the expiry of the copyright period. As the Library prepares for legal deposit of digital items we are discovering that DRMs can pose a real, technical threat to our ability to conserve and give access to the nation's creative output in perpetuity. This is neither in the interests of continuing innovation and creativity, nor is it in the public good. There is need to distinguish between TPMs and the creation and maintenance of Rights Management Metadata which will be essential to all stakeholders if copyright clearance mechanisms are to be simplified.

Licences emerging as the key transaction method. Licence contracts, rather than contracts of sale, are emerging as the key transaction method in many of the new business models being developed by the creative industries. Many of these licences deliver lower-level access and copying rights than would have been available under fair-dealing within copyright law. Many of these licences emanate from overseas publishers. It is of concern that, unchecked, this trend will drastically undermine public good access in the longer term, thus significantly shifting the balance to rights holders.

Orphan works. The issue of orphan works (works where the original rights holders cannot be traced) is an area which would benefit from review. The Library believes that enlightened change to the law would facilitate not only important commercial opportunities for publishers, broadcasters, artists and so on, but also the reproduction of such works in research and academic fields. We believe that there would be a tangible economic and public good benefit if a provision were established to streamline the process of seeking rights clearance to deal with the use of orphan works whereas at present many works are, arguably, unnecessarily 'locked up'.

Unpublished works An area not unlike that of orphan works is the area of unpublished works, where complex rules are locking away creative potential and offering little economic or social value to society. Unpublished works represent a body of works with numerous difficult to understand durations, that through complexity and long durations of copyright in certain instances make the works difficult to use. As with orphan works, we believe that it is in the public interest for enlightened legislative change to bring about a harmonisation of the duration of unpublished work. We do not believe such change will have any effect on the rights of the copyright holder as all that is being applied are the standard durations.

Provision for the visually impaired. The Library supports the view of Share the Vision, and other bodies representing visually-impaired library users, who argue that the rights of copyright holders to protect their intellectual property should not be exercised at the cost of excluding visually impaired (and other disabled people) from legal access to such sources of content.

Database rights While we appreciate that the issue of database rights is one that has to be dealt with at a European level, we understand that the part of the *raison d'être* for the Gowers review is to inform a UK position on intellectual property issues within the wider European context. This being the case we believe that it is appropriate for the issue of database rights to be raised. We are aware of the differing positions around database rights and the Commission's ongoing review of the right. Our position is broadly one of support for the *sui generis* right as we believe it protects the interests of those who have invested time and effort in the creation of a database. We do however believe that a number of areas need to be clarified in regard to database rights at a UK and European level as appropriate.

SUMMARY OF RECOMMENDATIONS

14. The British Library's recommendations to the Review, extracted from the Library's detailed submission (attached) are set out below.

1. Current term of protection on sound recordings and performers' rights (pp 9-11)

The British Library does not believe an extension in the term of copyright to be appropriate.

2. Copyright exceptions - fair use / fair dealing (pp 12 - 19)

The British Library recommends legislative amendments to the following:

- The Copyright, Designs and Patents Act 1988
- The Copyright (Librarians and Archivists)(Copying of Copyright Material) Regulations 1989, SI 1989 / 1212 Section 4)
 - To clarify explicitly that fair dealing covers digital copies.
 - To clarify that fair dealing covers all types of works
 - To introduce a private use exception and legalise personal non-commercial copying of copyright works
 - To permit reformatting for preservation purposes
 - To permit multiple copies for preservation purposes
 - To define what is meant by 'a permanent collection'.
 - To permit archiving and copying of all mediums that sit within a collection

3. Copyright - digital rights management (pp 19 - 24)

The British Library recommends the creation of a regulatory body, with a wide-ranging remit coupled with appropriate legislative change to deal with the important intellectual property issues we face as a society.

The British Library recommends amendments to the law as follows:

- To provide that licences and contracts may not override the various limitations and exceptions provided for in UK as well as international law.

- Secondary legal deposit legislation to provide, where possible, the supply of digital publications without a DRM / TPM “wrap-around”.
- To provide for certain libraries and archives to circumvent TPMs for the purpose of legitimate archiving and facilitating public access to all members of society in line with existing limitations and exceptions.

The British Library recommends the establishment of a national metadata standard for Digital Rights Management Systems that will:

- Facilitate the clearing of permissions in an electronic environment.
- Increase the speed, and efficiency at which permissions can be applied for and granted.
- Increase use of material benefiting creators, the economy and society as a whole.

4. Copyright - orphan works (pp 24 - 27)

The British Library believes that the problem of orphan works is best solved in a self-regulating environment.

The Library would be willing to play a leading role in the development of appropriate frameworks and codes of practice.

The British Library recommends a new system for dealing with orphan works based upon that proposed by the US Copyright Office in its “Report on Orphan Works”, amended to require any party wishing to exploit a work will have to perform best efforts to trace a rights holder and accredit them.

The British Library recommends that given the large holdings of libraries and museums and their public access remit, particular attention in the context of orphan works should be given to these bodies.

5. Copyright - unpublished works (pp 27 - 28)

The British Library recommends UK copyright law be standardised around unpublished works in the following ways:

- all types of pre-1989 unpublished works should be retrospectively brought in line with the relevant standard term.
- The term for anonymous unpublished works should retrospectively become 70 years since creation for literary, dramatic, musical, artistic and film works, and 50 years for sound recordings and broadcasts.

6. Copyright Database rights (pp 29 - 30)

The British Library recommends database legislation should be clarified or amended in the following areas:

- November 2004 ECJ ruling.
- Paper databases being classed as literary works.
- Archiving.
- Definition of lawful user.
- Access by the disabled.
- Duration

- Compulsory licensing by monopolies and the public sector.

CONCLUSION

15. A healthy creative economy needs an IP framework that strikes the appropriate balance between the rights of creators to be rewarded for their creativity and innovation and the public interest in ensuring access to information and ideas to support a healthy research base and an informed citizenry. Digital developments mean that such a framework cannot simply be national. It has to be developed in an international context and within a global economy. The British Library seeks to support Government to ensure that a balanced legislative and regulatory framework is developed and is particularly keen to be involved in devising an appropriate public interest test to guide us all in assessing future requirements and possibilities. We seek to work constructively and practically with the wider information and library community and the publishing industry to achieve such a goal, and stand ready to contribute further to the Review should this be considered helpful.

PART 2 - DETAILED RESPONSE TO SPECIFIC QUESTIONS RAISED BY GOWERS

1. **GOWERS ISSUE 1: Current term of protection on sound recordings and performers' rights:** *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.*

SUMMARY RESPONSE:

- The British Library does not believe an extension in the term of copyright to be appropriate.

1.1 (a) What are your views on this issue?

1.1.1 The British Library Sound Archive is one of the largest sound archives of music in the world with over a million discs, 185,000 tapes and holdings of every other medium upon which sound can be recorded. In the UK there is no legal deposit for sound recordings, and therefore the Library is dependent on its good relations with the music industry for voluntary deposit to grow its contemporary collection. The Library is also a publisher of specialist and educational CDs mainly in the area of historical sound recordings. We are therefore very aware of the dynamics of the music industry and appreciate the very real financial issues that the expiration of sound recordings has for some of the larger phonographic companies.

1.1.2 In looking at the issue of extension in duration of copyright in sound recordings, we do, on balance, believe that little demonstrable economic or social value will be generated by an extension of term. This year is the 250th anniversary of the birth of Mozart who is arguably more popular today than during his lifetime. Much of the debate on term extension focuses on whether to create parity with the US at 95 years. The real issue is not whether to extend sound recording copyright by 45 years, as the Beatles or Elvis Presley will be as popular in the future as they are today, just in the way that Mozart is. It is easy to imagine a situation where, if term extension is granted, these

very same debates emerge again in 45 years time. Rather, we believe the real issue Government should explore is whether we are potentially entering into a “race over extension” with the United States and at what point in time will influential rights holders feel it acceptable to relinquish their legitimate rights in a work into the public domain.

