

# GOWERS REVIEW OF INTELLECTUAL PROPERTY

## SUBMISSION BY THE NATIONAL MUSEUM DIRECTORS CONFERENCE (NMDC) AND THE MUSEUMS COPYRIGHT GROUP (MCG)

The National Museum Directors Conference represents the leaders of the UK's national collections, including the national museums and galleries in England, Scotland, Wales and Northern Ireland, The National Archives, the British Library and the National Library of Scotland.<sup>1</sup> The Museums Copyright Group 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.<sup>2</sup> NMDC and MCG welcome this opportunity to respond to the questions raised in the Review.

### Introduction

Museums create public value, through facilitating and stimulating engagement with their collections, which enriches individual lives, supports education and knowledge transfer, and preserves an invaluable inheritance for future generations. There were over 37 million visits each year to our leading museums and galleries in 2004-5 and over 10.3 million learners in onsite and outreach educational programmes.

Our museums and galleries make a significant contribution to the economy. They nurture and promote the values, qualities and skills that are essential for the sustenance and development of the knowledge economy and a resource that inspires, feeds and supports the creative industries.<sup>3</sup> The UK's museums and galleries are a global resource. National museum websites received over 60 million unique web visits in 2004-5 – an increase on 40% on the year before. 14 per cent of adults in England visited a museum/gallery website in the past 12 months<sup>4</sup> There were over 10.7 million visits from overseas residents to UK national museums in 2004-5 and six of the ten leading visitor attractions in the UK are national museums. The overall economic impact of our national museums and galleries, including indirect and induced effects is in the range £1.83 billion to £2.07 billion, and the overseas "export" of NMDC member institutions is some £320 million a year.<sup>5</sup>

The central role of museums has always been to communicate information about their collections to the public. Today, it is expected that museums will communicate not simply with those who visit their premises, but also with existing and new audiences by using new technology. This expectation is held by the public, by those

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<sup>1</sup> See [www.nationalmuseums.org.uk](http://www.nationalmuseums.org.uk)

<sup>2</sup> See <http://www.museumscopyright.org.uk>

<sup>3</sup> In 2004/5 36% of the audiences at the V&A identified themselves as practitioners, students or teachers in the Creative Industries.

<sup>4</sup> Department for Culture, Media and Sport 'Taking Part Survey': [http://www.culture.gov.uk/global/research/taking\\_part\\_survey/](http://www.culture.gov.uk/global/research/taking_part_survey/)

<sup>5</sup> *Valuing Museums: Impact and Innovation Among National Museums* Tony Travers and Stephen Glaister (2004)

that fund museums, and by museum professionals themselves. Government policy supports this expectation and considerable amounts of public money have been made available to enable it to happen.

Copyright is central to enabling museums to meet these expectations. Communication to the public is itself an act requiring the consent of the copyright owner. For some projects, ranging from large scale digitisation programmes to one-off website projects, copyright is absolutely critical to delivering the project's objectives. Yet in spite of the public benefit and non-commercial nature of many of these projects, copyright law currently gives cultural organisations virtually no leeway, which means that the cost of copyright research and clearance activity can be huge and frequently prohibitive.

It would be quite erroneous to think that copyright only affects a tiny proportion of museum collections. An increasing number of items in museum collections are affected by copyright, both because of the increased period of protection and because of the acquisition of materials that are still protected. A recent survey conducted by the MCG showed that the percentage of artistic works held in museum collections that remain in copyright ranged widely, but in no fewer than 36 cases out of 71 institutions polled, the percentage was 20% or more, and in 18 cases out of 71 the percentage was 50% or more.<sup>6</sup> Indeed, in some museums, the proportion of two-dimensional material still in copyright can be as high as 95% (for example, the National Museum of Photography, Film & Television and the image collections of the Witt and Conway Libraries in the Courtauld Institute). This should serve as a corrective to anyone whose views of museums is that they are simply repositories of old (and therefore out of copyright) material.

