The Libraries and Archives Copyright Alliance

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

Via gowers.review@hm-treasury.gov.uk April 21, 2006

Dear Mr Gowers

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

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

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

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

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

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

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

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

Yours sincerely

Barbara Stratton
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Secretary to LACA: the Libraries and Archives Copyright Alliance

Libraries and Archives Copyright Alliance

Response to the Gowers Review of Intellectual Property Call for Evidence

General comments

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

As far as copyright is concerned we challenge the view that we know is espoused by the UK Government, both at home and within the EU and WIPO, and by rightholders, and which is raised in the introduction to your Call for Evidence (p1 para 4) that "the present UK system strikes broadly the right balance between consumers and the rights-holders". Libraries and archives are being unduly restrained by copyright laws which, so far, have only addressed the digital age by tightening rightholder controls through monopoly licensing of digital material (since in the UK at least contracts and licences may override the exceptions and limitations to copyright) and by seeking to move towards increasing enforcement provisions and penalties for infringement. Users of copyright works include libraries and archives whose very mission is to promote access to knowledge for the benefit of society as a whole and they include the people who create copyright works and the entrepreneurs who invest in them. As far as user rights are concerned UK copyright legislation has been 'Luddite' in nature by manifestly failing to clarify its own legislation to establish beyond all doubt that the UK statutory exceptions and limitations to copyright apply not just to analogue works but also to digital works as provided by the WCT Article 10 and Agreed Statement [1]

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

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[1] WCT 1996 **Article 10 Limitations and Exceptions**
(1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.
(2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.
http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html#P83_10885

WCT 1996 **Agreed statement concerning Article 10:** It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.
It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.
http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html#P83_10885 or
http://www.wipo.int/treaties/en/ip/wct/statements.html

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

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

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

Copyright is also international. As various LACA member organisations are also members of IFLA: the International Federation of Library Associations and Institutions[2] which is a permanently accredited NGO observer at WIPO, we would like to see the UK working in support of redressing the lost copyright balance by supporting initiatives at WIPO (and as the EU works as one on copyright matters within WIPO, persuading the EU group in WIPO to do so) such as Chile's proposals on the public domain[3] and on a study of exceptions and limitations to copyright[4] and supporting proposals by developing country WIPO Members for a Development Agenda including an access to knowledge treaty.[5]

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

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

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

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

Intellectual property operates on a global scale and this is reinforced by the digital environment whereby the internet has created a global village. While information and knowledge resources are often available globally, they are becoming locked up by rightholder monopolies and their electronic licences duly enforced by digital rights management systems (DRMS) and their technological protection measures (TPMS). As that trend continues and analogue forms of information are abandoned by publishers[6], despite increased availability of works on the internet, the minimum rights of access and use guaranteed by statutory exceptions and limitations to copyright are becoming eroded because some national laws, including the UK's, allow contracts and licences to override statutory exceptions and limitations. This too needs urgent redress.

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

GENERAL QUESTIONS

1. How IP is awarded

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

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

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

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

[6] British Library predicts 'switch to digital by 2020'. BL Press Release 29 June 2005 http://www.bl.uk/news/2005/pressrelease20050629.html "Lynne Brindley, Chief Executive of the British Library, today predicted a switch from print to digital publishing by the year 2020. Speaking at the launch of the Library's new three-year strategy**,** Lynne Brindley said: **"…** by the year 2020, 40% of UK research monographs will be available in electronic format only, while a further 50% will be produced in both print and digital. A mere 10% of new titles will be available in print alone by 2020."

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

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

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

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

2. How IP is used

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

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

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

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

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

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

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

The costs to libraries of clearing rights due to extensive searches to trace and then negotiate with rightowners are difficult to estimate. An indication of the problems faced by all libraries and their users when seeking clearance is shown by Elizabeth Gadd's research report on copyright clearance in the higher education sector[8]. The problems faced by higher education

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

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

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

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

In 2002 LACA conducted an informal survey[9], through the pages and web site of the journal Managing Information, of commercial company libraries and prescribed not-for-profit libraries (not including public libraries) providing a document supply service for commercial uses which revealed that, although hard to estimate, on average this non-scientific sample of libraries incur costs in staff time in administering licences and clearances ranging from £400-£70,000 pa. Many commented that clearance time is unacceptable and causes conflict between the library and their users.

Some of the typical answers

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

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

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

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

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

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

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

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

We recall the 'John Clare' case[10], which we know is referred to in detail in the National Archives submission to the Review. Furthermore it can happen that an author's estate refuses permission for the author's work to be used for educational or research purposes, particularly if the estate believes that adverse criticism or unwanted revelations about the author may result. Since the implementation of the Information Society Directive, literary estates have been able to refuse to allow the copying of unpublished works, whether or not they are in their possession, for research where the purpose is to publish for payment and is therefore a 'commercial purpose', since in the UK unpublished works are, regardless of age, protected to 31/12/2039.[11] These defensive uses of copyright are unacceptable where research is concerned and serve to repress free speech and the advancement of research and knowledge by refusing access to and use of primary sources.

3. How IP is licensed and exchanged

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

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

Libraries usually have great problems negotiating licences for electronic works because they are usually the weaker side, especially if they really need to have access to a particular journal or suite of journals (the 'right' journals). This situation is only ameliorated to some extent where the library is, like The British Library, a very big client of the publisher, or where it is through sector affiliation a member of a major national consortium such as JISC (The Joint Information Systems Committee) which through its JISC Collections programme[12]

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[10] See http://www.johnclare.info/copyright.htm
[11] Copyright law changes could hamper the press. Press Gazette 05/12/03 p9
[12] http://www.jisc.ac.uk/index.cfm?name=coll

negotiates licences for digital resources for higher and further education establishments. UK further and higher education technology and software licences are negotiated by Eduserv.[13] If the library is an English public library the MLA (Museums Libraries and Archives Council)[14] negotiates e-content for the People's Network. If it is a developing country national or university library and a member of a purchasing consortium which is also a member of charitable foundations such as INASP[15] and eIFL.net[16], its electronic licences will be negotiated internationally by these bodies who work on behalf of consortia in a number of developing countries and countries in transition. The big players such as the BL, JISC, MLA, INASP and eIFL.net can afford to hire lawyers to negotiate terms and prices. Even then, these large organisations informally report difficulties with suppliers.

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

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

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

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[13] www.eduserv.co.uk

[14] http://www.mla.gov.uk/webdav/harmonise?Page/@id=73&Document/@id=18626&Section[@stateId_eq_left_hand_root]/@id=4332

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

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

[17] *Scientific publishing: free for all?* House of Commons Science and Technology Committee, 10th Report of Session 2003-04, HC 399-1, Volume 1, Chapter 3 paras 34-44, pp 23-27 (pdf pp 27-31). http://www.publications.parliament.uk/pa/cm200304/cmselect/cmsctech/399/399.pdf

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

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

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

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

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

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

The reporting burden required by the copying licences is significant. Collecting societies say they need this detailed data in order to distribute royalties equitably to their rightholders. For example the CLA Business Licence provides that "CLA may, no more than once in each year, require the Licensee to participate in a data collection exercise such as, but without limitation, a survey, a record keeping exercise or an Information Audit."[18] A CLA Information Audit[19] for example requires licensees to supply detailed data (title, publisher, ISBN/ISSN and number of copies held) of the stock of published books and journals held by the organisation (not just its library) which leads to difficulties in data collection and collation of information which has to be obtained from staff workstations and bookshelves. The NLA's approach is different: it only seeks to audit systematic copying (as opposed to ad hoc copying) once a year for a fortnight though licensees have to keep records of what is copied systematically throughout the year and be able to produce it and or the cutting to NLA on demand.[20]

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

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

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

Some rightholders choose not to make use of all the rights the law may grant them. We support movements such as Creative Commons[21] and derivatives such as the BBC Creative Archive Licence[22] since the purpose of the licensing starts from the premise of making the works as widely available as possible, generally with the minimum restrictions on non-commercial uses. It is however difficult for a creator to offer a free copyright licence or a Creative Commons Licence for certain uses of the content of a commercially published work where the copyright and related rights have not been assigned to the publisher (leaving the publisher only with typographical copyright for 25 years), since collecting societies collect royalties for the group they represent as a whole. This is not always justified i.e. a creator

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

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

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

[21] Creative Commons UK http://www.creativecommons.org.uk/

[22] Creative Archive Licence Group http://creativearchive.bbc.co.uk/

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

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

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

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

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

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

libraries need licences for off-air recording[24], and libraries in educational establishment, government departments, plus many research organisations, learned societies, professional bodies, and all commercial organisations need licensing for photocopying and scanning from hard copy text and images.[25] Many learned society libraries are major document suppliers and also need licensing in order to copy to supply to users whose purpose is commercial.[26] All, from time to time, may need licensing for public performance of recorded music[27] or film.[28]

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

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

Licensors have a monopoly on their 'product' and this inevitably affects the costs of copyright licences. Detailed evidence of these costs and their effect on libraries is discussed by the Report mentioned above of the House of Commons Science and Technology Select Committee Inquiry into Scientific Publishing in 2004.[30]

4. How IP is challenged and enforced

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

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

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

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

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

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

[26] www.cla.co.uk

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

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

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

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

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

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

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

SPECIFIC ISSUES

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

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

(a) What are your views on this issue?

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

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

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

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

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[31] Universities UK v Copyright Licensing Agency (CLA) [Intervenor: Design and Artists Copyright Society]. See Patent Office Copyright Tribunal page with links to the ruling and hearings transcripts http://www.patent.gov.uk/copy/tribunal/tribnews4.htm See also 'Universities UK welcomes Copyright Tribunal ruling.' UUK Media Release 13/12/2001 http://www.universitiesuk.ac.uk/mediareleases/show.asp?MR=280

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

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

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

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

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

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

Legislation is not usually applied retrospectively for good reason. To do so may cause untold confusion and disarray to existing arrangements in conditions where it can become impossible to make new arrangements because the past is history and the relevant people may be dead or disappeared. Term should never be extended retrospectively for existing works regardless of the circumstances: libraries and archives, museums and galleries have already had full experience of this when implementation of the Term Directive[34], with its by its retrospective extension of term by 20 years, brought back into copyright published works which had been in the public domain in some cases up to nearly the full 20 years. Not only did it cause untold confusion to users and librarians, archivists and curators alike, but it necessitated a further expenditure of scarce (often public) funds on library and archive administration of rights clearances or licensing for various copying purposes not covered by the copyright exceptions and for digitisation projects, including often futile quests in search of rightholders of orphan works.

- ## Copyright exceptions - fair use / fair dealing

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

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

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

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

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

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

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

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

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

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

People will continue to do this anyway as they know it is unlikely they would be found out. They would only be prevented by TPMs and it would be impossible to police illegal off-line circumvention of TPMs in the private domain. The consumer has already shown the record industry that he or she resents and will try to avoid purchasing CDs and DVDs with TPMs that prevent them from copying to play the discs on different platforms (or even from just playing the discs in a computer DVD drive). The Sony BMG rootkit debacle [35] has also warned the consumer off products with DRMS and TPMs.

While legal music downloads have now superseded purchase of handheld media[36], people will continue to consider that they have bought a copy of the tune rather than a licence to use it, and that they should be able to privately copy it for domestic convenience and play it on whatever platform they choose.

If private copying of music were to be permitted then it would be illogical not to extend the exception to other multimedia such as film, so that film can be moved from VHS to DVD as people upgrade their players from VHS to DVD players. There will be further upgrades to home entertainment equipment and formats (e.g. DVDs and recorders/players are about to change due to the advent of High Density televisions[37]) and the law should allow people to take advantage of hardware technology upgrades without having to repurchase their whole private collection of recorded music and film.

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

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

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

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

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

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

There does not appear to be any evidence in the public domain that private copying of purchased CDs and DVDs for domestic use by the owner of the medium or his/her household results in any loss of sales to rightholders. This practice has been going on since it became possible to copy media at home. Users' budgets for entertainment are finite and they are unlikely to purchase new formats of the same work. The threat of continued piracy within the UK from the sale of inferior quality copied CDs and DVDs at car boot sales and markets will diminish as more people download instead. With regard to print media the same applies – there is no loss of sales as the user will already have legitimately purchased or borrowed the work and is unlikely to buy again unless he or she is so impressed with the item copied that perhaps he or she then buys other works by the creator in question. Rightholders therefore will not lose significant sales, are therefore not harmed under the provisions of the Berne Three Step Test[38], and do not need compensation for such a 'fair use' exception.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[40] CDPA s.42 **Copying by librarians or archivists: replacement copies of works**

(1) The librarian or archivist of a prescribed library or archive may, if the prescribed conditions are complied with, make a copy from any item in the permanent collection of the library or archive –

(a) in order to preserve or replace that item by placing the copy in its permanent collection in addition to or in place of it, or

(b) in order to replace in the permanent collection of another prescribed library or archive an item which has been lost, destroyed or damaged, without infringing the copyright in any literary, dramatic or musical work, in any illustrations accompanying such a work or, in the case of a published edition, in the typographical arrangement.