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

1.2.1 From the perspective of an archive wishing to preserve material for future generations, any extension to duration of sound recordings would be a “double-whammy” for the British Library. Not only is the Library unable to archive sound recordings under the CDPA, but an extension to 95 years would bring nearly the whole body of the UK’s audio history into copyright. Given the current legislation on sound recordings this would effectively mean that a significant percentage of our holdings would decay and be unavailable to future generations. Given that knowledge is the life-blood of a healthy public domain we believe any extension, and the implication it has for archiving activities, is unacceptable. As outlined in section 2.3 below, many audio formats we hold are fragile or unstable and require the creation of a preservation surrogate. A further extension to the duration of sound recordings, and the attendant effect this will have on our ability to archive is, we believe, unacceptable.

1.2.2 There are a number of interesting studies from the US that shed light on the debate around the extension of copyright in sound recordings. The first is a report commissioned by the Library of Congress comparing the release of recordings in the US and Europe.² In the United States pre 1972 recordings are protected under State law until 2067; whereas in Europe, due to the lower durations in sound copyright, many more of these same works are now in the public domain. Given that rights holders own the rights, and have easier access to the originals, logic would suggest that one would see more re-issues of historical materials by the rights holders than the non-rights holders. However, the evidence is to the contrary: the report shows that for every five-year period prior to 1945, non-rights holders have issued more historical recordings than rights holders at a ratio of close to two to one.

1.2.3 Another interesting study commissioned by the US Congress³ makes stark the limited shelf-life of copyrighted works. Using old records from the US on copyright renewals⁴, Rappaport estimates that only 2% of copyrights between 55 and 75 years retain any “commercial value”, that is to say, they attract royalties after that time.

1.2.4 Both these studies show that the social and economic cost of extension may be higher than any gains to be had from the extension of the copyright monopoly by individual rights holders in the music industry. These statistics would suggest the aim of an extension in sound recording copyright would be to cover only 2% of works, for which the composer would still be entitled to receive a royalty anyway, as the underlying musical work would still be in

² Survey of Reissues of US Recordings. T Brooks. Co-published by the Council on Library and Information Resources and the Library of Congress. 2003.

³ Copyright Term Extension: Estimating the Economic Values. E Rappaport 1998.

⁴ All books prior to 1989, before the US became a Berne Convention signatory, had to be registered in order to assert copyright.

copyright. The Brooks study appears to demonstrate that more commercially available recordings would be available to the public after the expiry of the current 50-year term than before. Presumably in this country these would be by labels such as Naxos, Document Records etc. While we appreciate that certain individual companies may see a reduction in their returns come the expiration in the sound recording, the underlying copyright of the creator will still continue, and studies show that re-releases of music recordings themselves are likely to increase.

1.2.5 Applying basic economic principles to the extension of sound recordings, it is clear that extension makes little rational sense. Any product has a standard product lifecycle and indeed very few products have a life cycle as long as 50 years. In terms of the social value of a work so long after its creation, while still in copyright it is likely to be low, as access to the work is going to be limited by many factors including whether it is in or out of print, whether the rights holders can be traced, etc. The older a work becomes the less "accessibility" there is and therefore the fewer benefits for society as a whole. We believe that any extension to sound recording copyright beyond 50 years is likely to extend the period of time during which a work has least value for society. In terms of economic value, not only are financial returns at the end of a product life cycle low, the availability of the product itself is low, and the reuse of the work by commercial third parties is increasingly unlikely as the number of orphan works increase proportionally over time.

1.2.6 In contrast, however, the economic benefits for society of a work entering the public domain are likely to be great. Standard economic theory holds that pricing under monopoly conditions is inefficient, while in a competitive market sellers undercut one another, with the consequence that prices tend to fall. In addition to this the social value of a work entering the public domain rises as people are free to access and reutilise a work as they see fit.

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

1.3.1 As outlined above in paras 1.2, the Brooks study on differing copyright durations within the EU and the US demonstrates that more recordings are available to the public in an environment where the length of term is shorter. The greater number of recordings available is likely to enhance investment by more companies in reissuing recordings, while consumer interest is benefited as competition reduces prices. However at a global level the differing lengths of term mean that specialist/educational audio products produced in the European Union and featuring sound recordings over 50 years old cannot freely be released in the United States. This limits the availability of specialist/educational products in the US and reduces the financial viability of those produced in the EU given the limitations in the size of the market.

1.3.2 On the issue of creativity there is little evidence to suggest that the duration of copyright actually engenders creativity. It clearly protects the interests of the rights holder once created but is unlikely to engender creativity in itself.

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

- 1.4.1 The British Library does not believe an extension in the term of copyright to be appropriate.
- 1.5. **(e) If term were to be extended, should it be extended retrospectively (for existing works) or solely for new creations?**
- 1.6. The British Library does not believe an extension in the term of copyright to be appropriate.

2. **GOWERS ISSUE 2: Copyright exceptions - fair use / fair dealing:** *There are a number of exceptions to copyright that allow limited use of copyright works without the permission of the copyright holder.*

SUMMARY RESPONSE

The British Library recommends legislative amendments to the following:

- The Copyright, Designs and Patents Act 1988
- The Copyright (Librarians and Archivists)(Copying of Copyright Material) Regulations 1989, SI 1989 / 1212 Section 4)
 - To clarify explicitly that fair dealing covers digital copies.
 - To clarify that fair dealing covers all types of works
 - To introduce a private use exception and legalise personal non-commercial copying of copyright works
 - To permit reformatting for preservation purposes.
 - To permit multiple copies for preservation purposes
 - To define what is meant by 'a permanent collection'.
 - To permit archiving and copying of all mediums that sit within a collection

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

2.1.1 We welcome the Government's commitment to review existing copyright legislation. We see such a review as an opportunity to improve the legislative framework to amend some of the inconsistencies that exist regarding permitted acts and to reflect the realities of the digital age. New technology has fundamentally altered the way information is created, distributed and used and it is therefore vitally important that legislation is brought up to date to reflect this fact. At present, the lack of clarity in copyright law regarding the digital environment is causing serious problems, both for those seeking to enforce copyright law and those seeking to make it accessible fairly. As a result of this, we are seeing increasing infringement of the law, and some paralysis around the creation of new, 'fair' solutions.

2.1.2 We believe that the digital age has thrown up many challenges and many of the agreed trade-offs between copyright holders, copyright users and intermediaries such as libraries have altered. Despite this we would however reiterate the principles established by the World Intellectual Property Organisation (WIPO) by stating our view that fundamentally "digital is not different" in regard to the limitations and exceptions that exist in international law. Our belief, as also put forward in the submissions from SCOUNL, LACA, the Research Information Network The National Archives and the National Council for Archives, is that despite the changes wrought by new technology, the provisions for permitted acts such as fair dealing and copying by educational establishments and libraries are as valid as ever. The challenge is to define how these provisions are made relevant to the new "digital and networked" environment we now find ourselves in.

- 2.2 **(b) Could more be done to clarify the various exceptions? and (d) Are the current exceptions adequate or in need of updating to reflect technological change?** *Many of the clarifications in law are as the result of technological changes so we will respond to these points together. Our colleagues in libraries and archives, many of whom will also be submitting evidence to the Review, have identified many of the same areas requiring*

legislative clarification particularly around what are permitted acts for preservation purposes.

2.2.1 Copyright, Designs and Patents Act 1988 (CDPA). Chapter III. - Clarifying Fair Dealing to explicitly cover Digital Copies.

2.2.1a) Currently UK law is silent on the question of whether the original work, as well as a copy made under the 'fair dealing' provisions in Chapter III, can be digital or not. Given that the law is silent, and the fact that statements from WIPO are clear that permitted acts apply equally to the digital environment as the analogue one, it would appear clear that both digital works and copies from these digital works can be made.⁵ That is to say the range of limitations and exceptions apply equally to the digital world as they do to the analogue one.

2.2.1b) However, the reverse position, which one of the publisher associations has forcefully presented to the British Library in order to prevent digital copies being made available to members of the public under these provisions, can also be argued because the status of limitations and exceptions is not clear in UK law. In other words, if anything more than a photocopy of a print original is supplied to a member of the public for their own personal and non-commercial use, the Library might run the risk of breaking the law.

