

GOWERS REVIEW OF INTELLECTUAL PROPERTY

SUBMISSION BY THE NATIONAL ARCHIVES

The National Archives is a Government Department under the Secretary of State for Constitutional Affairs and Lord Chancellor. It selects, preserves and makes publicly available the records of English and British Government from Domesday Book (1086) to copies of government websites. It also promotes higher standards of preservation of, and public access to, non-governmental archives of all kinds throughout the country.

The National Archives the opportunity to contribute to the Gowers Review of Intellectual Property. It runs large-scale public services, which in 2005-06 welcomed over 260,000 readers to Kew and the Family Records Centre, provided nearly 190 million page impressions from its website, and supplied over 250,000 record images online. Copyright issues are very much to the fore as TNA considers how best to meet the future needs of its onsite and online users.

The following comments reflect not only The National Archives's perspective as it develops innovative online services for the digital age but also takes account of the interests of the wider community of archive and information professionals.

Overall messages

- Archive services have a wealth of largely unpublished material, now including digital records and digital copies of paper records, which contain historical information often of considerable interest to the citizen. With increasing public interest in personal and local identity, there is significant value that this content can add to people's lives.
- The present copyright provisions impose a considerable burden on archive services and prevent them from making information as widely available as possible to researchers. This is contrary to the current trend, and policy approaches to make public information more accessible
- In a digital age, there is the potential to do far more with archival content than previously – from allowing schoolchildren to create composite essays or videos from using different archival material, through to allowing access across the world. The current copyright legislation was not written in the digital age, and whilst it is format neutral, some of the provisions either don't map across to the digital environment or actively restrict usages that appear 'obvious' to archivist and users alike. The danger of not modernising the law to allow use in a digital age is that users will disregard copyright law, or that material, which could add significant value to researchers of all kinds, will not be accessible.
- It is not at all clear that the present copyright arrangements positively promote innovation – and in many cases we believe that they inhibit it, by significantly restricting the use of archival content

The balance between commercial and wider public interests

- Most archival sources are unpublished and were not created for commercial gain
- Use of these sources by researchers is relatively rare for truly commercial purposes – and there is often limited opportunity for commercial use as a result of the nature of the content
- The existing definition of ‘commercial research’ is very broad and therefore currently inhibits archivists from offering high quality public services
- There is a dichotomy between the copyright constraints in providing copies, which are intended to protect commercial interests, and the presumption that requests under the Freedom of Information Act should be answered through the provision of copies if that is what enquirers prefer
- The National Archives wishes to make available ‘born digital’ records from government departments available from its website but to do this fully and effectively it will need a provision enabling it to communicate copyright works, with suitable safeguards for owners’ interests

Copyright exceptions: fair use and fair dealing

- The UK should implement in full the EU’s Information Society directive, which would have the liberalising effect of increasing the list of exceptions
- Greater clarity in the legislation is needed so that works may be digitised and made available remotely and to ensure that born-digital works may be digitised may be preserved, copied and made available
- There should be safeguards put in place so digital rights management (DRMs) do not upset the delicate balance between owners’ rights and the right of the citizen to free information – if this does not happen, then there could be serious restrictions on copying by archives and libraries for non-commercial research
- DRMs could also prevent archivists and librarians from copying digital media onto new media for posterity

Copyright in ‘orphan works’

- This is a huge problem in nearly all archive services in the UK that hold material created by private individuals or defunct organisations. This means that material is inaccessible and caught in a loophole where no-one can exploit it.
- We believe that provision needs to be made for allowing the reuse or digital access to orphan works.
- Solutions to allowing such access include an exception permitting the use of copyright works once reasonable efforts to trace the owner have failed, support for the setting up of a non-statutory register of copyright owners, a central online notice board for the provision of licences, and provision for collecting societies to offer licences for orphan works. This issue is being explored in the US at present, and the conclusions may be relevant to the UK context as well.

The following detailed comments and evidence relate solely to copyright, since it is that branch of intellectual property rights that affects The National Archives, and archives generally in the UK.

Introduction

Archival institutions exist to preserve the records of the past for the benefit of present and future generations. The great majority of those records are unpublished, and were created as part of an administrative process (such as business, local authority or government files) or in the course of normal social interaction (such as letters and diaries). They were not created, on the whole, for subsequent exploitation and use of them rarely causes any damage to the economic or commercial interests of creators and their successors. On the other hand, archivists, like their library and museums colleagues, respect the rights of others and are diligent in ensuring that they conform to both the letter and the spirit of the law.