The relevance of intellectual property, notably copyright, to museums is twofold, reflecting the dual economy that now governs the activities of museums to a greater or lesser extent:

- Fulfilment of the public task

For the reasons explained above, the use of copyright material has become an increasingly prominent element in the fulfilment of the public task of museums – informing and educating members of the public about collections and their meaning. These activities certainly generate new copyright material, for example text written by curators and photographs of objects. However, in the main these activities necessitate the clearance of third party rights, that is to say the licensing in of copyright material for use in the context of exhibitions, catalogues, websites and other publications, electronic and non-electronic. This applies particularly to the two-dimensional material in museum collections – including everything from old trade literature to a variety of photographic and illustrative material – that has often been deposited with museums because its value has passed from the commercial to the cultural and historical. In addition, much of this material will have been deposited without any accompanying documentation or identification.

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<sup>6</sup> These are generally estimates. The numbers of items in some collections (especially those of members of NMDC) are in the tens of thousands.

This clearance activity now accounts for a significant expenditure of resources, not only in terms of licence payments to the relevant copyright holders, but also in terms of the time spent trying to identify copyright holders and to negotiate licence terms with them. For example, the cost of rights clearance for the Science Museum's Challenge of Materials gallery ran to well over £10,000 as long ago as 1996. Museums tend to be scrupulous about seeking clearances because they are risk-averse, and also because they have a strong incentive to maintain good relations with rights holders.

- Commercial revenue generation

On the other hand, funding pressures have also driven museums to investigate ways of managing intellectual property (whether the museums' own IP or that of third parties licensed in) so as to produce revenue. In the case of some museums, a significant part of the revenue generated from commercial activities is underpinned by copyright. For example, of the £13.5 million generated by Tate Enterprises Limited from commercial activities during the year to 31 March 2006<sup>7</sup>, over 25% was derived from the exploitation of the Tate's intellectual property (copyright and brand-related). Of the £8.45 million generated by V&A Enterprises Ltd during the year 2004/5<sup>8</sup>, 40% was directly derived from the exploitation of copyright through licensing and publishing activity. In both cases the revenue generated from intellectual property is significantly more profitable than other commercially-generated revenue. However, this income tends to derive mostly from self-generated rights (such as logos, and products inspired by the collections), rather than directly from the collections themselves.

While some of the larger institutions have certainly succeeded in showing how intellectual property can be exploited to generate revenue and, better still, profits that can be invested in the museum's core activities, they remain in the minority. The contribution made by these activities to museum budgets in general remains small, though it is growing, and for very many smaller institutions, generating revenue from intellectual property remains very difficult. Although third party agencies can fill the gap,<sup>9</sup> revenue from these activities tends to be marginal.

For the vast majority of institutions in the museum sector, copyright is an expensive burden which can stand in the way of promoting access. While public funding has been made available to fund the digitisation of large quantities of museum material, there appears to have been an insufficient understanding on the part of policy-makers of the obstacle that copyright poses to the achievement of access objectives. It is ironic that, just when museums are being encouraged to make their collections virtually accessible to everyone, it is physical access to museums that has been facilitated by the removal of entry charges. Meanwhile, the burden museums face in securing third party copyright clearances simply in order to fulfil their basic public mission continues to increase, and across the sector as a whole, is not remotely balanced by the money generated by a few institutions from copyright exploitation.

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<sup>7</sup> Source: Tate Enterprises Limited. The figures exclude other revenue that has no IP element.

<sup>8</sup> V&A Annual Review 2004/05

<sup>9</sup> Such as the Bridgeman Art Library, which licenses museum images on behalf of museums.

In an analysis of recent clearance activity the National Portrait Gallery (which has highly trained staff specialising in these matters) has found that the time spent in seeking permissions for nine separate uses of images for standard museum curatorial, archival, learning and access and exhibition purposes absorbed 106 person days of time and required licence fees to be paid by the Gallery of over £28,000. Some of the financial element of this expenditure may doubtless be recoupable from catalogue sales. The expenditure of time is not, however, recoverable, and reflects that the process is made more complex by multiple rights owners and the difficulties in establishing a reasonable royalty. In the context of the public task of museums, this expenditure hampers the provision of public access to material and is a drain on scarce resources.