2.2.1c) The principle of 'fair dealing', which is designed to foster education, creativity and therefore enterprise in our society, is in no way altered by the advent of new technology. We believe it clearly would be counterproductive and short-sighted to hinder its application to the digital environment. In the age of the web, where the provision of information is no way restricted by geography and is instantaneous - the time it takes to "google it" - we believe attempts by parts of the publishing industry to restrict fair dealing to the analogue to be counterproductive. Like other large libraries internationally, the British Library runs a 'document supply' operation, supplying excerpts from articles and journals to non-commercial private users as provided for by the limitations and exceptions in UK law. This traditional service has been accepted by publishers internationally in paper form - where articles are sent out in the post - but resisted in an electronic form. While we are trying to work constructively with publishers to resolve this issue we believe that knowledge is vital to the economic and social success of our nation, and attempts to restrict the speed at which it flows for limited self-interest is detrimental to the intellectual health of our nation and we believe would fail any public interest test. While we are in the process of discussing this with representatives of the publishing industry, the real difficulty we face is the lack of clarity in UK law. As stated above, we believe that international law clearly provides for the extension of limitations and exceptions into the digital environment and would ask that this is made clear in UK law also.

2.2.1d) In order for the important principle of 'fair dealing' to be protected in the digital age, and to better reflect the way people now require and use information, any new legislation must define the right to copy as being irrespective of the medium of the original, or the medium of the copy

⁵ Appendix 1. Statements from WIPO on limitations and exceptions in the digital age relating

made. Given that there are tens of thousands of on-line / CD-Rom publishers globally producing digital works, and the majority of the population now own a digital camera or a scanner, new legislation or clarification and guidance on the point of digital copying, is required to reflect the way information in our society is now produced and used.

2.2.2 **Copyright, Designs and Patents Act 1988 (CDPA). Chapter III. - Clarifying Fair Dealing to cover all types of Works.**

2.2.2a) Fair dealing provisions in Chapter III currently cover literary, dramatic, artistic as well as musical works; however they fail to cover the neighbouring rights that subsist within the sound recording itself, or in film or broadcast. Given this, not only is the law preventing short excerpts from, for example, musical recordings or television programmes being made for personal use, its absence clearly undermines the express grant of musical or literary works in the law within the context of fair dealing in the first place.

2.2.2b) In the case of sound recordings for example, as Britain's national sound archive, our experience over many decades tells us that a situation where a student's or a teacher's research into a piece of music is likely to stop at the copying of the music score alone, without them requiring reference to one if not more recordings of the same piece, is rare indeed.

2.2.2c) Considering new media, the internet is a multi-works environment bringing together, in many instances on one website or web page, primary and secondary works covered by the CDPA (e.g. www.bbc.co.uk contains text, film, sound recordings, images etc). Even if separating out the primary works for copying were practical, in the context of 'fair dealing' nothing is to be gained by the rights holder by excluding these works from permitted acts. Many householders own a camcorder, and it seems an unproductive copyright law that makes illegal the inclusion of non-substantive parts of a sound track or an episode of Tom and Jerry in the background of a home video. We believe an important step towards creating a healthy copyright environment to be the creation of a mature copyright regime that protects the rights of the creators of content but irons out some of the less rational exceptions to be

2.2.2d) We are very aware of the polarised debates that exist at the moment regarding copyright, particularly in the area of sound recordings, and the need for public education around respect for the balance that exists within our copyright regime. Part of the key to engendering respect in regard to copyright is education. But part is also the creation of a fair and rational copyright regime. We believe that ironing out some of the idiosyncratic elements of our copyright law where the law could be perceived as being "an ass" would go a long way to creating a copyright regime that is fair, easy to understand and therefore engenders respect from the public at large.

2.2.3 **Private Copying Exception**

2.2.3a) On this point, we will not be the only voice asking Government to look at the lack of a private copying exception in this country in regard to music, film and broadcast. In consultation with our library colleagues we were unanimous that a situation where the citizens of this country, as a matter of

course, are criminalised for copying music for themselves which they have legitimately bought fails any public interest test.

2.2.3b) We believe the law should reflect the ubiquitous nature of private copying of music for own personal use in this country. While we absolutely condemn peer-to-peer file sharing, or the pirating of DVDs for commercial gain, we believe that turning a blind eye to what is deemed by the citizens of this country to be fair and normal behaviour is wrong. In terms of educating members of our society to respect the balance that exists within copyright, we believe having a copyright regime that respects the rights of the artist as well as the rights of the individual to copy and create without undermining the rights of the copyright holder, is of the uppermost importance. We are concerned that, in the public's mind, the idiosyncrasies of UK copyright law in this area have contributed to undermining the way in which copyright as a whole is perceived. In part perhaps, this has led to a breakdown in confidence and respect for copyright law, in particular amongst younger generations, which all involved in the creative industries must find to be of concern. We believe only a healthy intellectual property structure that balances the requirements of all stakeholders will be sustainable into the future, and to this end call on Government to legalise personal non-commercial copying of copyright works.

2.2.3c) Not only have citizens been copying music they have legitimately purchased for decades, first onto cassette and then more recently onto CDs, computers etc, but manufacturers of hardware and software have also profited from this, a recent example being the success that Apple is having with ipods. As Government is unlikely to prosecute either industry for facilitating the breaking of copyright law or individuals for copying for their own personal use, it would be to the benefit of society as a whole to make private copying legal. Given the universality of copying of legitimately bought music, and a feeling amongst the general public that this is not an illegal act, we believe that an updating of copyright law is required to reflect the realities of our society. We believe an overly complex copyright system that ignores the norms of society in such areas is unlikely to engender respect or understanding from the public at large, undermining the copyright structure it is seeking to establish.

2.2.4 CDPA Sections 29 - 30 and Sections 37 - 39. The Copyright (Librarians and Archivists) (Copying of Copyright Material) Regulations 1989, SI 1989 / 1212 Section 4. - *Format Shifting.*

2.2.4a) Although the recently introduced section 28A of the CDPA does recognise that temporary copies may be made in the copying process, legislation should also make clear that a copy is not necessarily an exact replica and therefore "format shifting" is an inevitable part of copying - though not one that necessarily creates new attendant rights over and above those of the original copyright holder. For example, a user wanting a snapshot for fair dealing of a complex database, like a geographic database, in a proprietary format should not be prevented from making a fair dealing copy because they only have access to copying the data using "simpler" more widely available software like PDF or Jpegs. Although discussed in more detail in the next section, the requirements of digital preservation will also mean the alteration of formats. Reformatting will inevitably result in an alteration of the existing data structure which could lead to an alteration in

the appearance of the work and therefore be viewed as undermining the original as envisaged by the copyright holder. While perhaps it could be argued that reformatting for preservation purposes lies within the spirit of the law, we would recommend that Government consider how to cover off the creation of a new work in any amendment to legislation.

2.2.5 CDPA Section 42 (1). SI 1989 / 1212 Section 6. - *Multiple Copies and Active Preservation Policies.*

2.2.5a) Under existing legislation, libraries are able to “make a copy from any item in the permanent collection of the library” for the purpose of preservation. This is interpreted by all in the library and archive sector to mean a single copy. In an age where electronic information is stored on numerous servers, which will require, for security purposes, an electronic as well as a hard-copy form of backup (e.g. DVD, Microfilm etc) with an inevitable change in format, creation of numerous copies is unavoidable. Within the library and archive sector the most trusted medium for preservation, given the relatively unproven long term nature of digital material, is still microfilm. It is common for libraries to require not only a digital surrogate but also one in microfilm format. In addition to this it is best practice when storing data on servers, irrespective of whether you are a library or a business, to have a number of mirror servers, both on and off site to ensure any data stored is not lost.

2.2.5b) In these circumstances we believe that new legislation needs to reflect the fact that a single copy for preservation purposes is often no longer sufficient in an electronic environment. For example, currently one of the main ways readers access popular historical material such as newspapers is in microfilm form, which in many instances we film ourselves because suitable microfilm is not commercially available elsewhere. Increasingly we are considering for future preservation purposes the requirement to hold them digitally and then supply them in a digital form to our readers. We would naturally, where we had microfilm, use the microfilm as the base for digitisation. Given the relative “instability” of servers, we would expect the microfilm to be kept as a backup, but also, once on the servers, digital backup and “format shifting” will be required to deliver the data to the readers’ desktop. Without legislation to facilitate this process, permitting the creation and holding of multiple copies for preservation purposes, the important archiving and heritage role that libraries have traditionally played will be fundamentally weakened.