The development of digital technology and means of communication have had as significant an impact on archives as they have elsewhere. Records are now created and preserved digitally while existing analogue records are being digitised to improve public access to them. The expectation of users, and of ministers, council members and directors, is that digital and digitised records will be made available as widely as possible, using modern methods, notably the internet. The availability of records in physical record offices poses no copyright problems, and special provisions exist for the supply of copies, but the law of copyright has not kept pace with change and now presents a barrier to the development of the new services that the public desires.

Given the minimal damage that use of archival materials can do to the interests of most rights holders, copyright imposes an unnecessarily heavy burden on archives. The duration of copyright in unpublished literary works is grossly excessive, the requirement to obtain and keep declaration forms covering the supply of copies, which are never consulted, is costly, and the need to seek permission to use historical works, in the knowledge that the great majority of rights holders will be untraceable, is not cost effective. A free and open society needs access to information, including historical information, and the information society can only benefit if the unhealthy restrictions imposed by copyright are eased. The purpose of copyright is to reward and protect creators; those creators are dependent on source materials. The public interest will be served if those source materials are available as freely as possible where such freedom causes no damage to the interests of rights owners.

General Questions

1b Most people have heard of copyright, though some call it ‘copywrite’, but relatively few know much about it. There is a general perception that, as with patents, trade marks and registered designs (with which The National Archives and archives generally have few dealings), there is some sort of registration process. This perception is not helped by the general prevalence of information about US approaches, through television, films and publications, since in the USA there is indeed a registration system which is compulsory for US citizens who wish to sue for infringement of their copyright. The National Archives receives enquiries every week from members of the public seeking advice on how they should protect their work.

The Patent Office has made efforts to make material available for use in citizenship classes in schools, but this seems to have had a limited impact. The education system, at school and at university, is the obvious tool to inform people of what copyright is, what it protects and how it is acquired, but classes covering the subject will never have any success without the active support of central government. If general studies classes at school, and introductory sessions on undergraduate and graduate courses, were to include instruction on plagiarism and intellectual property rights people would over time be far better informed. The result would be of benefit to the economy by reducing piracy.

There are also barriers from the over-prescriptive definition of some classes of work. Artistic works in particular are precisely defined, in ways which prevent protection for some modern forms of artistic expression. Some of the works exhibited in the Turner Prize exhibitions at the Tate come to mind.

2a The National Archives is a government department. Its operational systems and commercial publications are protected by copyright, and reproduction fees (unrelated to IP rights) are charged for the downloading and use of images of historical records. However, many of its products are made available freely for use especially by the archival and records management communities as a public service.

2f It is not at all clear that copyright does promote innovation. What it does is protect innovative works once they have been created. There is a risk indeed that copyright in some of its manifestations, notably digital rights management systems (DRMS), actually hinders rather than promotes innovation. Innovative new writing in the world inhabited by archives requires access to and use of a great deal of earlier material. Fear of copyright infringement, inability to trace rights owners, and even inability to use appropriate parts of other works all get in the way of new research and new writing. Some of these issues are addressed in more detail later in this submission. Sir Isaac Newton was not worried by copyright infringement when he admitted that he had seen further by using the works of others, “standing on the shoulders of giants.” What he did not admit was that even in using that expression he was relying on John of Salisbury, who wrote: “We are like dwarfs sitting on the shoulders of giants. We see more, and things that are more distant, than they did, not because our sight is superior or because we are taller than they, but because they raise us up, and by their great stature add to ours.” Tom Lehrer recognised that he relied on others, singing in 1953 “plagiarise, plagiarise, plagiarise, only be sure always to call it, please, research.” T S Eliot did too: “Immature poets imitate;” he wrote, “mature poets steal.” There was great surprise recently when the Hyperion classical recording label lost a significant court action against an editor of 17th century music. In fact the result was unsurprising and there was a precedent, but the case highlights the impact that rights can have on the ability of people to innovate. Hyperion’s run of highly successful releases of recordings of the music of little-known early composers is likely now to grind almost to a halt, and it seems the company could even collapse. We need to ensure that our copyright system retains the balance that is so necessary to encourage innovation and yet at the same time to protect innovative works and the exercise of skill.