(2) The prescribed conditions shall include provision for restricting the making of copies to cases where it is not reasonably practicable to purchase a copy of the item in question to fulfil that purpose.

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

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

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

Copyright – digital rights management

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

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

LACA made a formal submission[41] to the recent APIG Inquiry into DRMS which closed in December 2005 and together with The British Library gave evidence to APIG at its hearing on 2nd February 2006. The APIG Report on the Inquiry is due out at the end of April 2006. **We refer you to our submission, which you indicate above is already in the Review Team's possession.**

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

[41] http://www.cilip.org.uk/professionalguidance/copyright/lobbying

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

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

Copyright – orphan works

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

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

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

- ## Copyright - licensing of public performances

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

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

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

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

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

- ## Legal sanctions on IP infringement

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

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

We were concerned by the European Commission's initial attempts to criminalize all infringement of IP in the early drafts of the Enforcement Directive 2004/48/EC (implemented in the UK on 18/04/2006[43]) as it passed through the co-decision procedure. This did not succeed partly because the Commission had not introduced criminal measures under the Justice pillar of the Community. However, in 2005 there began another move by the Commission, this time via DG Justice, Freedom and Security to introduce measures to criminalize any intentional infringement of IP via a proposed second Enforcement Directive and a Council Framework Decision.[44] These new proposals are currently being reconsidered by the Commission and European Parliament and Council and are expected to resurface during 2006.

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

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

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

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

[43] Intellectual Property (Enforcement, etc.) Regulations 2006 SI 2006/1028 http://www.opsi.gov.uk/si/si2006/uksi_20061028_en.pdf

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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Joint Proposals to the UK Government for Revisions to the Copyright Designs and Patents Act 1988

April 2006

Background

LACA: the Libraries and Archives Copyright Alliance[1] is convened and supported by CILIP: the Chartered Institute of Library and Information Professionals and monitors and lobbies in the UK and Europe about copyright and related rights on behalf of its member organisations and UK users of copyright works through library, archive and information services. A list of LACA member organisations appears at the foot of this page. Our members work at the interface between users and rightholders of copyright protected materials and databases both analogue and digital, and otherwise manage the use of copyright works and databases within both public sector institutions and commercial enterprises.

The Museums Copyright Group[2] is a voluntary association of museums and museum professionals dedicated to disseminate information about copyright among museums and to represent the interests of museums in the copyright sphere.

During the extensive discussions in 2002-2003 between LACA: the Libraries and Archives Copyright Alliance and The UK Patent Office concerning implementation of the Information Society Directive 2001/29/EC in the UK, the Patent Office made it clear that in its view the short time frame of just 18 months allowed by the Directive for implementation meant that it was not in a position to introduce any of the optional provisions in the Directive which did not already exist in UK law.

This was in contrast to other EU Member States (MS), which considered and in some cases implemented new exceptions available from the Directive's exhaustive list in Article 5. For

[1] See http://www.cilip.org.uk/laca
[2] See http://www.museumscopyright.org.uk

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

instance, at the present time a major 'second basket' of legislation' is going through the legislative process in Germany. Very few of the MS implemented the Directive by the due deadline, including the UK which implemented some 11 months late. Some, notably France, are still in the process.

However, in our discussions the Patent Office recognised that there were a number of anomalies in the Copyright, Designs and Patents Act 1988 (as amended) affecting libraries and archives and other cultural institutions such as museums and galleries, which needed re-consideration and that the Act was ripe for amendment. The Patent Office therefore invited LACA to make proposals in this regard. The Patent Office suggested that we include proposals for adoption of new exceptions from the list provided by Information Society Directive Article 5 in our proposals to amend the Act.

The work to draft our proposals was carried out by a LACA working group chaired by Professor Charles Oppenheim of Loughborough University Department of Information Science, in close consultation with the Museums Copyright Group (MCG). **LACA and MCG are therefore presenting the proposals jointly.**

While these Proposals are a standalone document, the conclusion of our work coincides with the Call for Evidence by the Gowers Review of Intellectual Property, so at the Patent Office's suggestion, we have submitted them to the Review in conjunction with our Response.

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LACA: the Libraries and Archives Copyright Alliance Museums Copyright Group

Joint Proposals to the UK Government for revisions to the Copyright Designs and Patents Act 1988

April 2006

Introduction

The proposals below are ones which we see as essential revisions to CDPA in order to meet the realities of the provision of library, archive and cultural institutional services in the public and not-for-profit sectors of the UK economy and the use by readers of their resources at the start of the 21st century.

The suggested amendments also reflect the need for the Act's provisions to explicitly recognise the provisions of Article 10 (and in particular its Agreed Statement) of the WIPO Copyright Treaty 1996[3] to provide that the normal exceptions and limitations to copyright in the UK (and any new ones that may be introduced in future) apply without question to the use of works in the digital environment.

[3] WCT 1996 **Article 10 Limitations and Exceptions**
(1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.
(2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.
http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html#P83_10885

WCT 1996 **Agreed statement concerning Article 10:** It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.
It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.
http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html#P83_10885 or
http://www.wipo.int/treaties/en/ip/wct/statements.html

(1) Contracts and Licences

a. Licences and contracts should not be allowed to override and diminish the statutory exceptions and limitations to copyright provided in UK legislation and associated regulations as well as those provided by European and international law.

b. Any term or condition in a licence or contract which purports to remove statutory rights should be null and void. To this end we recommend **either**

(i) inserting the wording (suitably amended) of **SI 1997/3032 Copyright and Rights in Databases Regulations 1997 s.19(2)**[4] into the CDPA itself to apply to all copying licences and to licences for all digital information products including databases; **or**

(ii) that in addition to the existing provisions for databases made by SI 1997/3032 mentioned above ,the appropriate wording from the **Republic of Ireland's Copyright and Related Rights Act, No, 28 of 2000**[5] be inserted into CDPA.

Justification

Parliament has decided in conformity with international law that there should be a balance in copyright law between rightholders and users for the public good. Exceptions and limitations to copyright have been introduced as a counterbalance to the monopoly right. This balance should not be upset by private contract.

SI 1997/3032 s.19(2) (Copyright and Rights in Databases Regulations 1997) already provides a similar provision with regard to databases. The Republic of Ireland's Copyright and Related Rights Act, No, 28 of 2000 , which is closely based on UK law, provides for this with regard to all copyright licensing. Furthermore, the introduction of these provisions into CDPA would bring

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[4] UNITED KINGDOM. SI 1997/3032 The Copyright and Rights in Databases Regulations 1997 – Reg. 19 Avoidance of certain terms affecting lawful users: (1) A lawful user of a database which has been made available to the public in any manner shall be entitled to extract or re-utilise insubstantial parts of the contents of the database for any purpose. (2) Where under an agreement a person has a right to use a database, or part of a database, which has been made available to the public in any manner, 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, or of that part of the database, for any purpose.

[5] IRELAND. Copyright and Related Rights Act, No. 28 of 2000 http://www.irishstatutebook.ie/front.html
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 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.
S57 **(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.

copyright licensing and contracts into line with the contractual provisions made in respect of computer programs[6] and databases.

(2) **Collecting Societies and Licensing Agencies**

We would like to see statutory provision for

a. An obligatory public register of all collecting societies

b. Guaranteed transparency – we propose a new s.118A prohibiting a collecting society from levying a fee for its licence unless

   (i) It issues to members and licensees, and any member of the public who requests it, an annual report including annual audited accounts, and information as to the proportion of income levied for administration, and the proportion and amounts of the residue funds which are distributed to different categories of its members, **and**

   (ii) It has made available to the public copies of its standard licence terms on the Internet and on request.

c. Accurate and up to date information to be provided by the collecting society or their agency on the internet and on request, concerning excluded works and rightholders from the licence(s) and with which countries and collecting societies it has reciprocal agreements.

d. Published codes of conduct governing the relationship between collecting societies and current and potential licensees, which also provide

   (i) For licensee representation as observers on collecting agency boards, **and**

   (ii) For appropriate consultation with stakeholders, including prospective licensees, on the drafting of licences, **and**

   (iii) For schemes agreed between the stakeholders, both members and licensees, for the distribution of unclaimed licence fee monies e.g. by means of educational bursaries and pension schemes for creators.

Justification

For the copyright monopoly to operate for the benefit of all stakeholders in the creation and use of creative works resulting from labour, skill and effort, it has to be recognised and accepted by all concerned that copyright needs to operate as a balance between a private property right and the public good. For educational, social and democratic purposes it is important for copyright works to be available on reasonable terms. The Copyright Tribunal is intended to ensure this, but the above proposals are designed to secure a basic level of fairness for users of licensed copyright material without recourse to the Tribunal and ensure greater user confidence in licensing. Customers of collecting societies are dealing with monopolies and cannot shop

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[6] SI 1992/3233 The Copyright (Computer Programs) Regulations 1992 reg 8 (CDPA ss50A(3) and 50B(4)): "Where an act is permitted under this section, it is irrelevant whether or not there exists any term or condition in an agreement which purports to prohibit or restrict the act (such terms being, by virtue of section 296A, void)." (s50C(b)): "is not prohibited under any term or condition of an agreement regulating the circumstances in which his use is lawful." Reg. 11 (s296A(1)) "Where a person has the use of a computer program under an agreement, any term or condition in the agreement shall be void in so far as it purports to prohibit or restrict—"

elsewhere. However some collecting societies do not openly make available to their customers all the basic information about the society's mandate or finances that is referred to in (2)(b)(i) and (c) above.[7] There are currently no codes of practice governing the relationship between collecting societies and their customers. The Patent Office copyright team did start some work on this in 2002-03[8] to which LACA contributed advice and information, but it does not seem to have progressed since then and there has in the last year been a complete change of personnel in the team.

Not only have some collecting societies exhibited aggressive behaviour to both actual and potential customers, along with dubious tactics to gain business, particularly when new to the market, but a lot of frustration and misunderstanding has arisen from time to time between some societies and their established customers. With regard to library licensing there was a very notable case in which the libraries' evidence was crucial that culminated in recourse to law: the referral, in July 2000, by Universities UK and the Standing Conference of Principals of the Copyright Licensing Agency (CLA) Higher Education Licence to the Copyright Tribunal.[9] This was triggered by the CLA's demand in 2000 for additional fees for the copying of illustrations and images from materials covered by then current five year higher education photocopying licence which due to expire on 31/07/2001. The Tribunal ruled in the licensees' favour on 13/12/2001 and its ruling applied to the current five year HE licence in operation from 01/08/2001 to 31/07/2006. The action was finally concluded in April 2002. Only after this legal action has the relationship between CLA and its licensees markedly improved although there are still some frustrations.

Furthermore, despite requests by licensees for additional licensing in the digital environment, there have been cases of reluctance by some societies to actively seek mandates from their rightholders to administer these. Sometimes years have elapsed before discussions actually begin[10]. A customer oriented statutory code of practice would do much to bring about transparency and improve relationships between collecting societies and their customers and further encourage copyright compliance.

Many licensees pay collecting societies large sums of (often public) money, yet it is not always clear how these royalties are then distributed to their rightholders. Furthermore it seems that royalties are not always disbursed to all rightholders either because rightholders fail to claim or because the rightholder cannot be found, so these monies then accumulate. In such circumstances where the sums are significant, especially given the public source of much of the money, it would be appropriate for permanent foundations to be set up, with the agreement of both rightholders and licensees, for the disbursement from such unpaid monies of educational grants and

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[7] E.g. The NLA (Newspaper Licensing Agency) told LACA in discussions in 2002-03 that it does not publish or distribute an Annual Report. The NLA annual accounts are lodged at Companies House but are not available on its web site or distributed to licensees.

[8] Informal e-mail dated 23/09/2002, subject 'Collective administration of copyright: code of practice' from Judith Sullivan, then Assistant Director, Copyright Directorate, The Patent Office.