2.2.5c) In a digital age, as briefly covered in 2.2.5a), digital preservation strategies will involve copying the same information a number of times, often in differing formats in order to ensure the continued integrity and accessibility of material in digital form. Digital archiving requires the ability to manage digital data effectively, and this will require the ability to reformat and copy to new storage media as current ones break down and become obsolete. On this point we believe that a shift in thinking is required in regard to and by libraries as digital material, and some audio formats, have a different nature to that of analogue materials. Digital material deteriorates and loses its integrity in a far more complex manner and is often not apparent in the way it is with a book. Moreover, once elements of a digital work are destroyed they are difficult, if not impossible, to restore. This being the case we believe that preservation of digital material requires

more up-front management and the multiple-copying of material before it begins to lose its integrity. Libraries will need to have in place processes that actively identify and monitor “at-risk” digital materials and the flexibility to make “pre-loss” copies before a work becomes corrupted. This will require the creation of specialist digital preservation structures and standards, likely to change over time. The different requirements of preserving digital material will probably mean that increasingly the purchase of a replacement copy as laid out in S42 (2) will not be practicable. We would ask the Government to consider this point in any amendment to legislation, as it is one important way that archiving is different in the digital world when compared to the analogue one.

2.2.5d) As stated in 2.2.5a) UK law currently only allows for one copy to be made for preservation purposes. Having surveyed how other countries deal with the issue of multiple copies for preservation⁶ we would commend to Government wording reflecting the situation in Japan and Denmark where the numbers of copies of in-copyright work that can be made for preservation and heritage purposes are limited by “reasonableness” alone. In a fast moving digital environment we believe that restricting preservation copies to a specific number would be hard to future-proof and therefore recommend legislation that incorporates a concept of reasonableness to the creation of preservation surrogates.

2.2.6 **CDPA Section 42 (1). SI 1989 / 1212 Section 6.** - *Definition of a ‘Permanent Collection’.*

2.2.6a) The British Library believes it is important to clarify in the digital age precisely what constitutes an item in a permanent collection. This becomes particularly important with on-line resources, for which libraries can pay hundreds of thousands of pounds for a subscription to an individual product, which of course historically the Library would have taken physical delivery of. These resources are not physically held on library shelves or servers as they are delivered remotely by the publishers themselves. Not only are they not physically held by the libraries, they are also supplied under licence, where the works are effectively “rented” to the libraries.

2.2.6b) As part of the Legal Deposit Libraries Act 2003, the issue of preservation of UK digital content by the legal deposit libraries has been addressed in principle, subject to Regulations which are yet to be forthcoming, but we recommend that the Government considers what role other libraries and archives can play in preserving this nation’s digital heritage. We believe that licensed on-line resources form part of the ‘permanent collection’ just as much as the previous paper-based collections did. Hence a library should have the same rights to make preservation copies as in a paper environment. Without this right, the role of libraries as important repositories of collections of information for future generations will be increasingly threatened.

2.2.6c) Another issue to be considered by Government is the status of the web, and whether works published on the web form part of a library’s collection, or to what extent (for UK material) this is the preserve of the legal deposit libraries only, as an outcome of secondary legislation under the Legal

⁶ See Appendix 2.

Deposit Libraries Act 2003. Given the historically unparalleled publishing revolution brought about by the invention of the web, its enormous depth and breadth, and its importance in documenting the historical record of our times, we believe that more libraries and archives than just the legal deposit libraries should be allowed to capture and preserve the web. Currently a number of predominantly US private interest or private corporations are “archiving the web”. We believe that archiving the late 20th and early 21st centuries publishing output is far too an important requirement to be left to the vagaries of the private sector alone, and Government needs to consider how to deal effectively with this in any review of copyright.

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

2.3.1 Any new legislation should make the right to copy for preservation purposes clearly applicable to primary as well as secondary works, which is currently not the case.

2.3.2 This is particularly relevant going forward for libraries given the prominence of on-line material, but is also very relevant today for us in respect to the British Library Sound Archive. Section CDPA (S 42 (1)) appears somewhat contradictory on the matter of whether or not a copy of a sound recording or film / broadcast can be made for preservation and heritage purposes: it clearly allows a library to make “a copy from any item in the permanent collection” but only refers to this not infringing in regard to literary, dramatic, musical, typographic and artistic works.

2.3.3 This has always been interpreted as meaning that sound and film cannot be copied for preservation purposes, and therefore the British Library Sound Archive, one of the largest sound archives in the world, is unable to preserve the nation’s audio heritage for the duration of sound recording copyright. As some music mediums are notoriously fragile - such as LPs - and others degrade from the day of creation - cellulose nitrate discs - current legislation is impeding our ability to preserve audio material. Hardware formats also become obsolete, meaning that copying of the original recording is required to ensure access to members of the public. For instance, Nelson Mandela’s ‘Rivonia’ trial speech, was recorded in 1964 on dictabelt, which has fallen from use and the hardware is no longer available.

2.3.4 Given the importance of preserving the nation’s sound archive, film and broadcast for future generations, this is an area of revision too important to ignore in any amendment to existing legislation. We would therefore call on the Government as a matter of urgency to review section 42 of the CDPA and allow archiving and copying of all mediums that sit within a collection as is the case in most other countries.⁷

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

2.4.1 The amendments to legislation we recommend in this submission do not alter the spirit of existing limitations and exceptions in UK law, and do not

⁷ See Appendix 2

conflict with the Three Step Test. In such a case we do not believe compensation to be appropriate.

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

2.5.1 There are significant issues regarding the archiving of material in the digital age. Please see the paragraphs under point 2.2 above, and paragraphs 3.2.1 below on our comments relating to contract law undermining permitted acts in copyright law. In summary our concerns regarding existing copyright law and the ability to archive are as follows:

- a) Limitation to a single copy for preservation purposes.
- b) Format shifting not applying to long-term preservation.
- c) Copying for preservation purposes excluding the copying of sound, film and broadcast works.
- d) Digital data being "rented" to libraries under contract, which are more restrictive than existing limitations and exceptions in copyright law.

3. GOWERS ISSUE 3: Copyright - digital rights management *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. Do you have a view on how the use of digital rights management technologies should be regulated?

SUMMARY RESPONSE:

- The British Library recommends the creation of a regulatory body, with a wide-ranging remit coupled with appropriate legislative change to deal with the important intellectual property issues we face as a society.
- The British Library recommends amendments to the law as follows:
 - To provide that licences and contracts may not override the various limitations and exceptions provided for in UK as well as international law.
 - Secondary legal deposit legislation to provide, where possible, the supply of digital publications without a DRM / TPM "wrap-around".
 - To provide for certain libraries and archives to circumvent TPMs for the purpose of legitimate archiving and facilitating public access to all members of society in line with existing limitations and exceptions
- The British Library recommends the establishment of a national metadata standard for Digital Rights Management Systems that will:
 - Facilitate the clearing of permissions in an electronic environment.
 - Increase the speed, and efficiency at which permissions can be applied for and granted.
 - Increase use of material benefiting creators, the economy and society as a whole.