2f The principal barriers to licensing in the archival sector are orphan works (see below) and ignorance about copyright. The clearance of rights involves skill and

tenacity, while the negotiation of suitable licences requires different skills combined with some knowledge of relevant law. Both activities tend to be treated as unfortunate complications rather than as vital activities integral to many projects. Education is again at least a part of the answer.

2j It is relatively rare that one comes across copyright being used primarily defensively or as a weapon. There is one notable example from modern literary studies. The country poet John Clare died in 1864, 142 years ago. During his lifetime he had managed to publish some 300 poems, but the remainder of his output, amounting to around 3,000 poems, remained unpublished. Under UK law, copyright in unpublished literary works will not expire until 2039 at the earliest; in the USA for some material the equivalent date is 2047. It appears that the rights to these unpublished works were (or may have been; the question has never been tested in court) acquired by his publishers, and from them they were bought in 1965 for £1 by an American Clare scholar. He has spent a large part of his academic career publishing numerous volumes of Clare's poems with minimal editorial intervention, preserving all the quirks of the original manuscripts. This has had the laudable consequence that Clare's work is now accessible in modern editions, but there are problems. Other scholars wishing to publish Clare's works have to wait to obtain permission, and in some case they have had to pay for the privilege. The result has been that few try, so that Clare studies have been dominated for forty years by one man. This in turn has led to what one scholar has called "the impoverishment of editorial debate compared with other Romantic writers, the absence of challenging alternative views, the deadening hand of the authorised 'definitive version'". What is particularly interesting is the justification offered. The American scholar has written that he is using the copyrights because 'my lifetime efforts are surely worthy of such limited protection free from opportunistic replication.' This seems to reveal a poor view of his fellow scholars, and does not explain how, say, Wordsworth or Keats scholars manage to survive when they do not enjoy similar protection for their source materials. If his own editorial contributions are sufficient he will have a new copyright in his new editions, which should give his scholarly endeavours ample and deserved protection. It is sad that he feels the need in addition to use copyright as a weapon to fight off scholarly competition by keeping his sources to himself. Scholarly debate and the provision of editions of the works of a great poet which are accessible to the general public is surely more than mere 'opportunistic replication'.

3c The exceptions regime is a particular burden for archives, especially as it is coupled with a preference to be diligent in dealing with copyright issues once they have been recognised. The great majority of archival materials are unpublished and were not created for commercial exploitation. Use of them by archives and by researchers, is also relatively rarely for truly commercial purposes. The communication to the public of digital copies of archival materials or the inclusion of copies of such materials in catalogues (both on- and off-line) are essential parts of modern public services and would have limited if any impact on the interests of rights owners, yet the difficulties confronting such activities are substantial. Equally, the inclusion of an illustration in a learned publication will enhance the publication and might even enhance the reputation of the rights owner, but will cause no real damage to that rights owner even if the publication is 'commercial'.

Research in archives, as in libraries, has been significantly hindered by changes introduced as a result of European legislation which limited the research for which copying in such institutions was permissible solely to non-commercial research. In principle this change was understandable: why should rights owners see their work used for the commercial benefit of others? However, the reach of 'commercial research' is very great and the change has had a very significant impact on the ability of archivists and librarians to offer high quality services to members of the public. There are other problems with the library and archive copying provisions, discussed below.