[9] Universities UK v Copyright Licensing Agency (CLA) [Intervenor: Design and Artists Copyright Society]. See Patent Office Copyright Tribunal page with links to the ruling and hearings transcripts http://www.patent.gov.uk/copy/tribunal/tribnews4.htm. See also 'Universities UK welcomes Copyright Tribunal ruling.' UUK Media Release 13/12/2001 http://www.universitiesuk.ac.uk/mediareleases/show.asp?MR=280

[10] For instance ARLIS UK & Ireland (Art Libraries Society) and LACA have from time to time over the past 2½ years been seeking a meeting with DACS (with whom we normally enjoy cordial relations) to initiate discussions for a digital 'slide collection' licence for HE and FE libraries to augment or replace the existing analogue slide collection. The latest request was made on 22/03/2006, which was acknowledged, but at the time of writing a month later DACS has still not offered a date.

bursaries or pensions for the general good of the creators represented by the society. This would benefit the creative industries in society in general. Otherwise such undistributed monies should be distributed back to the licensees. On the other hand, we commend, as an example of good practice, the Payback system used by DACS (Design and Artists Copyright Society) and DACS' openness in making its Payback Report available to licensees. In its 2004 distribution DACS succeeded in distributing 99% of available revenue to its artists due to is system introduced in the 2002 Payback whereby it rolls forward unclaimed monies in a limited way for a year to ensure as wide a distribution as possible).[11]

Permanent foundations set up by collecting societies for the general benefit of creators exist throughout Europe with regard to use of Public Lending Right payments but these are uncommon in the UK.[12] Donations, such as the £100,000 given last October by the Newspaper Licensing Agency (NLA) to the new Journalism Diversity Fund, seem to be isolated instances. [13]

(3) Circumvention of Technological Protection Measures (TPMs)

The law should be amended to

a. Allow circumvention in cases where the TPM or Digital Rights Management System (DRMS) obstructs access by the user or their agent for the strict purpose of exploiting a statutory exception to copyright (or database right, if applicable) which the TPM or DRMS has rendered unavailable.

b. Allow circumvention for the legitimate production of accessible copies, including the operation of 'read aloud' facilities for print disabled people, and to support those with other disabilities.

c. Require DRMS and TPMs to cease to be effective upon expiry of the copyright, and/or that the expiry of the copyright term be a defence against their circumvention.

d. Provide an exception to copyright for librarians and archivists to be allowed to circumvent DRMS and TPMs as trusted intermediaries in order to make copies which are permitted under existing copyright law and in order to migrate content in order to preserve it digitally.

e. Create a statutory framework which provides an effective procedure to implement Information Society Directive[14] Art. 6.4 where TPMs and DRMS prevent enjoyment of the exceptions, in particular:

(i) We recommend that regulations be introduced to establish regular government reviews of DRMS/TPMs in the UK with a view to

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[11] DACS Payback 2004 Report p13 (for distribution figures); p16 (9.8 Unclaimed monies) http://www.dacs.org.uk/pdfs/payback_2004_report.pdf

[12] IFLA Committee on Copyright and other Legal Matters (CLM). Background Paper on Public Lending Right. "***Typical characteristics of PLR systems are:***… Some PLR funds also provide pensions, health insurance, scholarships and emergency grants to authors, or other grants to support travel or other projects. [Footnote 19: E.g. Austria: 50% of PLR fund for the 'social needs' of authors. Germany: 55% of fund for health and insurance schemes and emergency funds for authors. Slovenia: 50% of fund for scholarships. Sweden: 66% of fund for pensions, long-term grants and emergency funds for writers. France: part of fund to finance supplementary pensions for writers and translators.]" http://www.ifla.org/III/clm/p1/PublicLendingRight-Backgr.htm See also PLR International website http://www.plrinternational.com/

[13] Newspaper Licensing Agency supports launch of Journalism Diversity Fund. NLA Press Release 17/10/2005 http://www.nla.co.uk/

[14] 2001/29/EC http://europa.eu.int/comm/internal_market/copyright/copyright-infso/copyright-infso_en.htm

determining exceptions to the prohibition against circumvention in order to enable the enforcement of the UK's statutory exceptions and limitations to copyright, and to address the problems posed by out-of-copyright works being unavailable for use because of DRMS/TPMs.

f. Amend s.296ZE(6) so that failure to undertake the duty defined in 296ZE(5) becomes an offence that then, in turn, is listed in ss.107-110 of the Act.

Justification

We believe that it is wrong to make what is currently lawful, unlawful by means of wholly protected DRMS or TPMs. A user should have the access permitted by the exceptions and limitations without having to struggle through complex and expensive procedures to obtain permission. This will become a particular problem as works get older, and especially after copyright expires when protection measures will no longer be valid. Reliable and accessible means to secure keys to unlock protection measures will be required.

UK law, The European Term Directive[15] and international treaties specify time limits applying to the protection of copyright and related rights. The effect of DRMS/TPMs, if conditions are not applied to these measures, is to make protection of copyright perpetual, which goes against the long-standing principles of all existing intellectual property laws. By the time copyright expires the rightholder company may have gone out of business or merged one or more times with other companies. The ownership of the rights may be impossible to trace rendering the product orphaned. It is probable that no key would still exist to unlock the DRMS or TPMs. It is unlikely that the key would be available in sources such as patent specifications as such information would not have been disclosed for security reasons. In any event searching for the patent (which may be held in another country) would be an uncertain and piecemeal solution and expensive for libraries or other users.

For libraries this is serious. As custodians of human memory, a number would keep digital works in perpetuity and need to be able to transfer them to other formats from quite early on in order to preserve them and make the content fully accessible and usable once out of copyright. DRMS and TPMs like other software may be downwardly compatible but not upwardly. They therefore become obsolete usually in less than five years. If the product is discontinued there may be no upgrade to its DRM/TPM and the product quickly becomes unusable as the operating system and hardware on which it can run ceases to exist.

We urge the Government to provide an exception for librarians and archivists to be allowed to circumvent DRMS/TPMs as trusted third parties in order to make copies which are permitted under existing copyright law and in order to migrate content in order to preserve it digitally. To this end they should be entrusted with the keys or preferably provided with unprotected content.

[15] 93/98/EEC http://europa.eu.int/comm/internal_market/copyright/term-protection/term-protection_en.htm

This is already the case in Norway where the current Norwegian Copyright Act contains provisions exempting libraries from the general prohibition on circumvention of "effective technological protection measures", provided that libraries already have a legal right to copy protected works.[16] Although Norway is an EEA member its copyright law complies fully with the EU Copyright *Acquis*.

DRMS and TPMs have the potential to contravene disability discrimination law, in that they prevent legitimate copying for the production of accessible copies for 'print disabled' people and the deployment of 'read aloud' software to aid the visually

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[16] NORWAY. Copyright Act 1961 (as amended). Act No. 2 of 12 May 1961 relating to Copyright in Literary, Scientific and Artistic Works, etc., with subsequent Amendments, latest of 17 June 2005. [Unofficial English translation] on Kopinor (the main Norwegian literary collecting society) website http://www.kopinor.org/opphavsrett/node_2182.

Making copies in archives, libraries and museums*, etc.*

§ 16 The King may issue rules regarding the right of archives, libraries and museums and educational and research institutions to make copies of works for conservation and safety purposes and other special purposes. The provision does not apply to commercial use.
The King may issue regulations on that archives, libraries, museums and educational institutions, using terminals on their own premises, can make works in the collections available to individual persons when this is done for the purpose of research or private study.

Prohibition against the circumvention etc. of effective technological protection measures

§ 53a It is prohibited to circumvent effective technological protection measures that the rightholder or others he has given permission employs to control the copying or making available to the public of a protected work.
It is also prohibited to:
a) sell, rent or in any other way make available,
b) manufacture or import for the making available to the public,
c) advertise for sale or rental,
d) possess for commercial purposes, or
e) offer services in connection with
devices, products or components that are offered for the purpose of circumventing effective technological protection measures, (or) that have only a limited commercial use for other purposes, or that have been developed mainly for the purpose of enabling or simplifying such circumvention….
…The provisions in the first paragraph shall not hinder copying pursuant to section 16.

Use of works when effective technical protective systems are employed

§ 53b Rightholders shall ensure that beneficiaries who have legal access to a protected work, without hinder by an effective technological protection measure, can use the work, hereunder produce new copies, pursuant to sections 13a, 15, 16, 17, 17a, 21, 26-28 and 31.

If the rightholder after a petition from a beneficiary of a section listed above fails to provide access as described in the first paragraph, he can, on the beneficiary's petition, be ordered to provide such information that is necessary to enable the work to be used in accordance with the objective. The petition shall be addressed to the Board established by the Ministry pursuant to regulations the King may issue. The Board can in addition to orders as mentioned, rule that the beneficiary without hinder under section 53a can circumvent the applied technological protection measures if the rightholder fails to adhere to the time limit imposed by the Board to comply with the order.

Copies of works that are encompassed under the Act No. 32 of 9 June 1989 relating to the legal deposit of generally available documents, shall nonetheless always be equipped with the information necessary to ensure that circumvention of technological protection measures to enable the legal copying is possible.

The provisions in this section do not apply where a protected work on agreed terms by transmission is made available to the public in such a way that the individual can choose the time and place of access to the work.

The provisions in this section do not apply to computer programs. The King may decide that some institutions in the sector of archives, libraries and museums automatically shall receive the information necessary to ensure that circumvention of technological protection measures to enable the legal copying is possible.

impaired. Visually impaired people have additional statutory rights[17] allowing them to have works converted into accessible formats in a timely manner, yet these rights can be adversely affected by DRMS and TPMs, leaving them without access to that material.

Furthermore, DRMS/TPMs can potentially prevent legitimate copying for all users, whether with disabilities or not, under the statutory fair dealing provisions and under library and archive privilege[18]. For example a DRM or TPM interfering with fair dealing uses may prevent a user from printing out a journal article or extracts from other digital works under fair dealing for research or private study[19], extracting digital excerpts from it in order to quote under the exception for fair dealing for criticism and review or for the reporting of current affairs[20], or for the conduct of judicial or parliamentary proceedings or Royal Commission and other statutory inquiries.[21]

Article 6(4) of the Information Society Directive recognises that there must be safeguards to protect certain fair use and fair dealing provisions relating to copyright works. It specifically makes provision “in the absence of voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned” for Member States to “take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law”. The way this provision was implemented in UK law[22] allows the Secretary of State to intervene where a claim is made that a rights protection mechanism prevents a permitted act.

Regrettably the protections offered by the UK’s implementation of the provisions of Information Society Directive Article 6(4) are seriously deficient. Article 6(4) is of great significance to users of copyrighted works, and it provides the only safeguard where voluntary agreements cannot be reached. However, in our view CDPA s.296ZE fails to implement Article 6.4 of the Directive in a manner meaningful to the users it is intended to assist. The process to be followed serves to stifle complaints since it is vague, likely to be time consuming and likely to be expensive to the complainant. We have little faith in a system whereby an order made by the Secretary of State can be ignored leaving him or her with the recourse of only naming and shaming. This puts the onus on the user to seek judicial redress. The user’s need to access works in a timely fashion will not be met. Two years since its introduction, The Patent Office has not introduced any procedures for implementing s.296ZE.

A proactive approach on these issues from government is preferable to the rather passive and negative approach to implementing Information Society Directive Article 6(4) taken by CDPA s.296ZE. In our view it would be sensible if regular government reviews of DRMS/TPMs were established in the UK with a view to determining exceptions to the prohibition against circumvention in order to enable the enforcement of the UK’s statutory exceptions and limitations to copyright and to address the problems posed by out-of-copyright works being unavailable for use because of DRMS/TPMs. This could be achieved through deployment of The Patent Office and the Copyright Tribunal. Regulations might be introduced to allow the Copyright

[17] CDPA s.31A-F
[18] ibid. ss38-43
[19] ibid. s.29
[20] ibid. s.30
[21] ibid. ss.45-46
[22] ibid. s.296ZE

Tribunal to become the appeal authority with enforceable judgments and also for it to provide a very swift 'small claims' procedure to deal with these complaints (see (9) below).

We refer also to LACA's submission[23] to the recent APIG Inquiry into DRMS and also to the submissions made by The British Library and Share the Vision (of which LACA's convenor, CILIP: the Chartered Institute of Library and Information Professionals, is a member). We understand that these submissions have also been sent by APIG to the Gowers Review. All three bodies also gave oral evidence to APIG at its hearing on 2nd February 2006. We have also had sight of a draft of The British Library's response to the Gowers Review and fully support its comments concerning TPMs.

