

Gowers Review of Intellectual Property – Call for Evidence

Submission by National Library of Scotland

Introduction

1. The National Library of Scotland is Scotland's largest library, and one of the leading research libraries in Europe with printed collections in excess of 13 million items and a history dating back to the seventeenth century.
2. NLS welcomes the opportunity to contribute to this review. As the scope of the review is wide, we concentrate this brief submission on a small number of areas which NLS feels the review should address. This submission therefore does not represent a full account of NLS perspectives on intellectual property.

General

3. Libraries and archives (and especially national institutions which have a stewardship role for posterity) have a mission to collect and preserve information, and make information accessible to users. This mission is, at times, constrained by current copyright and IP law, because of the need to reconcile that mission with the property rights of the creators on information. Our main general contribution to the Review is that the legal IP framework needs to be simplified and updated, in order to take account of the internet age, and to facilitate, rather than constrain, access to knowledge.

IP in the Digital Era

4. The digital era requires IP to be revisited. More and more published material is becoming available in digital format, either because it has been digitised or because it is born digital. Last year, Google announced an arrangement with five major libraries (Stanford, Harvard, New York Public Library, Michigan and Oxford) to digitise millions of books, including both in-copyright and out-of-copyright material. Other mass digitisation initiatives are planned through the Open Content Alliance, and the European Digital Library. In time, manuscript (unpublished) material will be widely available through the web too, as will sound, film, maps and other media. As such material becomes available on the web (whether in full, or 'snippet' form) the potential to re-use the knowledge of the world for new creative purposes will be phenomenal.
5. Rights holders (including both authors and publishers) will develop new business models to exploit their material in this new digital environment. It is the creation of these new opportunities which IP law should address and support, rather than attempt to shore up current copyright procedures rooted in the analogue age which are now unsustainable and outdated. As information becomes more widely available in digital format, old models of copyright are becoming increasingly restrictive to innovation, anomalous and contrary to social and economic well-being. We therefore would like to see IP legislation increase access to the world's knowledge, rather than restrict it. This is a fundamental pre-requisite to fostering innovation and creativity.
6. An example relates to the issue of "orphan works". The U.S. Copyright Office defines these works as those whose owners are difficult or even impossible to locate. In its Notice of Inquiry (NOI), the Office states that "the public interest may be harmed when works cannot be made available to the public due to the uncertainty over its copyright ownership and status, even when there is no longer any living person or legal entity claiming ownership of the copyright or the owner no longer has any objection to such use." The NOI also acknowledges "the uncertainty

surrounding ownership of such works might needlessly discourage subsequent creators and users from incorporating such works in new creative efforts or making such works available to the public."¹ Under current IP arrangements, NLS (and many others) spend considerable time and energy unproductively trying to identify copyright owners. Intellectual property law should encourage these new creative efforts, not restrict them. This will contribute to long term economic, social, cultural and educational wellbeing.

Exceptions to Copyright

7. There is a general need to rationalise and simplify the various exceptions to cover all relevant categories, particularly artistic and audio-visual works, to help ensure greater clarity and therefore greater compliance. The current exceptions are confusing. While most professional information workers (such as librarians) will understand and be aware of the two main exceptions (covering fair dealing and library privilege), most members of the public are unaware of, do not understand, or refuse to abide by what they see as unwarranted restrictions on their use of equipment which has been specifically designed to allow copying. However, once we stray beyond these two main exceptions even library professionals are often unaware of at least some exceptions, or are confused by the lack of clarity in the legislation and the often seemingly contradictory advice provided by so called copyright guides and experts. This complexity is an inhibitor to the creative use of knowledge.
8. The logic even of the main exceptions of fair dealing and library privilege is often difficult to understand. For example, the provision of illustrations: these are not mentioned under fair dealing for (non-commercial) research or private study; not covered by fair dealing for reporting current events; and restricted to illustrations 'accompanying the text' under library privilege.
9. All statutory exceptions should take precedence over contract law. As e-publishing continues to grow it is important that the development of new technologies does not allow the erosion of existing exceptions. All exceptions should be reviewed to ensure that this does not occur. In particular legislation should clearly indicate that any technological protection measures should not restrict the rights of individuals to print/download material at least to the limits allowed under fair dealing from print products. We share the concerns about the ability of DRM systems to prevent the legitimate use of existing exceptions and exemptions and to in practice extend the period of copyright protection. Technology should be designed in a way which would allow some standardised print/download limits before any additional authorisation was required.
10. We propose the following specific suggestions and comments:
 - Education exceptions apply only within educational establishments, ignoring the fact that much academic work, by both staff and students, is actually carried out in other public or research libraries. We would ask that legislation should address this anomaly.
 - A private 'fair use' exception is desirable particularly in relation to the transfer of copyright material to other formats for private use, providing the original format has been legally obtained.
 - The extension of exceptions to cover copying in response to freedom of information enquiries has been very useful.
 - Exception for visually-impaired persons should be extended to cover all print-handicapped persons including dyslexia and similar impairments. Consideration should also be given to

¹ <http://www.copyright.gov/fedreg/2005/70fr3739.html>

including people with mobility difficulties within this general exception category (ie where people have restricted physical access to resources).

Licensing

11. IP law should encourage licensing arrangements which permit the creative and economic use of resources. The National Library has negotiated a licence with the Copyright Licensing Agency (CLA) which allows us to continue to provide our customers with copies from books and journals of copyright material for commercial purposes. However the Newspaper Licensing Agency (NLA) has still not developed a licensing scheme which would allow libraries to provide a similar facility for their customers. The Library does have a NLA license covering copying for internal management purposes, but it is very disappointing that there is this major gap in the provision of licensing arrangements which would be of use to customers of the Library.
12. The costs to libraries for licensing online resources can be considerable. These normally involve detailed discussions concerning such issues as concurrent use levels and the provision of remote access. Online resources offer an excellent opportunity to develop these remote services, but licensing restrictions can frustrate that aim. As ICT has developed, and particularly with the growth of the internet, many barriers have been removed. The National Library of Scotland is keen to widen access to its resources, especially to those who are not easily able to physically visit the Library's Edinburgh-based reading rooms.
13. The negotiation of separate license agreements with suppliers can lead to a confusing array of license terms and conditions, some of which can impact on existing copyright exemptions relating to copying limits. As an example of restrictive conditions: licensing restrictions on two of our main electronic resources mean that we are unable to provide remote access to registered users of the Library who are affiliated to either a higher or further education institution. As this restriction covers almost 50% of our registered users we are prevented from providing an equitable service to a large number of our customers. Some e-publishers are also raising potential barriers by 'bundling' products so that some libraries are required to purchase resources they do not actually want in order to procure their actual required titles. We would therefore welcome provisions which make licensing arrangements simpler and cheaper so that knowledge can be more widely accessed.

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