- The limitation to non-commercial research is properly justified on the grounds of damage to the commercial interests of rights owners. However, the vast majority of rights owners in literary archival material are unaware that they own those rights, and have no commercial interest in them at all. How can they have if the work was created maybe 250 years ago? If the copyright term in the UK for unpublished literary, dramatic and musical works were to be brought into line with the standard term (life of the author plus 70 years or creation plus 70 years if the work is anonymous) as it is elsewhere in Europe, some of the problem would be removed since early 19th century and earlier works would cease to be protected.
- The research limitation in the UK is to non-commercial research. The directive uses a different expression, limiting copying by librarians and archivists to research which results in no direct or indirect economic or commercial advantage. It is to be expected that if the UK courts are ever asked to rule in this area they would look to the directive not the UK regulations (as they have done, for instance, with databases). This limitation is very broad, and has been interpreted to exclude anything for which the researcher will gain even insignificant royalties, the work of charities in preparing fund-raising campaigns and the work of agents carrying out family history research on behalf of private clients. It would make a great difference to archival research if the limitation could be amended to exclude only genuinely commercial-scale activities.
- It is to be remembered that research is not the same as publication or communication to the public. The act of research in itself, especially when conducted in an archive, can rarely have an impact on the interests of rights owners. It is the use thereafter of the work, as a result of the research, that could have an impact, and direct use would clearly infringe the rights of the rights owner though actual damage to the interests of that rights owner is much less likely.
- It is a peculiarity of UK law that shortly after the changes made to the definition of research in libraries and archives which so limited copying, the Freedom of Information Act was introduced with a requirement that applicants for information be supplied with copies of documents containing the relevant information if they asked for them, unless such supply was not 'reasonably practical'. UK government advice is that the supply of copies is not an infringement of copyright and so is practical. Very many of the archives in the UK (including all national, local authority and university archives) are authorities, or are parts of authorities, under the Freedom of Information Act. This means that they may receive FoI applications and (if the information is not exempt) must normally supply copies, even to members of the public conducting commercial research. There is a dichotomy here which has not

been resolved and which means that different types of archive may be operating different copying regimes for the same users.

- The library and archive copy provisions for research and private study apply to literary, dramatic and musical works only. They do not permit the supply of copies of artistic works, although they do permit the supply of copies of 'illustrations' to literary, dramatic and musical works. This has the effect that, for instance, a diary may be copied as a literary work, and any pictures in it that illustrate the text being copied may also be copied, but the illustrations may not be copied on their own. The exclusion of artistic works in their own right means that archivists may not supply copies of the millions of copyright photographs or maps they hold, even for private study and non-commercial research. The relevant provision of the EC directive does cover artistic works, and so should the UK statute. There are special provisions permitting the archiving of some types of work (recordings of folksongs, broadcasts), but while copies of folksong recordings may be made for users on the same terms as copies by librarians and archivists, there is no general provision permitting any copying, or even playing or showing, for users of films, other sound recordings or broadcasts, all of which are now widely held in archival collections.
- The library and archive copying provisions are not well-adapted to the digital and on-line world. There is nothing even that explicitly permits the availability to the public in an archive of digitised or born-digital material. The copying provisions themselves, and particularly those dealing with declaration forms (if they are really required), should be adapted to deal with the receipt of digital forms and with the supply of digitised copies and copies of born-digital records, with suitable safeguards to prevent inappropriate use or the passing of copies to others.
- The special provision covering the copying of public records is similarly ill-adapted to the digital and on-line environments. The inevitable expectation of ministers as well as of members of the public is that digital material will be made available to the public as widely as possible. This means not just access on the premises of a record office but access on the internet. The National Archives is now reaching millions of users each year through its on-line documents, but those available have mostly been selected on the basis that they are sufficiently old that any risk of infringement is negligible or that they are Crown copyright. The government's move, for all departments, towards electronic records management and file storage means that in future records will arrive in The National Archives in digital form. Given the quantities it would be impossible reliably to identify only Crown copyright material for internet access, even if that were desirable from a research point of view. Thus The National Archives needs a provision permitting it to communicate copyright works to the public, on its website, with suitable safeguards, which could be negotiated, for the protection of rights owners' interests.

3d Licensing is always a problem with unpublished literary works since there is, and can be, no licensing body which can represent the interests of, for instance, the writers of private letters and diaries. Rights clearance in every case requires a search for the individual rights owner.

3e,3f The problem of orphan works is a very significant factor for all archives now that pressure is on for them to digitise material and make it available remotely. The issue is discussed below in the Specific Issues section. More generally, licensing can pose problems if licensors seek to define licence terms in ways which diminish the user's ability to enjoy the statutory limitations and exceptions. The database regulations explicitly make void any licence term that seeks to prevent a lawful user from using an insubstantial part of a database and the computer programs regulations similarly avoids any contract term which seeks to prevent certain activities with programs. The copyright exceptions and limitations were introduced to provide balance against the monopoly rights of copyright owners. Private contracts should not seek to upset this balance, so a similar provision to protect the general application of copyright limitations and exceptions would be very beneficial.

