



MLA Response to the Gowers Review on Intellectual Property

The MLA Partnership

The Museums, Libraries and Archives Council (MLA) and the nine regional agencies work in partnership to provide strategic direction and leadership for museums, libraries and archives across England. Together we work to improve people's lives by building knowledge, supporting learning, inspiring creativity and celebrating identity. The partnership acts collectively for the benefit of the sector and the public, leading the transformation of museums, libraries and archives for the future.

Our aims are:

- To increase and sustain participation
- To put museums, libraries and archives at the heart of national, regional and local life
- To establish a world class and sustainable sector
- To lead sector strategy and policy development

Introduction

MLA welcomes the Gowers Review. Intellectual property is a major issue for museums, libraries and archives, as many of the collections they hold, and the knowledge that they curate and the education that they provide depend on the creativity of the past. They also serve to inspire creativity and innovation in the present, and also generate substantial income from the exploitation of their own intellectual property.

However, recent copyright legislation has significantly strengthened the position of rights holders, making the normal operation of museums, libraries and archives more difficult. The use of new technology, and the increasing education and non-commercial use of collections is meaning that institutions are having to spend more staff time, and hence money, in clearing rights, often disproportionate to the commercial value of the materials involved. There needs to be a greater balance between the interests of rights holders and users.

MLA is aware of a number of submissions of evidence by other bodies and groups from the museums, libraries and archives sectors, including those by the British Library, Museum Documentation Association and the International Association of Music Librarians. MLA supports these more detailed responses. MLA has also contributed in detail to the joint submission by the Library and

Archives Copyright Alliance (LACA) and the Museum Copyright Group (MCG). As a result, this response will concentrate only on a few specific issues raised in the consultation.

Specific Issues

Current term of protection on sound recordings and performers' rights

The extension of the term of protection on sound recordings and performance rights is not, in our view, to be recommended. We would find the proposal of extending the term retrospectively to be particularly difficult. In the past, this approach has created huge problems in the museum, library and archive sectors where previous legitimate uses of out of copyright material have become illegal. This has caused knock-on problems in terms of respect for IP legislation, as well as more pragmatic problems related to the publication of materials that were out of copyright.

In addition, as museums, libraries and archives act as repositories for many sound recording, particularly oral history recordings of no commercial value, any extension of the period of copyright will cause additional problems here. Many oral history recordings are now coming out of copyright, which is particularly helpful where institutions wish to give access to recordings that were made when the understanding of IP legislation was much less well understood. Staff time would need to be spent in clearing these recordings when they have enormous cultural and historical value, but no commercial value.

Copyright – orphan works

The issue of the clearance of orphan works is a major one for the cultural sector, where many institutions are making their collections more widely available through digitisation programmes. MLA acted as expert advisers to the Big Lottery Fund on a £50m content creation programme. The programme provided funding to digitise learning resources for cultural enrichment, reskilling the nation and promoting active citizenship. In these projects the cost of clearing IPR across all the projects was considerable (an estimate is in the order of £500,000 in staff time) and much of this related to attempts to clear local photographs taken many years ago where the photographer was uncertain or where the studio has gone out of business. MLA funded an initial study into alternative ways of dealing with orphan materials, where the aim was solely to enable access to collections of material for non-commercial educational purposes, and recognised that any commercial exploitation would be subject to standard licencing terms on a commercial basis.

We believe that it should be possible to establish a model where non-commercial digitisation of orphan works is permitted for the purposes of giving access to

collections held in publicly-funded museums, libraries and archives. The institutions should be able to retain high quality archival copies, and also be able to publish online at an agreed level of quality that would permit some uses (such as including a work in a school project) but is not of sufficient quality to allow commercial reproduction (including print). For still images, an example would be online publication at a resolution of 800x600 pixels at 72 dpi, and similar models could be identified for other media types. Commercial uses of the images would be subject to a standard agreement, perhaps with a copyright licencing society. If a rights-owner were to come forward, then either the image could either be removed from the website, or the rights-owner would be paid the standard fee that would have been payable if they had previously been identified.