(4) General and educational exceptions to copyright

We propose that s.36 be amended to allow a teacher or lecturer to copy from a work by any means for 'the sole purpose of illustration for teaching' (i.e. in class or in closed access Virtual Learning Environments (VLEs)) for a non-commercial purpose.

Justification

Information Society Directive Art. 5(3)(a) allows for the creation of a new exception permitting the copying and republication of a portion of a work for the purposes of illustration for teaching or for research, that should be added to the exceptions for criticism, review, and news reporting. The above proposal would make use of the Article's provision which would allow extracts of works to be copied onto a handout or a PowerPoint slide or onto presentations within a VLE. In the 21st century it is unrealistic to restrict copying for illustration for teaching to 'chalk and talk' or handwritten overheads. We cannot see that this proposal would cause rightholders to suffer any harm.

(5) Libraries and Archives: CDPA ss.38-44 (see also SI 1989/1212)

a. Amend the provisions of ss.37-44 to extend the library/archive copying regulations to other cultural institutions, notably museums and public galleries to permit all authorised employees of such institutions, not just those in their libraries or archives, to provide a copy of a work or part of a work held in the institution's permanent collection to an individual requiring it for the purposes of research for a non-commercial purpose or private study (along the lines of ss.37-40 and 43), or to another museum or gallery (along the lines of ss.41 and 42) for preservation or replacement purposes on a similar basis to prescribed libraries and archives. The charging basis should be on the lines of the provisions ss.38(2)(c), 39(2)(c), 43(3)(c).

b. Extend the classes of works which prescribed libraries, archives and museums and galleries may copy for individuals under statutory exceptions provided by ss.37-43 to include artistic works, film, sound recordings and recordings of broadcasts.

c. Additionally, we would like new provisions in the Act which would allow museums and galleries, and also prescribed libraries and archives to be able to make both analogue or digital copies of all classes of works (whether originally in analogue or digital format) held in their permanent collections for curatorial purposes, e.g.

[23] http://www.cilip.org.uk/professionalguidance/copyright/lobbying

(i) To document ownership for insurance purposes.

(ii) To produce and make available to the public catalogues, including exhibition catalogues, of works held in the permanent collection of the museum, gallery, library or archive. Where catalogues are produced with the benefit of this exception, if they are to be sold, the charging basis should be on the lines of the provisions of ss.38(2)(c), 39(2)(c), 43(3)(c).

(iii) To advertise an exhibition or the acquisition of a work.

(iv) For preservation purposes including to provide some degree of access to the work which may be too fragile to display (e.g. by digitisation).

(v) To make copies for exhibition in place of the original where the original is too frail to be exhibited, is being restored or is otherwise unavailable, for example because it is on loan. Copies for this purpose shall be accompanied by a sufficient acknowledgement, and shall comply with the prescribed conditions.

d. Provision for an exception for prescribed libraries, archives, and museums and galleries

(i) To perform, play or show a sound recording or film held in their permanent collection to visitors.

(ii) To make a copy of a sound recording or film held in the permanent collection and perform, play or show it to visitors to their premises, provided that only a single copy is made, it is accompanied by a sufficient acknowledgement, and the prescribed conditions are complied with.

e. Expansion of the definition of “making available to the public” by amending s30 (1A) and any other clause in which the phrase appears (including regulations and clauses relating to Publication Right) to include the availability to the public of a work held in a library, archive, museum or gallery accessible to the public.

Suggested wording might be ‘the acquisition of the work by or deposition of the work in a library or archive accessible to the public, provided that consent for any specific act of making the work available is not reserved by the owner of the material at the time of acquisition or deposition.’

f. To amend ss.37-44 to provide for the making available, via dedicated terminals, of holdings (of all classes of copyright works including sound recordings and film) that have been digitised for preservation purposes or deposited in digital formats for archival purposes in the library, archive, museum or gallery. This would comply with the Information Society Directive (2001/29/EC) Art. 5(3)(n) which also does not prohibit the linking of such terminals to each other provided that they are on the premises. Nor does it require all the terminals to be on the premises of one institution. Networks linking such institutions should therefore be able to take advantage of this provision. The reference to "purchase or licensing terms" in Art. 5(3)(n) presumably relates simply to purchase or licensing terms that would otherwise prohibit the use provided for by this Article.

g. CDPA s.42 and SI 1989/1212 reg.6(2) need to distinguish between making copies within a library and between libraries (s.42(1)(a) and (b)). The

requirement that the item be in the reference collection of the supplying library (CDPA s.42(1) and SI 1989/1212 reg.6(2)) should be removed.

h. Amend s.42 to

   (i) Legitimise the copying of a master copy from works (comprising all classes of copyright works including sound recordings and film) held in the library or archive's own stock to create a copy for archival purposes.

   (ii) Allow a further copy to be made from the archival copy for library stock to allow subsequent replacements due to wear and tear.

   (iii) Allow the archival and any subsequent copies to be made in any medium not just the original medium.

i. Amend the wording of the copyright declaration forms A and B in Schedule 2 of SI 1989/1212 as below to protect prescribed libraries supplying 'library privilege' copies by electronic transmission under CDPA ss.38-43 as follows. The current clause 3 text is added as the last paragraph to clause 2 and a new clause 3 inserted. The suggested additional wording is below in italics:

FORM A
DECLARATION: COPY OF AN ARTICLE OR PART OF A PUBLISHED WORK

TO THE LIBRARIAN OF [ADDRESS OF LIBRARY]

1. Please supply me with a copy of:

   * the article in the periodical, the particulars of which are
   * the part of the published work, the particulars of which are
   * the details as specified on request number
   required by me for the purposes of research or private study

(* Delete whichever are inappropriate)

2. I declare that:
   (a) I have not previously been supplied with a copy of the same material by you or any other librarian;
   (b) I will not use the copy except for research for a non-commercial purpose or private study and will not supply a copy of it to any other person; and
   (c) to the best of my knowledge no other person with whom I work or study has made or intends to make, at or about the same time as this request, a request for substantially the same material for substantially the same purpose.

I understand that if the declaration is false in a material particular, the copy supplied to me by you will be an infringing copy and that I shall be liable for infringement of copyright as if I had made the copy myself.

3. *If the copy was supplied by any form of electronic transmission, including fax, I further declare that, after the transmission has been downloaded in a satisfactory form, I will:*
   (a) print only one paper copy from which I will not make any further copies;
   (b) delete the electronic copy as soon as I have made a satisfactory print copy;
   (c) not make any further electronic copies, nor convert the file into another format or forward it to any other person;
   (d) not cut and paste or otherwise amend the document, except as may be permitted by law.

I understand that if the declaration regarding electronic supply, if applicable, is false in a material particular then I shall also be liable for infringement of copyright as if I had made the copy myself.

SIGNATURE# DATE
NAME
ADDRESS

* delete as appropriate

This must be the personal signature of the person making the request. A stamped or typewritten signature, or the signature of an agent, is NOT acceptable.

FORM B
DECLARATION: COPY OF WHOLE OR PART OF UNPUBLISHED WORK

To: The Librarian/Archivist* of [……………………………………] Library/Archive*
[Address of Library]

1. Please supply me with a copy of

   The whole/following part* [particulars of part] of the [particulars of the unpublished work] required by me for the purposes of research or private study.

2. I declare that:
   (a) I have not previously been supplied with a copy of the same material by you or any other librarian or archivist;
   (b) I will not use the copy except for research *for a non-commercial purpose* or private study and will not supply a copy of it to any other person; and
   (c) to the best of my knowledge the work had not been published before the document was deposited in your library/archive* and the copyright owner has not prohibited copying of the work.

I understand that if the declaration is false in a material particular, the copy supplied to me by you will be an infringing copy, and that I shall be liable for infringement of copyright as if I had made the copy myself.

3. *If the copy was supplied by any form of electronic transmission, including fax, I further declare that, after the transmission has been downloaded in a satisfactory form, I will:*
   (a) print only one paper copy from which I will not make any further copies;
   (b) delete the electronic copy as soon as I have made a satisfactory print copy;
   (c) not make any further electronic copies, nor convert the file into another format or forward it to any other person;
   (d) not cut and paste or otherwise amend the document, except as may be permitted by law.

   I understand that if the declaration regarding electronic supply, if applicable, is false in a material particular then I shall also be liable for infringement of copyright as if I had made the copy myself.

SIGNATURE# DATE
NAME
ADDRESS

*Delete whichever is inappropriate

#This must be the personal signature of the person making the request. A stamped or typewritten signature, or the signature of an agent, is NOT acceptable.

Justification

Most of these changes we seek are commonsense and self-explanatory. We seek to clear up anomalies within the Act that do not take account of modern library and archive good practice standards and which, in our opinion, do no harm to rightholders.

(5)(a): Furthermore we seek to extend the library and archive exceptions to other cultural institutions of national importance, i.e. not-for-profit museums and galleries. Currently only prescribed libraries and archives within museums and galleries may benefit from these regulations, not the institutions as a whole. We are happy to work with the Government on the criteria for determining which museums and galleries should be prescribed.

This would bring the UK into line with EU legislation: the corresponding section of the EU Information Society Directive 2001/29/EC Article 5.2(c) allows exceptions "in respect of specific acts of reproduction made by publicly accessible libraries,

educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage". Other parts of the CDPA 1988 make provision for copying by educational establishments but no part makes provision for museums.

Museums and galleries perform many of the same functions as archives as are specified in CPDA ss.42-44 in preserving and making available material for the public benefit of the community. These functions may require copying. A change in legislation will allow museums and galleries to copy for security and record, public display, or for non-commercial research purposes or other purposes of public benefit.

It is appropriate, in implementing Directive 2001/29/EC Article 5.2(c) more fully, to include galleries as well as museums. Galleries may be seen as museums of art objects. In some cases one institution combines both functions under one name, for example the Ashmolean Museum in Oxford functions as both museum and art gallery.

(5)(b): Libraries, archives, museums and galleries possess significant collections of artistic works as well as films, sound recordings and recordings of broadcasts and individuals seeking a copies from these classes of materials under a statutory exception should be able to do so. Libraries, archives and museums should in particular be allowed to copy artistic works as not being able to do so under ss.37-43 has caused unnecessary burdens. That one may copy an artistic work under s29 but a library or archive may not under ss.37-43 is a strange anomaly.

We believe that extending the classes of materials which libraries, archives and museums may copy is justified by the Information Society Directive Art. 5(2)(c) which is clearly not limited to any particular categories of work. For example, in the case of a diary which contains drawings by the diarist, it is currently legitimate to supply a copy of the diary entries together with the drawings relating to those entries (as 'illustrations' to the literary work). Perversely, it is not legitimate to copy the drawings alone (as artistic works).

CDPA ss.29 and 38-39 currently deal with much the same activity for the same purpose, i.e. copying for a legitimate purpose, namely fair dealing. It is quite possible for a person to use a self-service photocopying facility in one library, and legitimately copy from an artistic work, and find that the same work in another library can only be copied by the librarian, whom s.39 prohibits from supplying the copy. The factors which determine whether copying is done by the person requiring the copy, or by the librarian on behalf of that person, are primarily driven by library and archive policy on copying, not by the nature of the act. Library and archive policy is usually determined by factors irrelevant to the act: (i) conservation - to prevent damage to the physical object (especially to large objects-many books with artistic content are in large format), or (ii) operational considerations, such as the availability of a copying machine only in the librarian's office. A change would allow libraries and archives to conserve their resources better by allowing their trained staff to make legitimate copies from items prone to damage when used by readers to make their own copies. As most copying is already self-service, in which copying from artistic works is a legitimate act, any economic loss to authors and publishers would be negligible.

Currently in the strictest sense CDPA ss.38-39 would seem only to apply to prescribed libraries. These provisions should at the very least be extended to archives since they too may hold published works.

(5)(c): As mentioned in the Introduction to this document, WCT Article 10 and Agreed Statement clearly provide for copyright exceptions and limitations to apply in the digital environment and we think that the CDPA should make this crystal clear and also provide for prescribed libraries, archives, museums and galleries to have the exceptions they need in order to do their job with the maximum effectiveness to meet national objectives for research, education, culture, and the knowledge economy - in other words for the public good.

We are convinced that change is needed to improve the exceptions to copyright to make them fit for the digital age and to iron out existing illogicalities and anomalies in the exceptions and limitations regime. Without these changes UK libraries and archives will be unable to fully exploit digital technologies to their users' and society's benefit and various of their services will in many respects be held back to 20th century analogue technology in order to comply with copyright law. This handicap will adversely affect the UK's competitiveness in the global knowledge economy as a major provider of information services and document supply and obstruct the transfer of knowledge in the digital age.