4f The cost of legal proceedings (both financial and to reputation) is very great, and would be extremely damaging even to a large institution but prohibitive to a small archive, even if they are sure that they are in the right. Rights owners are aware of this. In the spheres of patents, trade marks and designs there are remedies for groundless threats of infringement. Small users would be better served if a similar provision were made for a groundless threat of copyright infringement.

4g Members of the public generally are more interested in historical source materials of the last 100 years or so than of earlier periods: they wish to study photographs of the places where they and their parents and grandparents grew up, to study life in Britain in the two world wars and the inter-war period, to study registers and returns which identify their ancestors. On the other hand, it is material from this period that poses the greatest risk if it is digitised and made available remotely without permission. There is great willingness to act properly and lawfully; archivists would much rather respect the rights of others than infringe them. Given the problems posed by orphan works, though, archivists who wish to digitise copyright materials are forced to conduct risk assessments. Their digitisation, and thus their public access policies, are determined in large part not by archival and research priorities but by the fear of litigation, which in many cases is probably unreasonable.

Specific issues

Copyright exceptions: fair use and fair dealing

The current exceptions (which cover more than just fair dealing) are broadly satisfactory, providing most users with reasonable access to and use of works without damage to the rights of rights holders. However, they are more limited in scope than is permitted by European legislation. The Information Society directive was an attempt to harmonise aspects of copyright, and notably the principal rights and exceptions, across Europe. Harmonisation has not succeeded because each member state was at liberty to pick and choose from the list of exceptions. The UK could demonstrate its European credentials, and set an example to the other member states, by deciding to make the full list of exceptions in the directive directly applicable.

Some problems with the special exceptions for material in libraries and archives are discussed above.

The fair dealing exceptions require that the use be fair. Fairness has been considered extensively by the UK courts, and the tests that they have devised are applied as far as possible, but those tests are inaccessible to the average member of the public and are not formulated in clear terms. A much more accessible definition is in the Berne Convention, whose three-step test has been copied into the WIPO Copyright Treaty and the EU information society directive. It would improve the clarity of the law if the terms of the necessary test of fairness were incorporated in the statute, preferably in a rather more developed form than provided by the three-step test, as it is for fair dealing in Australia and New Zealand and for fair use in the USA.

There seems little need for a broad fair use exception as in the USA, since the present European and UK exceptions regime is relatively clear and precise. There are some areas however where other uses than those covered in the 1988 Act should be regarded as fair dealing or legitimate:

- copying of films, sound recordings and broadcasts from copies or broadcasts legitimately obtained or received, for private use, should fall within fair dealing;
- provision to allow the reproduction of copyright works in non-sale exhibition catalogues and publicity for exhibitions (currently artistic works only may be copied for inclusion only in sale catalogues);
- the extension of the library and archive copying provisions, as amended, to museums, galleries and other cultural institutions;
- provision to clarify that cultural institutions may make digital copies of all kinds of works and may copy all digital works in order to preserve them on new media and in new formats as old media decay and new technology develops;
- there is a desperate need for an exception to deal with orphan works, for which see below.

If the exceptions and limitations are designed to ensure that the interests of rights owners are not damaged there can be no grounds for compensation to rights holders; they have not suffered and thus need no compensation. Moreover, in the archival field there is no licensing body which can or could represent the disparate interests of the huge numbers of owners of rights in unpublished literary works. These rights lie in individual letters, diaries, photographs and other materials not originally created in the expectation of gain from commercial exploitation.

The preservation of copyright works in archives present new problems now that records are being created digitally. DRMS pose one problem (see below). Greater clarity is needed to ensure that works may be digitised so that they may be made available remotely, as demands for remote access grow, and to ensure that born-digital works may be preserved, copied and made available. This is especially important for education, a field in which the use of web-based source materials has grown rapidly and will continue to grow. Without exceptions to cover the communication of works to the public on websites, there will continue to be barriers between the public and the information it desires and needs.

The National Archives has participated in the preparation of a list of proposed amendments to the 1988 Act by LACA (Libraries and Archives Copyright Alliance), and endorses those proposals.

Copyright: digital rights management

DRMs are an important mechanism to enforce rights, and we recognise their value, but they should not be allowed to upset the delicate balance struck by copyright law between the right of a copyright owner to protect his property and the right of the citizen to free expression, access to information and the use, within defined limits, of that information.