This is further eloquently illustrated by the situation currently facing the Ulster Museum, which is closing for a period of over two years for a programme of refurbishment. Its only option in seeking to fulfil its mission during this period is to establish a virtual presence on the web. This necessitates seeking permission to post images of works in the Museum's collections on its website. A huge amount of time has been invested in clearing the rights for 1,037 works, generally covering core non-commercial activities. Yet some rights owners have sought fees which, if extrapolated, would suggest a budget of over £175,000, simply to make a selected number of images available on the web for two years, in circumstances where the Museum is deriving no commercial benefit. This is, needless to say, a sum that the Museum simply cannot afford.

Museums accept the need to pay reasonable fees for the use of copyright works, although this is much easier to justify where the institution is deriving a commercial benefit from exploitation of the work. In the case of non-commercial uses, the costs in both time and money often cannot be justified. Museums are of course keen to explore sensible ways of mitigating the effects of this copyright burden, and NMDC and MCG have been involved notably in four particular areas:

1. by means of disseminating knowledge about copyright, best practice and sample licences,<sup>10</sup> although there are limits here imposed by resource constraints and by the fact that many licence negotiations are inevitably one-offs;
2. by exploring with the Design and Artists Copyright Society (DACS) the possibility of a blanket licensing scheme.<sup>11</sup> The aim of the proposed licence, is to allow digitisation of artistic works in collections in museums, archives and libraries and digital copies to be made available to staff, students and the public. However, the number of orphan works in museum collections currently poses a difficulty for such schemes (see below). The scheme remains at an early stage of discussion and in recent months negotiations have

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<sup>10</sup> For example, through publications such as 'A Guide to Copyright for Museums and Galleries' by Peter Wienand, Anna Booy, Robin Fry (Routledge). ISBN 0415217210.

<sup>11</sup> With the support of Museums Libraries and Archives Council (MLA), ARLIS- the Art Libraries Society and with the endorsement of LACA: the Libraries and Archives Copyright Alliance.

been on hold to allow the MCG to undertake a data gathering exercise, the results of which are referred to in this submission<sup>12</sup>;

3. the emergence of Creative Commons licences.<sup>13</sup> However, while Creative Commons licences might work well for material generated by museums, museums are, as indicated above, custodians of vast amounts of third party copyright material. In some cases, the licensing of this material is subject to control by collecting societies and other agencies, whose attitude to Creative Commons will be critical (although it is currently unclear). In many other cases, the resources that need to be spent in tracing copyright holders are so enormous, compared with the possible return, that the more cautious instincts of the institutions in question prevail and, unless there is a collecting society prepared to offer indemnified licences (as some are) it is difficult to see how this material can be handled within a licensing regime;
4. by working with other organisations in the wider cultural sector, notably LACA (the Libraries and Archives Copyright Alliance) to formulate proposals for amendments to the law (see the section below on copyright exceptions).

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<sup>12</sup> As the 'MCG DACS Survey': the results have not been published pending a statistical analysis.

<sup>13</sup> See in particular the report commissioned by the Common Information Environment (CIE) [www.common-info.org.uk/publications.shtml](http://www.common-info.org.uk/publications.shtml)

## GENERAL QUESTIONS

- 1(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?**

There is a continuing need for education in this area, not simply among the obvious target sectors in business, but in the wider cultural sector, which includes museums. The MCG was set up in 1996 in order to address an apparent lack of knowledge among museum professionals about copyright – prompted among other things by the implementation of the 1993 Term Directive<sup>14</sup> that instantly revived copyright in millions of photographs in museum collections. Museums engage in a range of activities, embracing both non-commercial and educational activities in pursuance of their core (usually charitable) missions, and also revenue-generating operations (such as publishing, touring exhibitions, picture libraries, image licensing) – both of which require a sound grasp of copyright.

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

Museums routinely use copyright in the course of their activities, both in the discharge of their public mission (to inform and educate the public), and in the running of commercial operations. As indicated above, copyright management is now an essential part of engaging with the real and virtual audiences that museums have developed, because communicating images or representations of cultural artefacts in many cases requires a copyright licence. At the same time, museum trading activity is largely underpinned by copyright exploitation in the form of image licensing, publishing, licensing of designs inspired by items in collections and on-line commercial activity.