- 3.1 The British Library submitted written and oral evidence to APiG on the issues of DRM. For further information we would refer the review team to these submissions but to summarise our views, as well as those of the wider library community, as represented by CILIP (*The Chartered Institute for Library and Information Professionals*) amongst others, our main concerns on the issue of DRMs, on which we base our recommendations, are as follows:
- 3.2.1 **Contract Law not Copyright.** The explosion of electronic publishing over the past ten years has had an important impact on libraries' collection policies, and as you would expect an increasingly important part of our collection is material held in an electronic form, the majority of which come with a DRM or Technical Protection Measure. (It is now estimated that between 80% - 90% of all journals published in this country are available electronically.) The British Library itself makes available to its users over 17,000 electronic databases on over 600 platforms, and our current 2005-2006 budget for digital products is £1,750,000 - a figure that has nearly doubled in the past five years.
- 3.2.2 Whereas the supply of these publications in paper form, where they exist, is under the framework of the UK copyright regime, their electronic versions come with a licensing agreement. Given that contract law supersedes, and effectively "trumps" copyright law in this country, the Library is concerned that the contracts are undermining the balance that exists at the heart of our copyright regime. The traditional trade-off between the award of monopolistic rights to the copyright owner in return for limited exceptions during the copyright period of the work is being undermined by contracts which exclude or modify the copyright exceptions currently in law.
- 3.2.3 A random sample of thirty agreements relating to electronic licences held or offered to the British Library from publishers from all over the world shows that—the great majority undermine the limitations and exceptions provided for in UK and international copyright law. These include most commonly:
- a) Limiting the number of copies that can be made either by number or by format. Although some contracts are silent on the ability to make copies it is also common in licences to limit copies to "hard copy paper print outs" only, "single print non-electronic" or even, only "in the original format."
 - b) Limiting the extent that can be copied. While one licence stated "misuse includes ... reproducing in any way copyright materials", others limited the extent to no more than "one percent" or in the case of one agreement not limited by substantiality that "inclusion of the text or images in any publication ... will result in copyright infringement."
 - c) Only two licences dealt with the issue of archiving and preservation of material by libraries as allowed for in Section 42 of the CDPA. One CD-Rom agreement did allow for making a single copy for "backup or archival purposes" and one on-line agreement allowed for the copying of the database by libraries for preservation purposes. A number of databases prevented even the continuing use of superseded versions of

the data even while under licence still, therefore undermining the very role of an archive or library.

- d) While most licences did allow for some limited copying, although in many cases this was less than is allowed under existing legislation, very few allowed for the copying of the whole material. In addition to preventing meaningful archiving, this also undermines UK statute relating to the visually impaired. In fact not one licence allowed for the wholesale copying of the work by the visually impaired. By signing these licences not only are libraries potentially falling foul of the Disability Discrimination Act 1995, but are also preventing the visually impaired exercising their rights to make a copy in line with the Copyright (Visually Impaired Persons) Act 2002.

3.2.4 Such limitations are far more restrictive than the existing fair dealing and library privilege provisions provided for in UK law and limitations and exceptions as provided for in international treaties.⁸ We believe the erosion that these restrictions present is undermining the existing copyright balance, and if left unchecked will also undermine the health of the public domain. Whether considering culture, education or the economy we do not believe that the nation's best interests are served by the undermining by contract of permitted acts as established in statute for nearly three hundred years.

3.2.5 Given the immense growth in digital content and concomitant with this the growth in contracting, the library community believes that a fair balance between the rights of the copyright holder and the rights of the user cannot be achieved by negotiating such points of principle on a contract-by-contract basis. As stated above, the British Library alone has over 17,000 electronic titles, each of which comes with a contract. The logistics of negotiating contracts on such a scale make the realities of negotiating points of principle with publishers around limitations and exceptions virtually impossible.

3.2.6 To this end the British Library recommends that the law be amended, as it has in Ireland, to provide that licences and contracts may not override the various limitations and exceptions provided for in UK as well as international law. Given the close relationship between Irish and UK law we commend to Government wording from the Irish Copyright Act as follows:

COPYRIGHT AND RELATED RIGHTS ACT, NUMBER 28 of 2000⁹

Part I Preliminary and General

Section 2 Interpretation

S2(10) Where an act which would otherwise infringe any of the rights conferred by this Act is permitted under this Act it is irrelevant whether or

⁸ For further reading on contract and copyright and the shifting balance read: Australian Government, Copyright Law Review Committee, Copyright and Contract, Chapter 4. <http://www.ag.gov.au/agd/www/Clrhome.nsf/Page/5E80FC581F65A4B1CA256C4F000E5328?OpenDocument>

⁹ <http://www.irishstatutebook.ie/front.html>

not there exists any term or condition in an agreement which purports to prohibit or restrict that act.

Part II Copyright

Chapter 6 Acts Permitted in Relation to Works Protected by Copyright

Reprographic copying by educational establishments of certain works.

57.—

******(4) The terms of a licence granted to an educational establishment authorising the reprographic copying for the educational purposes of that establishment of passages from literary, dramatic or musical works or the typographical arrangements of published editions or original databases, which have been lawfully made available to the public, shall be void in so far as they purport to restrict the proportion of a work which may be copied (whether on payment or free of charge) to less than that which would be permitted under this section.

Part V Databases

Chapter 7 Rights and Obligations of Lawful Users

Avoidance of certain terms affecting lawful users.

327.—

******(2) Where, under an agreement, a person has a right to use a database, any term or condition in the agreement shall be void in so far as it purports to prevent that person from extracting or re-utilising insubstantial parts of the contents of the database for any purpose.

- 3.3.1 **Legitimate Circumventions in UK Law under Article 6(4) of the Information Society Directive:** In 2003 the Legal Deposit Libraries Act extended the notion of legal deposit from the print world to the digital environment. The law will be implemented through a series of Regulations prepared by Government on the advice of the Legal Deposit Advisory Panel. The Act envisages collection by deposit by publishers, or by harvest. Whichever route is followed, it will be essential to ensure that DRMs cannot interfere with the responsibilities of the legal deposit libraries to acquire, store, preserve and give access in perpetuity. The Act already provides for the delivery by the publisher of “a copy of any computer program and any information necessary in order to access the work”. As a user of DRMs / TPMs ourselves, we have experience of the vagaries of technology, and how quickly formats change. Given this, we would ask that secondary legal deposit legislation provide for, where possible, the supply of these digital publications without a DRM / TPM “wrap-around”. However the Act does not explicitly provide for the circumvention of a DRM in the event of harvest from the internet, the effect of which would be to prevent the Library from capturing for heritage purposes some UK web publications. We would therefore ask that legal deposit libraries be permitted to circumvent a DRM / TPM for the purposes of archiving.
- 3.3.2 Linked to this point, a number of non-legal deposit libraries have traditionally discharged long-term preservation and access functions. They will continue to do so, partly because they will collect some specialist resources not acquired by the legal deposit libraries, and partly because they will require for their users levels of online access which the legal deposit libraries may not be entitled to provide. It is thus essential that, over and above the legal deposit libraries, there is potential for recognising other libraries to act as trusted intermediaries, to whom DRM “keys” should

be passed, or circumvention permitted, under defined circumstances to facilitate long-term preservation and legitimate access. We understand that such circumvention is provided for already in Norway and Denmark and would urge Government to consider this as a matter of importance for the UK.

- 3.3.3 A further issue with respect to legitimate access to TPM protected material where we believe libraries have a role to play with Government and the publishing industry is in the area of access to works by visually impaired members of society. We support the submissions made by LACA, Research Information Network, National Council on Archives and in particular Share The Vision and share their frustration that, despite the promise new technology brings, the reality is that still less than 5% of books are available in a form accessible to the visually impaired. While libraries are obliged under the Disability Discrimination Act 1995 to give equal access to visually impaired people as they are to the visually able, libraries are unable to do this given that TPMs often disable and prevent access to electronic material. Braille bars, voice output technologies and screen readers that libraries have invested in on behalf of the taxpayer are often rendered inoperable by the use of TPMs.
- 3.3.4 We would therefore ask Government to provide an exception in copyright law to provide for certain libraries and archives to circumvent TPMs for the purpose of legitimate archiving and facilitating public access to all members of society in line with existing limitations and exceptions.
- 3.3.5 The facilitation for circumvention of TPMs to uphold limitations and exceptions is provided for by Article 6(4) of the Information Society Directive. However we believe that its implementation in the form of CDPA S.296ZE¹⁰, where any complaint regarding a TPM preventing a permitted act under law is raised with the Secretary of State to be an inappropriate one. We believe the ubiquitous nature (from DVDs to iPods etc) of TPMs mean they have such an impact on the way people now live their lives in this country that we recommend a regulatory body, society be established with stakeholders from industry, Government and broader to oversee the contractual, consumer and industry issues they present, and to develop appropriate codes of practice. The fast moving nature of the technological world means that legislation is not alone an effective tool in managing the issues and challenges we face in the digital world. Some form of regulator aimed at protecting the balance that exists within our intellectual property regime, while mindful of developments internationally, we believe to be appropriate.
- 3.3.6 The digital world has shifted many of the trade-offs that existed within the analogue copyright world in this country and has engendered a polarisation of views on many digital and copyright issues, just one of which is DRMs. The international context also needs to be borne in mind, with the rapid growth of China and India whose laws do not comply with, for example, WTO obligations on patents. This being the case we firmly believe a regulatory body, with a wide-ranging remit coupled with appropriate legislative change is the best solution to dealing with the important intellectual property issues we face as a society.