Libraries, archives, museums and galleries are respectable and trusted institutions and should not have to constantly seek permission from rightholders (and many can not be traced as is indicated in our discussion on orphan works in Section (10) on Rights Clearances below) to make copies for the purposes outlined in this Section (with all the administrative burden and frustration that this often entails) but it should be clear in the library and archive exceptions that they have carte blanche to use any means available to them to carry out archiving or preservation and conservation of all types of media, including conversion to different formats and platforms in order to preserve the content or save the original from wear and tear.

This would be a fuller implementation of the Information Society Directive 2001/29/EC. It would benefit the public by permitting the viewing of library, archive, museum and gallery holdings digitised for preservation purposes, in a controlled reading/ consultation room; and benefit cultural institutions by permitting the effective use of library, archive, museum and gallery holdings digitised for preservation purposes.

(5)(d): We do not think that rightholders would be harmed by a new exception to allow libraries, archives and museums and galleries to perform, play or show sound recordings or film held in their permanent collection to visitors to their premises (and to make a single copy of such works held in their permanent collection for the same purpose). Currently such clearances are not much sought for small temporary exhibitions since many cultural and educational institutions do not play copyright multimedia works which are not central to the exhibition except in major exhibitions which have been years in planning. This is due to the administrative burden of rights clearances which can be particularly difficult with regard to older more obscure material.

It is to the public benefit that there be an exception of this kind as otherwise the need to clear rights and the limitations of cost that affect public institutions such as museums, galleries, libraries and archives, often means that such multimedia performances are not provided. Please note that we ask for this exception in the context of exhibitions and cultural and educational events held in 'prescribed

conditions' by the institution, not, for example, for 'musak' on the telephones or in the lifts, etc.

(5)(e): The definition of 'making available to the public' in s.30(1A) and elsewhere needs to include our amended wording as the availability of works held in a publicly accessible library, archive, museum or gallery is de facto 'making available'. It is an anomaly that CDPA does not specifically recognise this and it would make matters much clearer for these institutions this definition was amended accordingly.

This would give fuller implementation to the Information Society Directive 2001/29/EC. The relevant section of Article 5.3(o) allows, in relation to" Right of communication to the public of works and right of making available to the public other subject-matter", "use [by others than the rightholders] in certain other cases of minor importance where exceptions or limitations already exist under national law, provided that they only concern analogue uses and do not affect the free circulation of goods and services within the Community, without prejudice to the other exceptions and limitations contained in this Article."

The Copyright and Related Rights Regulations 2003[24] implement the concept of "making available to the public" and "communicating to the public" which in the CPDA 1988 were not sufficiently distinguished from "publishing". However, by not explicitly including reference to common practice in libraries and archives, the Regulations introduce uncertainly where it did not exist before.

Libraries and archives frequently acquire works existing in single or limited copies which have not previously been available to the public. These may be and generally are available for consultation by members of the public. In CDPA s.30(1A) subsections (a) and (c) do not apply to this situation because they refer only to putting works into circulation; subsections (d) and (e) relate primarily to sound and audio-visual works; subsection (c) implies either the creation of a copy or that it treats of a 'born-digital' work. Although the introductory text "made available by any means, including" indicates that the list at (a) to (e) is not exhaustive, the situation described above is so significant an element in the conduct of libraries and archives that it would be useful to have it explicitly listed and thereby legitimised in s.30(1A).

The change would also confirm that requests under the Freedom of Information Act 2000 for information about or contained in such works held by libraries and archives could be met by inviting requesters to inspect the works in the library or archive.

It should be noted that the change would explicitly allow the criticism or review of works in libraries and archives which, although unpublished, are available for public consultation. As this already takes place there is no consequential impact for rightholders.

(5)(f): The exception allowed for by the Information Society Directive Art. 5(3)(n) is very important to the development of digital library, archive and information services. Not to introduce such measures serves to stifle the development of digital information services of public domain material provided by libraries and archives to the public. This exception is especially valuable for making accessible (often older) analogue material digitized by the library, audiovisual material such as radio and television

[24] SI 2003/2498

programmes and films, and material in other electronic formats, which the library has acquired and which are not subject to licensing terms.

UK libraries and archives are currently in the situation of being able to acquire digital material for their collections which are not subject to purchase and licensing terms, i.e. works digitised by the institution itself or which have been deposited for free use without licensing terms, but they cannot allow users to access them on the premises without permission. These services could also be provided on an intranet between libraries, educational establishments, museums and archives since the Directive does not restrict the 'dedicated terminals' to providing access only to the works of the establishment in which the terminal is located. We know that these provisions are being introduced in Norway[25] and have been introduced in Denmark.[26]

(5)(g): Our proposed amendments for CDPA s.42/SI 1989/1212 regulation 6(2) (copying for replacement or preservation) are simply to remove the current ambiguities which lead to confusion. We also see no reason why the work **from which the copy is made** for supply between libraries for the purposes of replacement or preservation has to be held in a reference collection rather than a lending collection (s.42(1) main para.). Many libraries do not buy more than one copy of a work and whether or not it is also available for lending seems to be irrelevant when it comes to supplying a copy **from the work** to another library for the purposes of s.42.

By combining the two activities of copying to preserve, and copying to replace, after damage and/or loss, the legislation as currently creates difficulties in interpretation. The precise wording of CPDA s.42 is at odds with its commonly accepted interpretation and with widespread practice based on that interpretation. Where a copy is made by one library for another, the requirement for the copy in the supplying library to be in the reference collection is irrelevant; it is more logical, for the protection of rightholders' interests, for the replacement copy to be restricted to the reference collection of the receiving library (as is the common interpretation).

(5)(h): We also are convinced that CDPA s.42 needs to be extended to allow for the making of a master copy in any medium (including format shifting) from the original work held by the prescribed institution (in all classes of copyright protected material) for archival purposes and to allow further copies to be made in any medium for wear and tear replacement to the library stock from the archive master copy. For the purposes of preservation and replacement copying, this is the only sensible way to proceed and allows prescribed libraries and archives to make use of any available and all appropriate technology for preservation. If prescribed libraries and archives continue to be prevented by out of date copyright laws from transferring content to

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[25] NORWAY. Copyright Act 1961 (as amended) [Unofficial English translation] **§ 16** "…The King may issue regulations on that archives, libraries, museums and educational institutions, using terminals on their own premises, can make works in the collections available to individual persons when this is done for the purpose of research or private study." http://www.kopinor.org/opphavsrett/node_2182 *(NB. Our Norwegian contact advises that specific regulations are being introduced later in 2006).*

[26] DENMARK. Consolidated Act on Copyright 2003* Consolidated Act No. 164 of March 12, 2003. [Official English translation.] § 21(3) In public libraries works which have been made public may be made available to individuals for personal viewing or study on the spot by means of technical equipment.
http://www.kum.dk/sw4550.asp *(NB. We are informed by our Danish contact that the official English translation "public libraries" is to be understood in contrast to "private libraries" i.e. it also includes research libraries).*

new formats and platforms for preservation purposes, they cannot fulfil their core role to effectively preserve the nation's, indeed the world's memory.

If part of the aim of the existing legislation is to preserve originals by making a copy available for study, and/or to anticipate the moment when the original becomes unusable, then the sanctioning of the making of a single copy only postpones the moment when the work becomes unavailable, as at some point the copy itself may become unusable. It is better practice to make a master copy from which other copies can be made as required to keep the work available.

(5)(i): The additional clause 3 proposed for the two declaration forms is very much wanted by librarians and archivists. In most libraries, and eventually also in public libraries, we work in a digital environment in which all dealings including request for and supply of library privilege document delivery are as much as possible carried out electronically. There is no technical impediment to doing this, only the archaic provisions in our copyright law. The copyright declaration form is a declaration of trust between the signatory, the library and the rightholder. This does not change with regard to electronic document delivery. We believe that the proposed wording for a new clause 3 on the declaration forms will ensure that rightholders are no more at risk of unauthorised on-copying due to electronic document delivery than in the analogue world.

(6) **Visual Display of Works**

To redefine 'performance' to allow the display of other classes of works, not just artistic works so that a static visual display of a literary, dramatic or musical work is not an infringement.

Justification

It is currently an infringement to 'perform' a literary, dramatic or musical work. 'Performance' in this context includes 'any mode of visual or acoustic presentation', which must include simple exhibition (a basic form of visual presentation). What is required is a redefinition of 'performance' so that a mere static display of a literary, dramatic or musical work on a wall, table or in a display case is not an infringement. A display of this kind will no more harm a rights owner than will exhibition of an artistic work, and such a change need not be supported by any of the exceptions in the Information Society Directive since exhibition is an infringement of neither the reproduction right (Art. 2) nor the communication right (Art. 3).

An example of the vulnerability that exists for UK cultural and educational institutions by having no exception for the exhibition of a literary, dramatic or musical work, is that of the *Ulysses* case which arose in Ireland in 2004 when shortly before the major celebrations planned for the centenary of Bloomsday (the day on which *Ulysses* is set) in Dublin, the grandson of James Joyce threatened to sue if the Irish National Library exhibited its collection of Joyce's manuscripts (purchased for ?12.6 million in 2001). In order to foil this threat, the Irish government had to rush through the Copyright and Related Rights (Amendment) Act 2004, which amended the Copyright and Related Rights Act 2000 by adding subsection 7A to section 40. This made plain that public exhibition of a literary or artistic work, or a copy of such a work, in a place to which the public has access is not an infringement.

- However, the rushed legislation still left the public exhibition of a dramatic or musical work as an infringement, which means that the public display of the script or the music of, say, Guys and Dolls would infringe. **This is illogical. If there were a change to UK law, we would not want the same limitation.**
- A useful outcome is that copies of works may also be exhibited, though it is possible that the courts could nevertheless find an infringement from the making of such a copy, since there appears to be no exception in the Irish Act to cover the making of a copy for the purposes of an exhibition. **Thus, if there is to be a change in UK law, which makes it no infringement to exhibit a copy, we also need the exception to enable the copy to be made.**

We therefore suggest that the UK government follows the principle rather than the practice of the Irish solution to the *Ulysses* case.

(7) Database Regulations[27]

In the light of recent ECJ judgments in 2005 the EC is currently considering its options concerning the Directive so we are not making recommendations for UK legislation in this regard until a later date. **We attach our submission to the European Commission's recent consultation which closed on 12th March 2006.** [Appendix 1]

(8) Off-air recording of broadcasts

S.35 only allows educational establishments to make off-air recordings of broadcasts. We believe that cultural institutions, other than those listed in SI 90/2510, including prescribed libraries and archives along with other museums and galleries should also have an exception allowing them to generally make off-air recordings in support of their collections and legitimate non-commercial activities. At the very least they should be allowed to make, without the need for any licence, archival recordings of any broadcast of direct relevance to an item held in their collection.

Justification

It has been a hardship for non-educational establishments that they have no exception allowing them to make off-air recordings, particularly of material relevant to their collections and activities. We cannot see that extending this exception in line with the provisions of s.75 will harm rightholders.

(9) Disability exceptions

Extend the provisions of the Information Society Directive (2001/29/EC) Art. 5(3)(b) to ss.31A-F of the Act to include people with disabilities other than visual impairment so that they can enjoy the same sorts of exception as visually impaired persons with regard to all classes of works, not just literary, dramatic, musical and artistic works. This should include people with a reading impairment, print handicap, dyslexia or other significant learning difficulty, or any physical disability not already covered in s.31F(9) of the Act including hearing impairment requiring subtitling and sign language.

Justification

It is not only manifestly unfair not to provide copyright exceptions to accommodate the needs of all people with 'print disabilities' other than those caused by visual

[27] Copyright and Rights in Databases Regulations 1997 SI 1997/3032

impairment as currently defined by the Act, but we now have a situation where current copyright legislation is incompatible with SENDA and the DDA. While the Information Society Directive merely provides an optional exception in Art. 5(3)(b), it should be fully implemented as otherwise people whose disability is not covered by a copyright exception are being denied their human rights.

LACA's postbag includes three letters, received in February 2006, from university librarians who work with print disabled people who do not qualify under copyright law as being 'visually impaired'. These letters, from which anonymised extracts are quoted below, illustrate the difficulties libraries encounter and the resulting discrimination suffered by this group of users, as a result of having no exception in copyright law because print disabled people, including dyslexics, do not qualify under the exception introduced by the Copyright (Visually Impaired Persons) Act 2002.