Museums also use trade marks to badge their products and services, and there is an increasingly sophisticated appreciation of the role of the brand in the activities of museums, notably the national institutions. Most of the national institutions have registered their names and/or logos as trade marks.

- 2(c) **To what extent are these decisions influenced by sector-specific considerations?**

Sector-specific considerations are of paramount importance in the museum sector in determining how copyright is used and managed. Copyright has emerged as an important tool for museums because its flexibility in terms of licensing and management enables museums to pursue their dual missions (educational and commercial). It is a means by which museums can manage the flow and exploitation of content – through licensing – in such a way that these two missions can co-exist. The attitude that museums have towards their collections, which they hold on trust for the wider community, and to the creators who are the source of so many of the objects in their

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<sup>14</sup> Council Directive 93/98/EEC

collections, also means that museums are in general highly scrupulous in managing copyright and in seeking appropriate clearances. This perhaps leads to an over-cautious approach, but museums depend on close and friendly relationships with artists, and their heirs and representatives.

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

Some institutions have pioneered new ranges of products whose design may depend in part on newly generated copyrights 'inspired' by objects in the museum's collections. A good example is the range of products developed and licensed by V&A Enterprises Ltd. In this context the UK IP system has served to promote innovation.

Another example is the recent investment by Fleming Ventures in Science & Media LLP, a joint venture with the Science Museum. This will see Science & Media seeking to develop a fully commercial operation based on exhibitions developed using Science Museum intellectual property. The digital component here may be a small part of the whole proposition, but it is a suggestive example of the interest private investors are taking in museum intellectual property.

Many other institutions however encounter copyright as a stifling burden which prevents innovation. This is particularly true in the case of 'orphan works' (see below). The cost burden of tracing rights owners can inhibit the development of new services providing access to the nation's cultural memory to members of the public.

**2(g) To what extent does your organisation make use of other methods used by Government to encourage innovation, such as public funding?**

Museums do make use of government grant-in-aid or other sources of public funding to pay for artist in residence schemes, commissioning of public art, educational activities and research. Funding streams such as Culture Online<sup>15</sup> and the NOF Digitise programme<sup>16</sup> have also allowed many innovative new digital offerings to be developed. In the NOF Digitise programme, 154 institutions were awarded grants. Grants ranged from £14,000 to £4m and were allocated to 37 consortia and 34 individual projects. Together they have produced a digital learning materials foundry of well over 1 million images, tens of thousands of audio and video clips, innumerable pages of text and many hundreds of new learning packages on a diverse range of topics.

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

Museums face a number of difficulties in negotiating licences. One is a lack of settled model documents. The MCG has taken steps to address this by

<sup>15</sup> See <http://www.cultureonline.gov.uk/>

<sup>16</sup> See <http://www.mla.gov.uk/> under 'People's Network'.

supporting the publication of model agreements,<sup>17</sup> and other such resources exist. However, adapting these models for use with individual rights owners can still be extremely resource-intensive.

Another is the difficulty in tracing rights owners (see section below on orphan works). The willingness of rights owners to grant permissions for non-profit activity is highly variable. Many individual creators are more than willing to do so as they view a (properly credited) presence on a museum website as a benefit. In a survey recently carried out by the MCG 27 out of 71 institutions polled (38%) said they had arrangements with at least some rights owners whereby material was licensed to the institution free of charge.

However, these arrangements tend to be with the creators themselves. The estates of deceased artists and agencies representing artists appear to feel much less able to grant royalty-free licences, perhaps because their primary concern is in generating revenue from copyright. Although a more realistic scaling of fees for non-profit uses may become available, organisations representing rights owners have in the past requested fees that have been perceived to be prohibitive in a non-profit context. The new pricing structure offered by DACS (Design and Artists Copyright Society, with whom many museums deal as the collecting society representing visual artists in the UK) does reflect an understanding that a 'one size fits all' pricing regime is not appropriate.<sup>18</sup> Collective administration on behalf of rights owners, provided that collecting societies are adequately regulated, does facilitate licence negotiation and indeed in the case of true licensing schemes,<sup>19</sup> once the terms have been negotiated on behalf of rights owners and prospective users, there is in principle no further negotiation required. The lack of such schemes in the museum sector is a frustration for many museum professionals and, as indicated above, the MCG is in exploratory talks with DACS to see whether a scheme permitting non-commercial uses of artistic works would be viable.<sup>20</sup> However, it is likely that the sector will continue to struggle in the absence of a single well-funded strategic organisation with sufficient resources to be able to take on the costs of negotiating such schemes with rights holders on behalf of the museum community (which numbers some thousands of institutions).