Unless means to evade them are provided by rights owners, which is currently unlikely, DRMs are capable of preventing legitimate

- copying for non-commercial research, private study, criticism, review and current news reporting, and for the disabled;
- copying by librarians and archivists for their users for non-commercial research and private study; and
- copying by librarians and archivists onto new media in order to preserve the content for posterity, given the inherently short life of digital carriers.

Rights owners using DRMs should be required:

- to allow limited copying by users;
- to allow copying within existing or amended statutory limits by librarians, archivists and staff in other cultural institutions; and
- to provide keys to unlock DRMs to specified libraries and archives, such as national, local authority, university and specialist archives, legal deposit libraries, and national, university and specialist libraries as trusted intermediaries to enable them to make preservation copies and to migrate them to new formats as technology develops.

As discussed above, UK law should not permit licensing terms imposed by rights owners to over-ride statutory exceptions and limitations.

The current clumsy and ineffective scheme for users to challenge rights management systems which prevent them using statutory limitations and exceptions by appealing to the Secretary of State should be replaced. Any replacement should be based on best practice in this area elsewhere in Europe. An independent regulatory body might be one solution, but funding would be an issue.

The National Archives was party to the LACA written and oral evidence to APIG on the issue of DRM and would draw the Review's attention to it

Copyright: orphan works

Orphan works are a huge problem in archives. Virtually every archive in the UK has at least one collection containing such works. They include letters from private individuals or defunct companies and organisations, which comprise many collections of private papers. The National Register of Archives at:

<http://www.nationalarchives.gov.uk/nra/>

has records relating to collections of papers of some 46,000 individuals, 9,000 families, 29,000 businesses and 75,000 organisations, some containing just a few items but others containing hundreds of items. Orphan works also are to be found in

their hundreds of thousands in collections of photographs, especially documentary photographs. Very few collections contain useful data on authorship or ownership at the time of creation: photographs are anonymous, signatures are illegible and the status of the author (whether as employee for instance) is unclear. Without even that information, the faint chance of finding a present-day rights owner vanishes.

Some examples of orphan works in archives are:

- the National Archives has a very significant collection of 19th and early 20th century photographs, with (unusually) information about authors and contemporary rights owners. At least half of the 400,000 or so images are now orphans.
- a local archive has a collection of nearly 3,000 images of the town by an early 20th century photographer whose descendants are unknown;
- a university archive has a collection of nearly 3,500 decorated book papers of which well over half are orphans;
- another university archive has a collection of mid-20th century fashion designs from a defunct fashion house, the whole of which is effectively unusable;
- a specialist archive has 50 collections containing over 1 million works in all, about 25% of which are estimated to be orphans; and
- a regional archive has a large collection of oral history recordings (some 10,000 in all), many of which were made at a time when knowledge and understanding of intellectual property rights was limited. In order to use these recordings they now need to trace the original contributors or their successors. Given that the information contained in the recordings was not, on the whole, personal but related to the community, information which should be publicly available has become privatised.

There are several things which could be done to alleviate this problem, the first of which is the most important:

- provide an exception which permits the use of copyright works if, after reasonable enquiry, the user has been unable to identify and trace the copyright owner. Reasonable enquiry should be defined. If the copyright owner comes forward after use has begun, with appropriate evidence of ownership, he should be entitled to require that a licence be taken out and to receive fees for past and future use at the same level as the fee which would have been set if a licence had been granted in advance. If the user can show, by evidence of his enquiries, that reasonable enquiries were undertaken, this should be a complete defence to any action for infringement.
- provide support and encouragement for a non-statutory register of copyright owners. The WATCH database, the work of the universities of Reading and Texas using their own resources, at <http://tyler.hrc.utexas.edu/> is already well-established. With funding and publicity it could become an invaluable resource for those seeking to trace rights owners, but it must be recognised that any voluntary register will itself raise problems of accuracy, currency and legitimacy (are the rights actually owned by the person registered?).
- central provision of an on-line noticeboard on which applicants can post their desire for licences, and to which rights owners can subscribe so that they receive automatic notification of notices in their field.

- provision to encourage collecting societies, where they exist, to offer licences for orphan works, with indemnities and with provision for the appropriate distribution of fees that cannot be allocated, perhaps to charities.