- **"Copyright Requests for Dyslexic Students….to publishers**

Year	Number of Publishers involved	Copyright requests cleared
2003	23	35
2004	25	58
2005	15	17
2006 (so far)	3	5

The majority of copyright requests are cleared by publishers free of charge, with only 3 being refused and 1 publisher and copyright holder unable to be found.

Records for previous years are limited, as is information on the number of students these requests relate to. Over the past two years, there have been between 4-6 students using the Unit at any one time with half being visually impaired and partially sighted.

The time taken for publishers to respond can vary from less than a week to two months. Publishers from the United States of America tend to be confused by the request as the [American] copyright act covers both visually impaired and dyslexic students.

The types of request also vary from requiring audio tapes already available from the RNIB tape library; new audio CDs to be recorded and photocopies of entire texts onto coloured paper.

Many students are unaware of the time it can take to gain copyright clearance and are often frustrated by what is involved in getting material to them. It would be useful if dyslexic students were granted similar allowances to visually impaired students. With reduced administration, it would free up our time to help more students and comply with SENDA legislation."

- "The University…. as a creative arts institution has a higher than usual proportion of dyslexic students. Estimates can vary between 10% and perhaps as high as 70% in some particular cohorts. For many years the work has been studio based and largely practical, but in recent years, the academic requirements have changed, along with a higher dependence on IT as a teaching and learning tool, i.e. VLEs [Virtual Learning Environments].

Many of our dyslexic students suffer from scotopic sensitivity which affects the appearance of print, and many of them have short term memory problems which present very real obstacles to the reading of dense academic prose. There have been proposals to record some of the basic key texts, i.e. Susan Sontag's 'On Photography' and Roland Barthe's 'Camera Lucida' - if

this had been possible, the learning experience of dyslexic students would be greatly enhanced. The exception of copyright only applies to the visually impaired, so we cannot support our dyslexic users in this way.

Therefore we would fully support the widening of the copyright exception to include dyslexic users.**"**

- **"**I am sending you information regarding barriers faced by ….University Library to create Alternative Format (AF) of books. No student has requested the particular book yet, but the book is a core text book for a department in the University, so we are being proactive and getting it ready if it is requested in the future. We need to scan and OCR the book then we "Add Value" to the text to make it accessible and unambiguous before we record it.

  I contacted a publisher if they had a digital copy of their book – which would save time scanning the book, so we could create a DAISY Full Audio-Text Talking book. They replied saying that if the non-visually impaired (i.e. dyslexic) student bought a copy of the book first then they would send us an electronic version of the book for us to make it a Talking book.

  suggested that was odd – why should anyone have to BUY an inaccessible version just so they can THEN borrow an accessible version from the library? I have not had a reply since. We have gone ahead and scanned the book and will deposit a copy of the AF book with the RNIB and University Library but I also know we will have to seek permission to lend it if the client is Print-Disabled but not Visually Impaired (P.D. but not V.I.)

  So… the barriers are really these….

  1) Print-disabled clients (not legally recognised as blind) have to pay for extra copies – it is the university that is incurring the cost of producing accessible versions – NOT the publishers so surely the publisher can be flexible.
  2) Print-disabled clients have to wait for an alternative format to be created – which can and does take a long time (proactive behaviour is being discouraged in this example).
  3) Seeking permissions from copyright holders is time consuming whether it is to create an AF copy or lending and existing AF copy while the client can only wait for an answer and the digital book is there but out of reach.
  4) Copyrights can be sold and systems not updated so we end up on a wild goose chase for the current owner – this has taken months to sort out in a previous occasion.
  5) When we have built up a Digital Library at the University we will have to keep the AF versions OFF the Open Shelves because sighted clients will not be legally entitled to the Digital copies (on CD-R) – this could lead to the Print-Disabled clients having to disclose their Print-Disability in order to receive the E-book.
  6) If a P.D. but not V.I. client needs the E-book from "under the counter" then they will have to be in possession of permission first. (see third issue above). If they don't have permission then they cannot have the E-copy – arguing that they are waiting for a reply is not good enough as far as the Library is concerned because the Library cannot compromise its status as a Lending Library. However, the client will still suffer.

  The majority of publishers have been very good in granting permissions either to create an AF version or to borrow from the RNIB.**"**

(10) **Rights clearances**

In cases of infringement resulting from the copying, for a commercial or non-commercial purpose, of 'orphan' copyright works (i.e. all classes of copyright works including sound recordings and films), whether published or unpublished, where it can be shown that after reasonable enquiry, the rightholder cannot be traced, the law should provide that

a. The user may act as if a licence had been granted.

b. The only actions that may be open to the rightholder are to require that the copier take out a licence from that point forward and to seek compensation.

c. Any compensation payable to rightholders who subsequently make themselves known to the copier or exploiter of the work, should be limited by statute to the level of licence fees that would have been payable had a licence been granted at the time when copying or exploitation began.

Justification

Rights clearance, for example, for public sector digitisation projects presents many problems and is a very major cost for any information project. Such rights clearance is very complex, because different individuals or collecting societies hold the rights in different kinds of original works, both published or unpublished and many are untraceable or fail to respond to enquiry at all. The time consuming and very expensive administration of rights clearance for digitisation has become a major obstacle to projects funded by the public purse, such as in the educational, health and the cultural sectors which are in the van of digitisation projects for the public good. It is in the public interest for there to be some statutory provision which will have the effect of simplifying procedures and will indemnify users of affected works.

Libraries, researchers, archives and museums often seek to republish 'orphan' works for archival, research, and preservation purposes. Orphan works cause huge problems for rights clearances since they are still in copyright, but their rightowners remain untraceable after reasonable enquiry. Libraries, archives, museums and galleries expend a significant amount of scarce resource trying to trace such rightowners to clear rights and it is unreasonable if, in such circumstances, their subsequent use of a copyright work might then result in unreasonable demands for recompense or possibly in litigation.

There is currently no provision in UK law to deal with the problems presented by orphan works, whereas we understand, for instance, that Danish law allows exploitation of works if reasonable efforts have been made to clear the rights but the rights holders cannot be traced. We understand that the French society of authors is creating a database of deceased authors and that the French user community is seeking legislation to indemnify users if the deceased author is not on this register.

The LACA postbag has produced the following examples of orphan works problems from archives around the country. Anonymised extracts are quoted below:

- "Most people assume that I know about the hundreds of thousands of documentary photographs to be found all around the country and so have not bothered to tell me of them. Even here just one of our collections…. contains some 400,000 images 1863-1912, about half of which may be expected to be in copyright; for the great majority of these we know the original copyright owner but have no means of tracing the current owner."

- "The ….Archive recently acquired 2890 negatives taken by a [local] man…. and are of that town plus… [other local towns]. The photographs were taken between the 1940's and 1970's and are still within copyright but they were thrown away as part of a house clearance when the photographer died. Because the photographer took a wide variety of shots this collection is of great historical importance, for example towns being demolished in the 1960's, the …. bypass being built etc."

- "The Art and Design Library at….University has published images without clearance (though of course, some may actually be out of copyright anyway, if we haven't managed to find out the artist's date of death).
  1. Book illustrations and typography project: 33 images out of 296
  2. Gallery project (mainly 3-D art, e.g. glass, ceramics): 24 images out of 560
  3. Decorated bookpapers project: 916 out of 2,246 (mainly bookpapers with no known maker, many of which probably would be out of copyright anyway.) [N.B. This project is still ongoing, and it is possible that many more papers will go onto the website without their copyright owners being traced. So far, a further 1,042 are still unaccounted for!]."

- "….[The] University has at least one collection which you can describe as of "orphan" works. This is the…. collection of fashion designs from 1940s-1950s. This came in from a former employee, now deceased, who saved these from the workshop…when it closed in the 1960s. The firm was a London based couture firm. The founders retired in the 1960s and I have no idea how to contact any surviving relatives - if there are any. I checked with the V & A and they have nothing in their collections or more information on the firm. We use the fashion designs on display and fashion students use them for research. However, we have not as yet put these on their website as they would be infringing copyright - which is frustrating as they are great and we would like to publicise the fact we have them much more. We also have loads of photos in copyright and have no idea who the photographer is, but doesn't everyone."

- "The …..Archives Trust has been given more than 50 collections in the 4 years we have been going and these contain a total of more than 1 million items (dates range from early 1900's to present). Of these we reckon some 25% are orphan works which puts them right at the back of the queue for scanning and cataloguing. We try to put as many as possible of our catalogued images on to our website - currently only 9000 or so."

Everyone in the information and copyright community, and in society at large, stands to benefit if there were a free publicly available voluntary register of rightholders even though international conventions currently require no compulsory registration of copyright. Not just librarians, archivists and museum curators, but also entrepreneurs such as publishers, film and record producers who want to use copyright works would be able to find their creators, who in turn could then benefit from their rights. The Government should encourage the voluntary registration of copyright works in order to minimise the problems presented by orphan works. This would do much to encourage collecting societies to deposit appropriate member data in freely accessible public sector databases such as WATCH.[28] So far only DACS has agreed to do this, although it seems progress is slow. However databases such as WATCH would need additional assured long term funding in order to expand. It would be appropriate for the UK Government and also the European Commission to consider offering public funding for existing or future public sector database projects of this kind in support of national and European cultural and educational objectives.

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[28] WATCH – Writers, Artists and Their Copyright Holders http://tyler.hrc.utexas.edu/

The US Copyright Office Report[29] of 31st January 2006 has recognised the major problems posed by orphan works and it merits study by the UK government and the European Commission and Member States' governments. However, the Report's legislative proposals appear to force the parties to have to make recourse to the courts each time a rightholder surfaces in order to determine what is 'reasonable compensation' – whereas the whole point for the inquiry was that libraries, archives, researchers and museums wanted a straightforward solution that avoids litigation. In our view this makes the Report's proposed solutions cumbersome and fails to ameliorate the uncertain situation which libraries, archives, researchers and museums face.

In cases involving the use of orphan works, where (after reasonable enquiry by the user) the rightholder only subsequently makes him or herself known to the user of the work, we only favour the Report's proposal (p127: s.514(b)(1)(A)) of a 'notice and takedown' procedure provided that takedown is not enforceable in cases of non-commercial use. The proposed statutory language needs to be clearer on that point.[30]

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[29] U.S. Copyright Office. Report on Orphan Works: a Report of the Register of Copyrights. January 2006, http://www.copyright.gov/orphan/orphan-report-full.pdf VI. Conclusions and Recommendations pp94-127 (pdf pp 108-143); 3. Applying the Recommendation to Orphan Work Uses pp122-7 (pdf pp138-143) See also U.S. Copyright Office Orphan Works page http://www.copyright.gov/orphan/

[30] ibid. C. Recommended Statutory Language - Section 514: Limitations on Remedies: Orphan Works p127 (pdf p143).
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.

This is because enforced takedown would leave holes in the project for which the orphan work was required. Such gaps could potentially wreck the project (the work or works in question could be its central focus for example) and undo years of work and make the expenditure of (usually public) funds a waste. If a 'notice and takedown' procedure were to be introduced in the UK, we agree with the Report's proposal that where the use is non-commercial it should be without compensation if complied with expeditiously. However, it must also be *optional* for the user to comply and the user should have the right instead to obtain a reasonable licence from that point forward offering reasonable compensation.

We feel that the compensation payable for that use should be limited by statute in order to avoid unreasonable demands. In this case the act of copying would not strictly be an infringement because it would be authorised by the new provision we are asking for in this section allowing use after reasonable enquiry. Our understanding is that in circumstances such as these the courts would seek to put the aggrieved party in the same position as he or she would have been in had the act not been done, unless the copying was wilfully infringing or otherwise excessive. It is therefore appropriate to limit compensation to the normal licence fee backdated as necessary.

We believe that implementation in the UK of legislation to effect our own proposals above would ensure fair compensation to rightowners and avoid the risk of litigation whenever possible. We urge the Government to conduct its own inquiry into orphan works in the UK, or to encourage the European Commission to undertake one, in order to progress the matter without further delay.

(11) **Term of protection for copyright works**

a. The term for unpublished Crown copyright works should be reduced from creation+125 years to creation+70 years to bring them in line with anonymous unpublished works.

b. The copyright term for pre-1989 unpublished literary, dramatic and musical works of known authorship should be made the same as the standard term (life+70), plus (if it is thought necessary) a short period for older works. The term for anonymous unpublished works should remain at 70 years since creation.

c. The 2039 provision for some old photographs and for unpublished works should be removed. The law currently makes unnecessarily complicated term provisions for these works, which are both difficult to understand and enforce for works which are often 'orphaned'. Removing the 2039 provision is unlikely to harm creators, most of whom will now be deceased.

d. There should be no extension of term for sound recordings or for performances in sound recordings.