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

Museum professional themselves do not appear in general to have encountered difficulties, largely because they are not aware of any restrictions. However, many external researchers wish to use and reproduce museum resources for research purposes. In this context, the fact that museums do not enjoy 'library privilege'<sup>21</sup> (except in respect of their own in-

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<sup>17</sup> In 'A Guide to Copyright for Museums and Galleries', *ibid*

<sup>18</sup> See <http://www.dacs.org.uk/>

<sup>19</sup> Those regulated under Chapter VII Copyright, Designs & Patents Act 1988 (as amended)

<sup>20</sup> See <http://www.museumscopyright.org.uk/question.htm>

<sup>21</sup> Arising under sections 37 to 43 Copyright, Designs & Patents Act 1988 (as amended)

house libraries) is a bizarre anomaly, especially where the relevant European harmonising Directive specifically contemplates it.<sup>22</sup> A further anomaly is that library privilege does not extend to artistic works, which are often the category of museum material that is of predominant interest to researchers, although, again, the relevant Directive would cover artistic works and indeed films. It should be made possible for museum professionals to be able to make single copies of copyright works for the benefit of researchers.

One of the changes made to UK copyright law following implementation of the Information Society Directive was the narrowing of the exception permitting fair dealing for research to non-commercial research only. Many museums undertake commercial activities, but the profits of these activities are re-invested into the core (non-profit) mission of the institutions. It is unfortunate that museums have to bear the additional cost of licences to permit what would otherwise be limited copying with little real impact on the legitimate economic interests of the rights holders. NMDC and the MCG would consider the overall system of exceptions fairer if, in exchange for this erosion of their ability to use copyright material, the other provisions in the Information Society Directive concerning cultural institutions (see below) had been implemented. However, the MCG does not report significant concern from museums that the additional licensing costs arising from the narrowing of the exception permitting 'fair dealing' for the purposes of research is imposing an excessive burden on museums.

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

Key barriers to obtaining copyright licences are:

- the difficulty of identifying rights owners (the orphan works problem, commented on further below); and
- split ownership: this is not infrequently encountered by museums where copyright has passed to an artist's heirs. The rules on jointly owned copyright make it dangerous to rely on a licence granted by one co-owner only.<sup>23</sup> In the example cited above relating to the National Portrait Gallery, one set of negotiations involved three sets of rights holders in relation to the estate of a single artist, driving up transaction costs.

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

Cost is undoubtedly a barrier to licensing copyright in the museum sector. Although in some cases rights holders (usually individual artists) are prepared to offer royalty-free licences to museums, in many other cases the cost of obtaining paid-for licences permitting use of copyright works in carrying out an institution's non-commercial activities can be sufficient to render the

<sup>22</sup> Article 5(2)(c) of Directive 2001/29/EC ('the Information Society Directive')

<sup>23</sup> See in particular section 173(2) Copyright, Designs & Patents Act 1988 (as amended)

licence unaffordable. To secure such licences in relation to all the millions of copyright works in the collections of public museums and galleries would be extremely costly at current rates. There is certainly no sign that the government recognises this as an obstacle to the fulfilment by museums of the policy requirement of offering greater access to museum collections. Regrettably, these barriers are already serving to remove from public circulation those few works that were digitised during the recent formidable spate of digitisation that was funded by the New Opportunities Fund.

Museums of course recognise that where a copyright permission is properly required the right holder is entitled to charge a royalty, and that (subject to limited constraints) the amount of the royalty is at the right holder's discretion. In other words, the determination of royalty levels is left to the market. However, it is clear that this introduces a granularity to the process of rights clearance that (i) imposes a heavy resource burden on museums and (ii) can impoverish the offerings that museums feel able to make in fulfilling their core, educational functions. As indicated above, recent changes made to pricing structures by DACS indicate a welcome recognition that some allowance should be made for the non-profit nature of the institution making the copies, and if the MCG DACS licensing scheme referred to above were to emerge, then this would have an impact too.