¹⁰ Appendix 3

- 3.4.1 **Standards for DRMs** The British Library is represented on the Department of Culture, Media and Sports' group "Creative Economy and Intellectual Property" that is part of the Creative Economy programme chaired by the Library's Chairman Lord Eatwell. The group has been through a process of interviewing close to thirty heads of industry within the creative industries. One of the themes that has come out from the group's initial findings is the lack of standards in the area of Digital Rights Management systems, the majority of which are developed in the United States, that frustrate the smooth online processing of rights. This reflects not only the numerous DRM systems used by the music, publishing and broadcasting industries but also the complexity of our copyright regime.
- 3.4.2 As with our recommendations on orphan works and unpublished materials, we believe that our society and economy would benefit from some regulation in this field. The current structure of rights, though complex, justly rewards artists and creators, but it does not reflect the electronic environment where communication makes geography and time differences irrelevant, and where the consumer and business often expect a service to be provided at the touch of a button.
- 3.4.3 We believe that the establishment of a national and regulated digital rights structure, particularly focussing on metadata structures, would facilitate the processing by industry of copyrighted works enormously. The traditional skills of librarians and cataloguers in creating structures and standards for accessing books, music and film could be of value and the British Library is willing to play its part in developing a national metadata structure that facilitates the processing of rights in the digital age.

4. **GOWERS ISSUE 4: Copyright - orphan works**

SUMMARY RESPONSE:

- The British Library believes that the problem of orphan works is best solved in a self-regulating environment.
- The British Library would be willing to play a leading role in the development of appropriate frameworks and codes of practice.
- The British Library recommends a new system for dealing with orphan works based upon that proposed by the US Copyright Office in its "Report on Orphan Works", amended to require any party wishing to exploit a work will have to perform best efforts to trace a rights holder and accredit them.
- The British Library recommends that given the large holdings of libraries and museums and their public access remit, particular attention in the context of orphan works should be given to these bodies

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

- 4.1.1 The British Library, as a publisher of academic books as well as CDs, many of a historical nature, has much first hand experience of clearing rights in a commercial environment. We also work with some of the largest publishers in the world, such as Thomson Learning who are interested in using

historical material held by the Library for commercial purposes. As part of our Government remit of underpinning academic and commercial research in this country we have experience of clearing rights for large publicly-funded academic programmes.

- 4.1.2 The British Library is currently undergoing a protracted process of clearing over 4,000 hours of sound recordings as part of a British Library sound portal funded by JISC. While work is still continuing on clearing all the rights for this, a discrete section of the programme reveals some interesting statistics regarding orphan works. In the late 1980s, the Library made 220 oral history recordings of jazz musicians and promoters. The majority of the recordings were made by the British Library at the time, and as many permissions as possible were applied for and received by the Library from the interviewees, as well as some of the interviewers / sound recordists who were not Library employees. Between May 2005 and February 2006 all identifiable outstanding permissions, totalling 200, were applied for in order to put these recordings on the web for music researchers and the public alike. Of this 200, 107 permissions were cleared, 27 received no response despite chasing, and 53 could not be traced. Thirteen of the rights holders were discovered to be deceased during the process. This represents 26.5% of the total requiring permission as orphan works which, given the well-controlled environment¹¹, one can conjecture is considerably lower than the norm for large projects such as this. It also leaves a further 20% where the permission is left in limbo due to no response, for unknown reasons, and the apparent lack of an estate to approach to seek permission.
- 4.1.3 In addition to our own study, we believe that studies from the US also shed light on the extent of the problems associated with clearing rights and the extent of orphan works.¹² Between 1999 and 2001 the Carnegie Mellon University Libraries undertook two studies on clearing permissions with the aim of mounting in-copyright books on the web. The first study, entitled the "random sample feasibility study" aimed at seeking permission to put on the web 277 randomly selected titles from 209 publishers. (Interestingly this number was 11% lower than an earlier target, because a number of books were deemed to be "too complicated to pursue"¹³ and were eliminated from the sample.) Ultimately 21% of the publishers could not be located, meaning these works were effectively orphaned. Of the 50% of publishers who responded 27 % granted permission while 23% did not. Of the 23% who did not give permission it can be surmised from other, similar studies that one reason was that the Publisher themselves were unable to ascertain their own right with the author to give permission, given that contracts can be unclear or even mislaid.
- 4.1.4 The second study entitled the "fine and rare book study" attempted to get the non-exclusive digitisation rights to 284 randomly selected copyright works owned by 104 different copyright holders. This study returned an even higher percentage of 31% of publishers who could not be traced and therefore no permissions could be sought.

¹¹ The programme started with a high level of documentation, the majority of the sound recording rights were owned by the British Library, most recordings were made less than fifteen years ago, and none of the works were donated by third parties.

¹² Acquiring Copyright Permission to Digitize and Provide Open Access to Books. Denise Troll Covey; Digital Library Federation and Council on Library and Information Resources. 2005.

¹³ *ibid.*p12

4.1.5 Of course the universities could have approached the authors themselves in addition to the publishers to increase the percentage of rights granted. However studies relating to the Million Book Project ¹⁴ suggest that only about half of authors in the US could be located. Given that the US have copyright renewal records relating to the pre-1976 requirement to register an extension to copyright, rates in the UK are likely to be far lower.

4.1.6 Given that books are relatively easy to seek permissions for - in comparison to audio recordings or film with their multiple layers of rights, or photographs which generally have no information attached to them at all - it can be surmised that the percentage of orphan works in all forms is higher than the figures returned by the Carnegie Mellon University Libraries for books. Given this we would estimate that it may not be inappropriate to suggest that over 40 percent of all works may be orphaned works.

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

4.2.1 Given the extent of orphaned works, and the extent to which they represent "locked up" material, we believe this is an area where enlightened change to the law would facilitate not only important commercial opportunities for the creative industries but also valuable use in the fields of research, academia and the arts. The British Library has long believed that a self-regulating system allowing for the usage of orphan works, without prejudicing the rights of the copyright holder should they then be found, is to be recommended.

4.2.2 Legislation that allowed for the use of orphan works in a self-regulating manner would have the positive effect of un-locking creative material into the economy and therefore have high levels of social value. We, and many publishers and academic institutions, have spent time and effort to no avail, trying to establish the copyright holder in a work we wish to use. The current system is one where, having performed due diligence but if the owner cannot be found, the user is faced with a situation of having wasted effort to no benefit, or going ahead with no means of being able to reduce legal liability for such use. In such a situation many potential users are put off using the works due to the fear of litigation.¹⁵ We believe as a nation dependent on the creation of intellectual property, the current situation of "lock-up" is a barrier to growth, in all senses of the word, in our society.

4.2.3 A number of countries, such as Canada and Denmark, have different ways of dealing with the issue of orphan works, but we believe that the proposal put forward by the US Copyright Office in its "Report on Orphan Works" has much to recommend it.¹⁶ In common with The National Archives, we would - subject to a number of minor caveats - recommend this model to Government, as well as the European Commission who are also looking at

¹⁴ A US, China and India Government funded project to digitise and provide open access across the web to a million books.

¹⁵ United States Copyright Office Report on Orphan Works. 2006. p 115. "A vast majority of the commenters in this proceeding agreed that the prospect of a large monetary award from an infringement claim, such as an award of statutory damages and attorneys' fees, was a substantial deterrent to users who wanted to make use of an orphan work, even where the likelihood of a claim being brought was extremely low."

¹⁶ See Appendix 4 for proposed wording.

the issue of orphan works in the context of the i2010 Digital Libraries initiative.