Justification

Most of these measures simply serve to tidy up anomalies in the term of protection which affect libraries, archives, museums and galleries. The proposed changes are unlikely to adversely affect creators although it would (in a few cases) reduce the term of Crown Copyright to bring it in line with other works. Most digitised Crown material apart from specific business units such as Ordnance Survey is available free on a click-use licence. It would simplify matters, and ensure that the UK was compliant with the Term Directive if Crown copyright duration were on the same basis as other copyrights.

We do not believe that applying the standard term of protection (life+70), which is the current term for post-1989 unpublished literary, dramatic and musical works of known authorship, to earlier unpublished works would too abruptly cut off existing rights. In Canada (which has a standard life+50 term), works whose creator died prior to 1947 were, in 1997, given a term of five years expiring at the end of 2002. The delay in the expiration of copyright in these works until 2039, no matter what their date of creation, is excessive.

The arguments being advanced by the major record producers, that the UK should argue within Europe for the extension of the term for sound recordings from 50 years to 95 years to bring it in line with the US term of protection appears to have attracted some ministerial support within DCMS. The Commission had already stated in 2004 "From the point of view of the Internal Market, the term of protection for phonogram producers does not cause particular concern since the term has been harmonised in the Community and also been incorporated by the 10 new Member States. Moreover, it seems that public opinion and political realities in the EU are such as not to support an extension in the term of protection. Some would even argue that the term should be reduced. *At this stage, therefore, time does not appear to be ripe for a change, and developments in the market should be further monitored and studied*."[31] [our italics]

Record producers have been aware of this situation since the Rome Convention on Phonograms of 1960 and are now trying to go beyond the Convention through supranational bodies such as the EU. We understand that, resulting from pressure from the record industry, in particular organisations representing the big recording labels, there is now to be a study undertaken jointly by the UK Patent Office and DCMS before the UK Government decides its policy on the matter. We would like assurance that the authors of this study will formally consult the whole copyright community including libraries, archives and museums and galleries. We also understand that the EC is to review its position as part of its evaluative review of the Copyright *Acquis*.

We also note that the question posed on extension of term for sound recordings by the Gowers Review Call for Evidence[32] includes consideration of an extension of the term of protection for performances in sound recordings, presumably because it is thought sensible to keep the term of protection for both rights in line with each other.

We can see no justification to extend the term of protection for sound recordings and also for performances in sound recordings since a 50-year monopoly for an entrepreneurial work is surely long enough. The current demand by the recording industry is almost similar to an 'arms race' between Europe and the US to extend terms of protection ever longer and longer. The effect of the extension of term by the Term Directive for literary works to life+70 has already been seen in the Bloomsday affair recounted in (6) above: *Ulysses* and other works by James Joyce would have been out of copyright at the end of 1991 had the term of protection not been extended by the Directive, bringing Joyce's works back into copyright and conferring the rights on the third generation of the Joyce family.

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[31] Commission of the European Communities. Commission Staff Working Paper on the Review of the EC Legal Framework in the Field of Copyright and Related Rights [Sec(2004) 995]. Brussels, 19.7.2004.

[32] Gowers Review of Intellectual Property Call For Evidence, p7. Specific Issues - Current term of protection on sound recordings and performers' rights. http://www.hm-treasury.gov.uk/media/978/9B/gowers_callforevidence230206.pdf

The longer exclusion of works from the public domain will only serve to stifle creativity, particularly in the music business, which with digital technology now thrives on creative use of previous recordings and re-issue of recordings of historical performances. Once creative works are in the public domain, people can make new things with them. While some pop stars have (we think misguidedly) publicly supported an extension of term in sound recordings and performances in sound recordings, in fact the owners of the underlying rights in the music and the lyrics (protected for life+70) would benefit substantially from the removal of the original record company's monopoly after 50 years, as would performers whose work is reproduced on new labels. A blanket copyright extension would result in the protection of record producers' entire back catalogues, including works which no longer bring them any income, and restrict the revival of otherwise forgotten performers on cheaper labels.

We believe that this proposal will have a very adverse effect on library, archive and museum sound collections of national and international importance with regard to preservation and transfer of recordings to different formats, including digitisation, because of the expensive and time consuming need for yet more rights clearances of often obscure material. This becomes nigh impossible with regard to unpublished sound recordings (eg. vox pop recordings, folk music and folk memory, bird song, etc.). There would also be dampening effect on the making available of sound recordings from such collections to the public, as is so admirably done by The British Library Sound Archive.[33] We fully support the expert submissions made by two LACA members: IAML (UK & Irl)[34] and The British Library to the Gowers Review, which provide detailed examples of the problems that would be caused to the nation's audio heritage and educational resources by this proposal.

We support the Adelphi Charter[35] principles, of which we say more in (15) below. In this context the following Adelphi principles apply:

> 3. The public interest requires a balance between the public domain and private rights. It also requires a balance between the free competition that is essential for economic vitality and the monopoly rights granted by intellectual property laws.
>
> 6. Copyright and patents must be limited in time and their terms must not extend beyond what is proportionate and necessary.

(12) **Infringement**

It should become an offence to make an unjustifiable threat of infringement proceedings. We suggest that the wording of s. 70 of the Patents Act 1977 be used, but deleting "a patent" and replacing it by "copyright" throughout, and also completely deleting the wording in ss.70(2)(b) and 70(4) of the Patents Act.

Justification

This would be similar to provisions in patents and trademark law and will extend such protection to users of copyright works. We give two examples below of what appears

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[33] http://www.bl.uk/collections/sound-archive/publications.html; http://www.bl.uk/collections/sound-archive/nsaabout.html

[34] International Association of Music Libraries, Archives and Documentation Centres, United Kingdom and Ireland Branch http://www.iaml-uk.org/

[35] www.adelphicharter.org; English text at http://www.adelphicharter.org/pdfs/adelphi_charter2.pdf

to be unjustified behaviour by rightholders (which could potentially lead to infringement proceedings).

- A recent example of such behaviour by a music publisher came to the attention of IAML (UK & Ireland), a LACA member:

Last year copies of a musicological study of pop music had to be pulped because permission to quote short musical extracts was not given, i.e. there was outright refusal, not even permission in return for payment. More recently, another musicologist has received a response from a major UK music publisher, which shows a similar attitude.

The publisher wrote: "It is our policy to charge a permission fee for extracts of 4 or more bars, although in cases such as yours the charge is usually a minimum, levied on the basis that there is inherent value in the music which should be recognised commensurately. However, regardless of any fee, and even for extracts of 4 bars or less it is still necessary to obtain the publisher's formal permission for any such usage. Whilst the Copyright Act does not make this explicit, it is generally accepted that the fair dealing provisions for review and criticism do not extend to publication of extracts (of any length) from a copyright work in a book. They are intended to apply to articles in newspapers, journals and so forth, whether in the context of a CD or concert review, compositional analysis, general discussion etc. I would also bring to your attention the fact that we have issued licences for similar extract usage in other academic books to [publisher X] in the recent past. Therefore we maintain our position that both a licence and payment of a permission fee are necessary for the inclusion of the extracts, and look forward to receiving the information regarding selling price requested below."

In this case the publisher appears to have been trying to circumvent the provisions of CDPA s.30 which allows for excerpts to be quoted for publication and which is based on Article 10 of the Berne Convention.[36] S.30 expresses no limit to the amount that may be 'dealt with' and applies to 'works' which, under s.28, are 'works of any description'. Thus there is no exclusion of this permission for any format or category of work. The provisions are not intended to apply only to newspapers and journals, and they do therefore apply to quotations in books. The test is purpose, not quantity, or anything else. This publisher's interpretation would render s.30 completely redundant and frustrate its purpose.

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[36] Berne Convention **Article 10 Certain Free Uses of Works: 1. Quotations; 2. Illustrations for teaching; 3. Indication of source and author** http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P144_26032
(1) It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.
(2) It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.
(3) Where use is made of works in accordance with the preceding paragraphs of this Article, mention shall be made of the source, and of the name of the author if it appears thereon.

- Another example of what may possibly be unjustified behaviour, concerns the NLA's (Newspaper Licensing Agency) application forms for new licences[37] which ask potential licensees to declare as follows:

Indemnity for past copying	Yes	No
We have copied newspaper cuttings for 6 years or more & require the full indemnity.	? ? ?	? ? ?
If No: (please tick one of the following)	? ? ?	
• We have copied newspaper cuttings in the past but only since……/……/…… (insert date) and require an indemnity from that date	? ? ?	
• We have not copied newspaper cuttings in past years and enclose evidence of our organisation's policy relating to copying copyright material	? ? ?	
• We have previously held a newspaper copying licence which expired on……………………............		

Our view is that the above wording on the application form for the various NLA licences presumes liability for any prior copying that took place and does not take account of the fact that some limited copying is allowed by statutory exceptions to copyright. As can be seen from the quote above from the application forms on their website, NLA also demands evidence of the applicant organisation's "policy relating to copying copyright material" from those who declare that no newspaper copying took place. However advisable it is to have a formal policy, such policies may not exist, as there is no legal requirement for organisations to have one and many do not.

Most potential library licensees who had contacted LACA felt intimidated by this wording. Because of general dissatisfaction felt by library licensees about various aspects of NLA licensing, in 2002-2003 LACA had long discussions over a year with the NLA about its licence terms with some positive results. However, NLA would not modify its position on this particular declaration.

Potential licensees who state they have copied from hard copy newspapers before taking an NLA Licence, but who also claim (particularly if they are non-commercial organisations) that they do not require backdated indemnity since the type of copying that took place was under one or more of the statutory exceptions, e.g. ad hoc copying by individuals for fair dealing purposes (CDPA ss.29-30), due to visual impairment (CDPA s.31A), or 'library privilege' copying by prescribed libraries (CDPA ss.38-43), have to argue their case with NLA to try to avoid being charged for backdated indemnity of up to six years. While of course this charge may not be made in every case as the NLA presumably exercises some discretion, the licensee is faced with having to prove it is 'not guilty' when the legal position is that the NLA needs to prove that infringing copies were actually made, not the other way round. NLA has established a reputation for litigation as was evidenced by the well publicised *Marks and Spencer* case[38]. We believe most new library licensees, who tend by nature to be risk averse, pay up rather than have the hassle of dispute, when perhaps they need not.

[37] http://www.nla.co.uk/ Click on How to Apply - Type of Licence Required and then on individual licence links
[38] Newspaper Licensing Agency v. Marks and Spencer plc 12 July 2001 [2001] UKHL 38

(13) **Copyright Tribunal**

There should be compulsory procedures for the swift initial resolution of disputes subject to the jurisdiction of the Copyright Tribunal, as a precursor to any full legal proceedings. The Tribunal's jurisdiction should also be extended to complaints about TPMs.

Justification

Following the Leggatt Report in 2001 (Tribunals for Users - One System, One Service), the Lord Chancellor's Department announced that the Copyright Tribunal is one that will be excluded from the new unified Tribunals Service. One reason for this exclusion was that cases "are of a specialist nature where the parties are invariably representative bodies that have UK-wide coverage and that use senior barrister (sic) to argue their cases."[39]

Article 3(1) of Directive 2004/48/EC on the Enforcement of Intellectual Property Rights provides that the measures, procedures and remedies to ensure the enforcement of relevant intellectual property rights "...shall be fair and equitable and shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays."

While the availability of the expertise of a specialist tribunal is welcome, it seems plain that there is currently no effective provision for the resolution of minor disputes by individual licensees and the current Copyright Tribunal procedure might well be deemed unnecessarily complicated or costly. The same criticism may also be made of the many steps presently required to challenge TPM restrictions, as described in proposal (3) above.

Restricting access to legal representation or to a court or tribunal could be contrary to treaty obligations (e.g. TRIPS Agreement 1994 Art.42) and the Human Rights Act 1998. However, it is now well established that it is legitimate to establish procedures for the swift initial resolution of disputes, with rights of appeal.

One option would be to extend and adapt the optional affidavit procedure under the Copyright Tribunal Rules 1989 (S.I.1989/1129 rule 14(3)), providing for a compulsory initial procedure subject to strict time limits.