**4(g) To what extent is the risk of litigation a factor in your organisation's investment in innovation?**

Museums are extremely reluctant to spend public money on litigation, and museum professionals are generally risk-averse, whether a proposed use of a copyright work is for commercial or non-commercial purposes. These factors conspire to ensure that the threat of claims is a significant factor (perhaps more than it ought to be) in inhibiting the reproduction and publication of materials in museum collections.

## **SPECIFIC ISSUES**

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

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

Museums would object to the extension of the term of protection for sound recordings. Many institutions have sound archives, some very extensive, for example that of the British Library, which is making its own submission. The extension of the term of protection for sound recordings would limit the ability of these institutions to make historic recordings available, unless it was balanced by an expansion in the scope of the exceptions (within the parameters of the applicable Directive) to allow non-profit and non-commercial uses of recordings in these archives. It is true that some institutions are making sound recordings primarily as a means of recording oral history. However, it is unlikely that any putative commercial value derived from an extension to the term of protection would affect the

investment museums are making in this area, which is to add to their collections material which can be made available to the public.

### **Copyright exceptions: fair use and fair dealing**

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

While in general the regime of exceptions under UK law represents a fair balance, museums would support the contention that the tenor of all recent legislation has been to increase the scope of the protection for rights holders. As bodies established for public benefit purposes, museums are in an anomalous position. Museums and galleries hold their collections in trust for the benefit of the public. Their collections are meant to be displayed to the public. More than this, museums and galleries are expected, and consider themselves to be under an obligation, to allow their collections to be used as a resource for teachers, pupils, researchers and members of the public. Neither the primary purposes of the institutions, nor these core activities, involve commercial objectives. However, unlike educational establishments, libraries, archives, broadcasters and even auction houses, museums cannot rely on any specific exceptions that recognise their public benefit role by permitting limited copying of works where this is not for commercial advantage. This anomaly is underlined by the fact that:

- the Information Society Directive specifically allowed for exceptions that would be relevant to museums, but that these were not implemented by the UK in spite of representations made to the government;
- a significant part of the cost of securing copyright clearances for the non-commercial or public benefit uses that might otherwise be permitted by exceptions is met from the public purse through the public funding received by museums. This seems an unnecessary waste of public money, especially given the government's stated enthusiasm for increasing access to the nation's cultural heritage.

It is sometimes suggested, as an argument against extending the exceptions to cover non-commercial copying by museums that, as against private sector businesses, museums have certain advantages, arising from their public status, or even that it is somehow relevant that, in another context, museums exploit their intellectual property commercially. These criticisms derive from a misunderstanding of the governance structure and responsibilities of museums, and in a copyright context, from a lack of appreciation of the balance within the copyright system between the rights of copyright owners and the interests of users (as embodied in any regime of copyright exceptions, commented on below). As a matter of governance, the public task and commercial activity of museums are segregated, significant commercial operations usually being carried out in wholly separate trading subsidiaries. In relation to copyright, museum trustees have a duty, arising from charity law, to ensure that any intellectual property held by the institution must be exploited as far as possible for the benefit of the institution. However, it must be emphasised that any proposals that

museums have to amend copyright law by extending the range of the copyright exceptions relate solely to the non-commercial activities of museums (their public mission). The application under international treaties and the Information Society Directive of the 'three-step' test<sup>24</sup> to all copyright exceptions would be quite sufficient to ensure that any reliance placed by museums on exceptions and limitations would be confined to their core non-commercial and educational activities.

A final fundamental point is that, currently, the permitted acts and exceptions can be overridden by contract. This is especially relevant in the digital sphere, where access to copyright works is routinely made available under contractual licences. In the view of NMDC and MCG, it should not be possible to oblige a user to contract out of the exceptions.