At this stage, there appears to be general agreement that this could be a workable model, but three factors need to be agreed. The first factor is an agreed understanding of what constitutes a reasonable attempt to trace a rights-holder in these circumstances. The second factor is agreeing a scale of charges with relevant representatives of rights holders. The third factor is that any model must recognise any existing 'free licence' agreements already in place between institutions and rights holders.

MLA believes that such a model would enable the online publication of more materials that are of significant educational, cultural and historical value, and at the same time open up the potential commercial licencing of those materials under fully commercial terms and conditions.

MLA also believes that it is important to agree mechanisms for demonstrating the materials that can be re-used for non-commercial purposes. This is for two reasons, firstly to promote the re-use of resources to boost innovation and creativity. At the same time, it can be a tool to educate users to understand that although some material can be re-used in this way, other materials cannot, as they are subject to copyright. These approaches are powerful educational tools to promote respect for IP legislation. MLA has supported the idea of Creative Commons, and has recently joined the Creative Archive Licence Group (http://creativearchive.bbc.co.uk/archives/creative_archive_licence_group/) in order to enable museums, libraries and archives to actively engage in the debate about IPR.

Copyright exceptions – fair use / fair dealing

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

MLA believes that the existing exceptions remain valid, particularly in the digital age. There are a number of issues where exceptions are made increasingly difficult through DRM mechanisms – for example making it impossible to repurpose materials so they can be accessed by the visually impaired. These

same DRM mechanisms also impact on the ability to preserve digital resources for the long-term, a major issue for museums, libraries and archives.

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

Current exceptions do need some updating to maintain the spirit of exceptions when they were defined in terms of print media. In addition, the definitions of 'library' and 'educational institution' are increasingly unhelpful. Museums and archives, as well as libraries hold, preserve and enable access to copyright materials, and they should operate under the same set of exceptions.

UK legislation should have a private 'fair use' exception, but there should be clear guidance as to what is permissible, and what is not. This should enable the transfer of materials from one format to another for private purposes, enabling access by visually impaired users.

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

MLA is aware of particular problems in the context of the re-use of resources, where the implementation of Virtual Learning Environments can lead to the creation of complex objects with many third party rights. In the vast majority of cases, the rights issues are real, placing a substantial administrative burden on teachers and learners, but have no detrimental financial impact on the commercial sector.

The development of a National Education Network offers new opportunities for the management of copyright materials in education. Within the next two years all learners will be authenticated onto the National Educational Network, and this development offers huge potential for enabling access to copyright materials within this secure environment, reducing the concerns of rights holders when they are licencing materials to the educational sector.

The implementation of the National Education Network and the development of other strategies by the Department for Education and Skills, such as ePortfolios and Personal Learning Spaces, raises other issues that the Review team may wish to consider raising directly with the Technology Group at DfES.

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

The issue of preservation is also not adequately dealt with under current exceptions, where institutions should be able to make a 'reasonable' number of preservation copies, should be able to make preservation copies of sound and moving image materials, and should be able to make preservation copies of

internet sites. In each case, these preservation copies would not be made available for wider public use until after copyright has lapsed.

Legal sanctions on IP infringement

There is much fear of the possible implications of inadvertent breaches of IP legislation by employees of public sector cultural institutions. The concern is that by digitising and making available an orphan work for non-commercial pro bono purposes, the institution will be liable for a serious infringement of IP legislation. In such cases, institutions have been threatened by rights holders of being sued for the sum of £20,000 or more. It would be helpful to clearly establish ground rules for the compensation to rights holders that would be due in such cases. This could be set at the level of the licence fee that would have been payable if the institution had been able to trace the rights holder. MLA would also like institutions enabled to make available print copies of such works on a similar basis to that of providing copies of materials under FOI requests, where public bodies are able to make charges relating to the full cost of providing these copies.

However, if an institution were to make works available as part of a fully commercial service without making adequate arrangements with rights-holders, then this would clearly be an infringement of existing legislation.

MLA would welcome the opportunity to discuss some of these issues in further detail with the Gowers Review Team, Please make contact in the first instance with:

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