- 4.2.4 In terms of the details of any proposed process we would recommend that any party wishing to exploit a work will have to perform best efforts, as opposed to reasonable efforts in the US proposal, to locate the rights holder. No infringement would be deemed to have occurred if copies were then made of the original works. Best efforts should also be made to accredit the copyright owners, as would be the case with any normal exploitation of a work. If the rights owner were later to be identified, then reasonable compensation would be provided commensurate to the level of its use. We also believe that the original copyright holder should then be able to, within the constraints of reasonableness and proportionality, control the terms of any subsequent licence.
- 4.2.5 Given the deterrent litigation brings to the use of the works it is important that any compensation is limited to "reasonableness". That is to say, an amount of money that could reasonably have been expected to have been paid had the user and the copyright holder engaged in negotiations prior to the use of the work.
- 4.2.6 We recommend that given the large holdings of libraries and museums and their public access remit, particular attention in the context of orphan works should be given to these bodies.¹⁷ We also believe that any system should be sensitive to the intended use of a work, to ensure that in cases where socially valuable material is made available with little reasonable, commercial value, liability to high infringement costs is negated. We believe that even minimal monetary compensation may be inappropriate or prohibitive for not-for-profit public institutions making material available for the public good in a non-commercial environment. This being the case we would commend the US approach to orphan works. That is to say, in the case of non-commercial usage of an orphan work, no compensation would have to be paid by any such institution if they ceased use of the work having been asked to by the rights holder. This is a practice that mirrors closely the notice and takedown procedure that has widely come to be accepted in the context of the web. If the organisation wishes to continue to use the work, then it would have to negotiate, as with any commercial use, reasonable compensation for past use as well as any future use of the work.
- 4.2.7 We believe that the very real problem of orphan works is best solved in a self-regulating environment that benefits society at large by unlocking and enriching the public domain while not unduly prejudicing the rights of the copyright holder. We believe that, if a model for orphan works similar to the one proposed in the US were adopted in this country, a very genuine and significant step towards a more creative and free-thinking society would have been made by Government.

¹⁷ United States Copyright Office Report on Orphan Works; 2006. p 117-118.

5. **GOWERS OTHER ISSUES: Copyright - unpublished works**

SUMMARY RESPONSE:

- The British Library recommends UK copyright law be standardised around unpublished works in the following ways:
 - all types of pre-1989 unpublished works should be retrospectively brought in line with the relevant standard term.
 - The term for anonymous unpublished works should retrospectively become 70 years since creation for literary, dramatic, musical, artistic and film works, and 50 years for sound recordings and broadcasts.

- 5.1 An area not unlike that of orphan works is the area of unpublished works, where complex rules lock away creative potential and offer little economic or social value to society. Unpublished works represent a body of works with numerous, difficult to understand durations that, through complexity and long durations of copyright, in certain instances make the works difficult to use. It is particularly interesting to note that the Patent Office, which is responsible for intellectual property in the UK, readily acknowledges on its website that "it can be quite difficult to work out the exact term of protection"¹⁸ for unpublished works.
- 5.2 Currently the duration of unpublished works is dependent on many things such as the date of creation of the work, the type of work (photographs are particularly complex), the year the author died, whether the work is anonymous or the author is known, and even whether the work sits in a library or archive or not. In a society such as ours dependent on the creation of a healthy intellectual property environment, where the means to copy thanks to the advances in technology increasingly sit with the individual, we believe it is the duty of Government to make copyright as simple and easy to understand as possible. As with orphan works, we believe that it is in the public interest for enlightened legislative change to bring about a harmonisation of the duration of unpublished work.
- 5.3 With this in mind we recommend the standardisation to UK copyright law in the following ways:
- a) As with literary, dramatic, musical or artistic works created on after 1st January 1996, all types of pre-1989 unpublished works should be retrospectively brought in line with their standard term.
 - b) The term for anonymous unpublished works should retrospectively become 70 years since creation for literary, dramatic, musical, artistic and film works, and 50 years for sound recordings and broadcasts.
- 5.4 We do not believe such change will have any effect on the rights of the copyright holder as all that is being applied are the standard durations. On the positive side it will remove many of the uncertainties surrounding the status of unpublished work that are hampering their use by the research community as well as by business.¹⁹

¹⁸ <http://www.intellectual-property.gov.uk/faq/copyright/unpublished.htm>

¹⁹ The British Library has first hand experience of working with SMEs wanting to use unpublished works for who the rights issues of unpublished works have been confusing and difficult to understand thus having an adverse impact on their business processes.

- 5.5 The advantages of harmonisation of duration would be an immediate simplification of our copyright regime with a concomitant rise in its transparency and accessibility for the public. The British Library is concerned about the apparent lack of understanding of copyright amongst the public, as is witnessed by peer-to-peer file sharing. We very much welcome Government attempts to increase the public's understanding of intellectual property issues, but at the same time believe it is incumbent upon Government to make copyright law accessible and understandable. Unpublished works is an area of unnecessary and unproductive complexity which we believe should be harmonised with the standard duration terms.
- 5.6 In the case of the older works it would see an increase in the number of works (many of which are no doubt orphan works) entering the public domain for use by industry, the education sector and the individual alike. Applying a public interest test, the British Library believes that the case for harmonisation of unpublished works is a compelling one.

6. GOWERS OTHER ISSUES: Copyright - Database Rights

SUMMARY RESPONSE:

- The British Library recommends database legislation should be clarified or amended in the following areas:
 - November 2004 ECJ ruling.
 - Paper databases being classed as literary works.
 - Archiving.
 - Definition of lawful user.
 - Access by the disabled.
 - Duration
 - Compulsory licensing by monopolies and the public sector.

- 6.1 While we appreciate that the issue of database rights is one that has to be dealt with at a European level, we understand that the part of the *raison d'être* for the Gowers review is to inform a UK position on intellectual property issues within the wider European context. This being the case we believe that it is appropriate for the issue of database rights to be raised.
- 6.2 While the British Library is aware of the differing positions around database rights and the Commission's ongoing review of the right, our position is broadly one of support for the *sui generis* right as we believe that the right protects the interests of those who have invested time and effort in the creation of a database. We do however believe that a number of areas need to be clarified in regard to database rights at a UK and European level as appropriate. These are as follows:
- 6.3 Clarification of the *sui generis* database right as a result of the Court of Justice of the European Communities rulings in November 2004, most well-known in the UK, in regard to the British Horseracing Board Ltd v William Hill Organization Ltd case. We would agree with statements from the Commission that the *sui generis* right is difficult to understand, and would suggest this state of affairs has been exacerbated by the misunderstandings caused by the rulings. We believe that as with any legislation regarding intellectual property complexity and a lack of clarity is a barrier to creativity and enterprise and therefore would call on the UK government to urge for clarification of the database directive.
- 6.4 We would echo the submission from LACA and the Museum Copyright Group (MCG) and call for the separation of the *sui generis* right from printed databases, as we believe the interplay between copyright and database rights is one area that causes confusion. In the UK we have the concept of a literary "compilation" within copyright law and would recommend for the purposes of clarity that printed versions of electronic databases are best treated solely as a literary compilations.
- 6.5 Clarification of permitted acts within the CDPA and how they relate to SI 1997 /3032 - Copyright and Rights in Database Regulations. There are a number of areas within the SI itself that could be made clear through a further definition of exceptions and limitations in the context of databases. By defining a literary work as a database within the CDPA, UK law appears to apply library privileges such as archiving to databases though this appears

to be contradicted by section 20A of SI 1997 that specifically refers to non-infringement of the copying of databases by legal deposit libraries only. When considering the issue of archiving in a digital context, and whether a literary / database work forms a permanent part of a library's collection we would welcome this to be considered in the context of both the CDPA as well as SI 1997 /3032.