Alternatively, similar to proposal (1), all reproduction rights licences and digital product licences offered to UK users might be required to include a clause providing, in the first instance, for the compulsory appointment and use of an independent arbitrator, adjudicator or mediator in the event of disputes. The new Patent Office Model Mediation Procedure & Agreement[40] could provide the basis for minimum standards of dispute resolution.

(14) **Moral Rights**

a. Remove the formality that a creator must assert his or her moral rights in copyright works and performances.

b. Remove exceptions to the moral right of integrity for journalism (newspapers and magazines), collective works of reference and translation.

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[39] http://www.cst.gov.uk/tribunal-reform.html

[40] http://www.patent.gov.uk/about/ippd/mediation/

c. Remove the facility of a general waiver of moral rights of integrity (s87), which relates to existing or future works. It would be more appropriate for publishers to obtain a licence from the creator that allows them to make corrections.

Justification

We think that the UK's statutory requirement for the formal assertion of moral rights is unfair on the creator, particularly since copyright itself arises without formality. Although Art. 6 bis of the Berne Convention[41] merely requires members to confer on creators the right "to claim" authorship, the UK law does appear to contravene Art. 5(2) of the Convention which requires that an creator's "enjoyment and exercise of these rights shall not be subject to any formality." To remove the assertion requirements for moral (and performing) rights would bring the UK in line with other EU Member States.

(15) **Development of Copyright Law**

We urge the UK Government to adopt the principles of the RSA's Adelphi Charter[42] and to seek to further the interests of the UK as a whole, i.e. not only the economic interests of UK plc but also the educational, cultural and human rights interests of the ordinary UK citizen and the development of UK society.

In particular, we urge that the Charter's principle quoted below, that copyright law development be rigorously evidence-based, be integrated into UK copyright law and into the UK Government's approach not only to the development of national copyright law but also as a Member of the EU when it is involved in negotiating about European copyright legislation and international treaties, conventions and trade agreements concerning copyright.

"There must be an automatic presumption against creating new areas of intellectual property protection, extending existing privileges or extending the duration of rights.

- The burden of proof in such cases must lie on the advocates of change.
- Change must be allowed only if a rigorous analysis clearly demonstrates that it will promote people's basic rights and economic well-being.
- Throughout, there should be wide public consultation and a comprehensive, objective and transparent assessment of public benefits and detriments.

We call upon governments and the international community to adopt these principles."

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April 2006

[41] http://www.wipo.int/treaties/en/ip/berne/index.html

[42] www.adelphicharter.org; English text at http://www.adelphicharter.org/pdfs/adelphi_charter2.pdf

APPENDIX 1 [Section (7) above (Database Regulations) refers.]

Text of the LACA submission to the European Commission's Consultation on the DG Internal Market and Services Working Paper: First evaluation of Directive 96/9/EC on the legal protection of databases (closed 12th March 2006).

DG Internal Market and Services
European Commission

Via Markt-D1@cec.eu.int 11 March 2006

Dear Sir/Madam

DG Internal Market and Services Working Paper:
First evaluation of Directive 96/9/EC on the legal protection of databases

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

The effect of the Directive

The Commission has recognised in its Consultation that there are a number of difficulties with the Database Directive and we agree this is so. We also agree with the Commission that there is no evidence that the existence of the *sui generis* right has actually benefited the European database industry so the objective of the Directive has not been achieved. The reported majority view of stakeholders who responded to the Commission's private online survey simply displays a natural reluctance to lose an existing protection. It is clear that US database industry has been able to dominate the commercial database market without the need for *sui generis* protection and despite the protection existing for European databases. It would seem that withdrawal of the Directive would not only serve the interests of deregulation, but also be unlikely to harm the European commercial database industry's ability to compete in the world market.

It should be remembered that there is also a widespread non-commercial database industry creating and re-using databases, much of which is undertaken by libraries, archives, museums, educational and research establishments. Non-commercial databases are created cooperatively by reutilising the contents of independent databases, often between institutions and often across international borders. Such projects include national and international union catalogues and potentially the proposed European Digital Library. This activity is of great benefit to the education and research community and to the information society as a whole.

While the *sui generis* right imposes an additional layer of rights to be cleared in order to create such collaborative super-databases, at the same time it provides a level playing field of protection when it comes to the participation of such non-original databases in European-wide collaborative public sector projects since the right is harmonised in all Member States.

However, we agree with the Commission (para. 5.1) that *sui generis* right is difficult to understand. The complex problems concerning the interpretation of the Directive pose barriers to further creativity and enterprise, and to research and communication. The information society and research community has largely coped by ignoring the Directive's existence but this can be perilous. For example, the lack of understanding of the right nearly removed the human genome data from the public domain through privatisation. In his speech at the launch of the Adelphi Charter[43], Sir John Sulston[44] referred to how the human genome database was nearly acquired by a commercial company in return for the promise of additional funding to the Project. It was not at first realised that the company would have acquired the *sui generis* right in the database and thus a monopoly over access to and dissemination of the data itself which is subject to only very narrow exceptions. Researchers who could pay the subscription fees would have found themselves bound by their licence not to disseminate the information to protect the owner's commercial monopoly. Since the human genome data underpins all research in genetics, any barriers to access and dissemination of the data would have completely undermined the efficacy and speed of further scientific and medical research.

Solutions

We believe that of the four options proposed by the Commission, only two are viable: to **repeal the whole Directive** or to **amend the *sui generis* right.**

Repealing the Directive is attractive to us in the UK since it is a neat solution and Member States would then revert to the protections they had before. With regard to the UK and Ireland, withdrawal of the Directive has a number of advantages. Repeal of the whole Directive is unlikely to harm database makers since nearly all UK and Irish databases, including non-commercial databases created by libraries and archives (which under the Directive are 'non-original'), would then be protected by copyright by reverting from the *droit d'auteur* test of originality to the lower 'sweat of the brow' test of originality. The situation for users would be eased as the raft of complexity introduced by *sui generis* right operating in tandem with copyright in original databases would be removed. Furthermore databases would cease to have perpetual term of protection, reverting to the copyright term for literary works.

Alternatively, **amendment of the *sui generis* right and other provisions of the Directive** would maintain harmonisation of protection for databases within the Internal Market. This would benefit library and archive database makers when participating in major cross-border collaborative projects of the kind mentioned above. However, we feel that should this option be chosen by the Commission, considerable amendment of the *sui generis* right is needed, as set out below, in order for it to work effectively.

Amendments to the scope of the Directive

The Directive has caused users of databases considerable difficulties of interpretation due to the complexities caused by the introduction of the *sui generis* right. The considerable interplay between copyright and the *sui generis* right within a database poses the greatest difficulties since nowadays so very many works, both printed and electronic, are now in fact classed as databases, to the extent that the class of copyright protected work known as a literary 'compilation' in UK copyright law has become largely redundant. Literary compilations are printed literary works and before the Directive was implemented used to include works now treated as printed databases. We think that printed 'databases' are better

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[43] www.adelphicharter.org; The RSA Adelphi Charter Launch, 13 October 2005 Transcript, p10 http://www.rsa.org.uk/acrobat/adelphi_131005.pdf

[44] Nobel Laureate and former Director, Wellcome Trust Sanger Institute, UK

treated as literary compilations since each printed edition is a static work akin to other printed literary works. To do this would furthermore avoid a lot of confusion.

- We **recommend** that the unnecessarily broad scope of the Directive be reduced by providing that *sui generis* right should subsist only in electronic databases.

Many not-for-profit libraries and archives participate in projects with commercial publishers by providing data such as catalogues or other datasets for the creation of indexes and search engines for repositories of data. It benefits society if, as producers of these databases, such libraries and archives continue to have access to the data they create under licence terms and conditions so they can make it available, adapt, add, store and preserve it and it prevents such data, which was created using public funds, from being locked up in proprietary commercial databases. Before the introduction of the *sui generis* right many licences hindered libraries and archives in this objective but its introduction has increased the bargaining power of libraries and archives as database producers leading to some improvements in licensing.

However, the European Court of Justice (ECJ) rulings of November 2004[45] significantly restricted the scope of the *sui generis* right by distinguishing between the resources used in the 'creation' of data and the 'obtaining' of data in order to compile database content with the result that while the activity of obtaining data is protected by the *sui generis* right, creating data is not. This removes *sui generis* protection from libraries and archives which create the data that makes up the contents of their non-original databases i.e. catalogues or metadata lists.

- This was not the intention of the Directive so, if the Directive is to be retained, we **recommend** that the sui generis right be amended in the light of the ECJ judgments to restore protection to all non-original databases.
- Additionally, we **recommend** that provision be made for compulsory licensing as originally intended by the Commission.[46] This would benefit libraries and archives as database users.

Amendments to address the complexities of *sui generis* right concurrent with copyright

Many databases comprise copyright protected works and where they are 'original' at the level of *droit d'auteur* originality defined by the Directive, they are protected both by copyright and *sui generis* right. The two rights appear to be completely enmeshed and are impossible to unravel in order to establish what may or may not legally be done with the information contained in the database under an exception or limitation to copyright or *sui generis* right.

Quite often the two rights and their exceptions and limitations contradict each other, yet the Art. 7(4) provision that *sui generis* right is 'without prejudice' to copyright or other rights does not establish which takes precedence in a conflict of law. Art. 7(1) relies on interpretation of the term 'substantial' which is undefined and gives 'qualitative' investment as a criterion for the subsistence of *sui generis* right, yet it fails to distinguish how 'qualitative' investment is different from the intellectual creativity that gives rise to copyright and fails to recognise that copyright and *sui generis* right have different terms and different exceptions.

Our experience is that there is widespread confusion as to what *sui generis* right is, what is protected by copyright and what by *sui generis* right, particularly since most databases are actually protected by both rights. The result is a chilling effect when it comes to extracting

[45] Fixtures Marketing Limited v. AB Svenska Spel (C-46/2) and The British Horseracing Board Ltd and Others (C-203/02)

[46] Directive COM(93) 464 final–SYN 393, Brussels 4 October 1993. Compulsory licences and arbitration were included in Art. 8(1)-(3).

and re-using content for non-commercial purposes since the exceptions for the *sui generis* right are far too narrow. The creation of non-commercial databases is hampered because the rights that need to be cleared within a single database are made so complex and entwined. We wish to see a situation in which most non-commercial databases can be created and re-used for non-commercial purposes without the need for permissions or waivers.

- We therefore **recommend**
  (i) that the references to 'qualitative investment' in Art. 7 be removed since they are unclear and ambiguous with regard to any copyright subsisting in the database;
  (ii) that the exceptions to the *sui generis* right be harmonised with the list of exceptions in Art. 5 of the Information Society Directive 2001/29/EC.

Amendment to the Term of protection

Another major problem is the term of protection for databases. Under Art. 10(3), significant additions made incrementally to a database allows for the term of protection to be re-set for another 15 years at each addition. This creates a perpetual term of protection for both original and non-original components in the database, which is absolutely contrary to the principle enshrined in all other intellectual property rights that protection is for a limited term. Unless the protection is waived such databases will never enter the public domain.

- We **recommend** that the term of *sui generis* right be limited to 15 years from the first publication of the database but that portions of it may be protected for a further 15 years only if reliable authenticated date stamping is applied to the revised parts, allowing older data to enter the public domain.

Amendment to the concept of 'lawful user'

The failure to define the term 'lawful user' in the Directive has led to confusion amongst both users and database makers, which is compounded by the Information Society Directive 2001/29/EC referring more straightforwardly to just 'users'. We see a 'lawful user' as being someone who is allowed access to and use of a database by statutory right and/or by the terms of a licence. However, many rightholders fail to recognise access and use of databases by statutory right and are (we think wrongly) defining a 'lawful user' only as someone who has directly obtained a licence for access and use of the database. The interpretation of Art. 6(1) and the effectiveness of Art. 15 of the Directive require the deletion of the word 'lawful', or that 'lawful user' be defined to include a user who is making use of a statutory exception (by definition a 'lawful' use).

- We **recommend** that the term 'lawful user' be deleted from the Directive and replaced with 'user' to bring it into conformity with the Information Society Directive. An alternative is to insert the UK's definition[47] of 'lawful user' into the Directive.

Yours sincerely

Barbara Stratton
Senior Adviser, Copyright, CILIP and Secretary to LACA

[47] United Kingdom. Copyright and Right in Databases Regulations, 1997. S.I. 1997/3032 Reg. 12(1): '…"lawful user", in relation to a database, means any person who (whether under a licence to do any of the acts restricted by any database right in the database or otherwise) has a right to use the database;' http://www.opsi.gov.uk/si/si1997/73032--c.htm#19