- 6.6 Similarly the term "lawful user" within the SI, and the Directive needs to be clarified as while legislation extends fair dealing in regard to databases, the term "lawful user" is often construed as referring to an individual or an employee of an organisation that has purchased the database. Given the clear extension of fair dealing to the area of databases as provided by both the CDPA and SI 1997 / 3032 this clarification would we believe be most helpful within UK law as well as at a European level.
- 6.7 We welcome the Commission's analysis that an exception for people with a disability should be included within the Database Directive from which it is currently absent. S 31A (2) (a) of the CDPA currently also does not allow for the creation of a copy from a database for the visually impaired. We would urge the government to revise this restrictive provision, and give fair access to the disabled to all forms of works and not just to those available in paper form.
- 6.8 One area that we also believe needs to be considered further by the Commission is the term of protection for databases. Whereas a literary compilation is most likely to be subject to a seventy, or life plus seventy duration, a database is in some senses perpetual as a "significant" addition allows for an extension of copyright for a further fifteen years. Given that many databases are dynamic this essentially means that they will never enter the public domain. However at the same time the maintenance of a database means that effectively organisations now don't produce numerous "static" works as they used to, but only maintain one that is updated over time. We therefore believe that further consideration is required by the Commission on the circumstances under which an extension of copyright is granted, and its duration.
- 6.9 Libraries as well as museums, educational and research establishments are creators of extensive databases themselves. These are created not simply within the institution itself but often between institutions at a national as well as supra-national level often collating data from many different sources. For example the British Library creates a number of bibliographic databases alone, as well as in partnership with other institutions internationally. The first proposal on databases²⁰ the commission made included the compulsory licensing of databases by monopolies to prevent anti-competitive behaviour, as well as the compulsory licensing of publicly available databases created by public bodies under "fair and non-discriminatory terms." We would endorse LACA and MCG's recommendation and recommend this provision is reinstated into the Directive.

²⁰ Proposal: The Legal Protection of Databases, COM (92)24 final, Brussels, 13 May 1992, OJ 1992 C156/4. Art. 8, paras. 1 and 2. See Appendix 5

Appendix 1

Agreed Statements concerning the WIPO Copyright Treaty adopted by the Diplomatic Conference on December 20, 1996

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.

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.¹⁰

Appendix 2

	Are there restrictions on the type of in-copyright work that can be copied by Libraries for heritage and archive purposes?	Are there restrictions in statute on the numbers of copies that can be made by Libraries?	In the digital environment are there restrictions on format-shifting an original work for preservation?
Denmark	None	None ¹	None
France	Not covered in French law.	Not covered in French law.	Not covered in French law.
Germany	None	None ²	
Japan	None	None ¹	None
Spain ³	None	None	None
UK	Sound, film and broadcast excluded.	One Copy Only	Permanent or semi permanent format shifting not permitted in Copyright Law.
US	None	Three Copies Only.	None

1. Both respondents said that in reality this was limited by reasonableness.
2. A German High Court ruling has interpreted the legislation to mean no more than seven copies.
3. This reflects Spain's new copyright law this is currently being ratified in the Spanish Congress.

Appendix 3

296ZE Remedy where effective technological measures prevent permitted acts

(1) In this section -

"permitted act" means an act which may be done in relation to copyright works, notwithstanding the subsistence of copyright, by virtue of a provision of this Act listed in Part 1 of Schedule 5A;

"voluntary measure or agreement" means -

(a) any measure taken voluntarily by a copyright owner, his exclusive licensee or a person issuing copies of, or communicating to the public, a work other than a computer program, or

(b) any agreement between a copyright owner, his exclusive licensee or a person issuing copies of, or communicating to the public, a work other than a computer program and another party, the effect of which is to enable a person to carry out a permitted act.

(2) Where the application of any effective technological measure to a copyright work

other than a computer program prevents a person from carrying out a permitted act

in relation to that work then that person or a person being a representative of a class

of persons prevented from carrying out a permitted act may issue a notice of complaint to the Secretary of State.

(3) Following receipt of a notice of complaint, the Secretary of State may give to the

owner of that copyright work or an exclusive licensee such directions as appear to the

Secretary of State to be requisite or expedient for the purpose of -

(a) establishing whether any voluntary measure or agreement relevant to the copyright work the subject of the complaint subsists; or

(b) (where it is established there is no subsisting voluntary measure or agreement) ensuring that the owner or exclusive licensee of that copyright work makes available to the complainant the means of carrying out the permitted act the subject of the complaint to the extent necessary to so benefit from that permitted act.

(4) The Secretary of State may also give directions -

(a) as to the form and manner in which a notice of complaint in subsection (2) may be delivered to him;

(b) as to the form and manner in which evidence of any voluntary measure or

139 agreement may be delivered to him; and

(c) generally as to the procedure to be followed in relation to a complaint made under this section;

and shall publish directions given under this subsection in such manner as in his opinion will secure adequate publicity for them.

(5) It shall be the duty of any person to whom a direction is given under subsection (3)(a) or (b) to give effect to that direction.

(6) The obligation to comply with a direction given under subsection (3)(b) is a duty owed to the complainant or, where the complaint is made by a representative of a class of persons, to that representative and to each person in the class represented;

and a breach of the duty is actionable accordingly (subject to the defences and other

incidents applying to actions for breach of statutory duty).

(7) Any direction under this section may be varied or revoked by a subsequent direction under this section.

(8) Any direction given under this section shall be in writing.

(9) This section does not apply to copyright works made available to the public on agreed contractual terms in such a way that members of the public may access them

from a place and at a time individually chosen by them.

(10) This section applies only where a complainant has lawful access to the protected

copyright work, or where the complainant is a representative of a class of persons, where the class of persons have lawful access to the work.

(11) Subsections (1) to (10) apply with any necessary adaptations to -

(a) rights in performances, and in this context the expression "permitted act" refers to an act that may be done by virtue of a provision of this Act listed in Part 2 of Schedule 5A;

(b) database right, and in this context the expression "permitted act" refers to an act that may be done by virtue of a provision of this Act listed in Part 3 of Schedule 5A; and

(c) publication right.

Appendix 4

UNITED STATES COPYRIGHT OFFICE REPORT ON ORPHAN WORKS

C. Recommended Statutory Language

SECTION 514: LIMITATIONS ON REMEDIES: ORPHAN WORKS

(a) Notwithstanding sections 502 through 505, where the infringer:
(1) prior to the commencement of the infringement, performed a good faith, reasonably diligent search to locate the owner of the infringed copyright and the infringer did not locate that owner, and
(2) throughout the course of the infringement, provided attribution to the author and
copyright owner of the work, if possible and as appropriate under the circumstances,
the remedies for the infringement shall be limited as set forth in subsection (b).

(b) LIMITATIONS ON REMEDIES

(1) MONETARY RELIEF

(A) no award for monetary damages (including actual damages, statutory damages, costs or attorney's fees) shall be made other than an order requiring the infringer to pay reasonable compensation for the use of the infringed work; *provided*, however, that where the infringement is performed without any purpose of direct or indirect
commercial advantage, such as through the sale of copies or phonorecords of the infringed work, and the infringer ceases the infringement expeditiously after receiving
notice of the claim for infringement, no award of monetary relief shall be made.

(2) INJUNCTIVE RELIEF

(A) in the case where the infringer has prepared or commenced preparation of a derivative work that recasts, transforms or adapts the infringed work with a significant
amount of the infringer's expression, any injunctive or equitable relief granted by the
court shall not restrain the infringer's continued preparation and use of the derivative
work, provided that the infringer makes payment of reasonable compensation to the
copyright owner for such preparation and ongoing use and provides attribution to the
author and copyright owner in a manner determined by the court as reasonable under the circumstances; and
(B) in all other cases, the court may impose injunctive relief to prevent or restrain the
infringement in its entirety, but the relief shall to the extent practicable account for any harm that the relief would cause the infringer due to the infringer's reliance on this section in making the infringing use.
(c) Nothing in this section shall affect rights, limitations or defenses to copyright infringement, including fair use, under this title.
(d) This section shall not apply to any infringement occurring after the date that is ten years from date of enactment of this Act.

Appendix 5

Proposal for a Council Directive on the Legal Protection of Databases, COM (92)24 final, Brussels, 13 May 1992, OJ 1992 C156/4. Art. 8, paras. 1 and 2, of the Proposal read as follows:

“(1) Notwithstanding the right provided for in Article 2(5) to prevent the unauthorized extraction and reutilization of the contents of a database, if the works or materials contained in a database which is made publicly available cannot be independently created, collected or obtained from any other source, the right to extract and re-utilize, in whole or substantial part, works or materials from that database for commercial purposes, shall be licensed on fair and non-discriminatory terms.

(2) The right to extract and re-utilize the contents of a database shall also be licensed on fair and non-discriminatory terms if the database is made publicly available by a public body which is either established to assemble or disclose information pursuant to legislation, or is under a general duty to do so.”