**(b) (c) Could more be done to clarify the various exceptions? / Are there other areas where copyright exceptions should apply?**

In its submission to the Patent Office following adoption of the Information Society Directive NMDC made the case for extending the regime of exceptions within the parameters permitted by the Directive, and in particular to apply the following provisions of the Directive:

Art. 5(2)(c) - non-profit making establishments

This allows the UK to amend UK copyright law so as to:

- (i) add museums and public galleries to libraries and archives as being institutions to which library privilege applies, and to extend these provisions to cover artistic works;
- (ii) allow specific acts of copying relevant to the activities of museums and galleries (eg copying for curatorial, preservation or insurance purposes, or for the provision of some degree of access to the object; and making copies for exhibition in place of the original where the original is being restored or is otherwise unavailable, for example because it is on loan).

Article 5(3)(a) - Illustration for teaching or scientific research

Museums and galleries are heavily involved in a wide range of educational and research activities, reflecting their educational and curatorial functions. Among the educational activities are lectures and other forms of teaching and the running of educational websites. Copyright law should contain an exception to allow for such activities.

Article 5(3)(j) - advertising the public exhibition or sale of artistic works

UK copyright law allows auction houses and sale rooms to reproduce copyright works for the purposes of advertising their sale even though the

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<sup>24</sup> Article 9(2) Berne Convention and Article 5(5) of the Information Society Directive

activities of auction houses are purely commercial.<sup>25</sup> From the perspective of publicly funded museums and galleries, who cannot reproduce copyright works for the purposes of making available catalogues of their collections, or advertising their exhibition to the public, this seems anomalous. Museums would therefore seek an amendment to UK law permitting the reproduction or communication to the public of artistic works for the purposes of publishing catalogues of their collections or advertising their public exhibition, whether in print or electronic form.

Article 5(3)(n) - communication by dedicated terminals on the premises of cultural institutions

The UK should avail itself of the opportunity presented here to provide for the making available of material via dedicated terminals. Since the Directive does not prohibit the linking of such terminals to each other (provided that they are on the premises of libraries, museums or archives), and does not require all the terminals to be on the premises of one institution, networks linking institutional premises should be able to take advantage of such a provision.

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

Museums would not see the need for compensation to rights holders in respect of the uses describe above, provided that they satisfy the ‘three step’ test. Museums are not looking for exceptions that would exceed that test.

**Copyright – digital rights management**

Museums make use of both digital rights management (DRM) and technical protection measures (TPMs). The two are separately dealt with in the Information Society Directive, and ought to be kept conceptually separate. As a matter of policy, it is of concern to museums that TPMs can be used to vitiate the uses of copyright works that would be permitted under the statutory exceptions, and considers that the current regime under UK law offering remedies to users affected by TPMs<sup>26</sup> are cumbersome and most unlikely in practice to be followed by ordinary users. NMDC and the MCG therefore reiterate the position already expressed in the response made to you by LACA jointly with the MCG.

In the context of digital rights management it should also be said that many copyright works made available electronically are made available subject to contractual licence terms. Under existing law these can effectively oust the permitted acts and exceptions under copyright, thus undermining the balance between rights holders and users. It has been argued that this is justified given the ease of duplication and manipulation of copyright works in the digital world. However, given the built in limitations to the extent of the permitted acts arising under the ‘three step test’, and the use of TPMs and DRM by rights holders, this argument is not in the view of

<sup>25</sup> Section 63 Copyright, Designs & Patents Act 1988 (as amended)

<sup>26</sup> Section 296ZE Copyright, Designs & Patents Act 1988 (as amended)

NMDC and MCG sufficient to cancel over a hundred years' worth of development in the regime of exceptions in the digital domain.

### **Copyright – orphan works**

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

Orphan works are a major problem for museums which have in their collections tens of thousands of works whose copyright status is doubtful due to difficulties in tracing authorship and, even where it is reasonable to assume that the work remains in copyright, the current copyright owner cannot be traced. The absence of a system of copyright registration, and the origins of many of these collections, means that the chances of museums being able to identify the authors and /or current owners of copyright are vanishingly small.

This is particularly true of documentary photographs and other items that are not works of fine art or 'fine art photographs'. In a survey recently carried out by the MCG, it is clear that the percentage of works in collections for which the authors' identity is known is much higher in the case of fine art works, but lower in the case of documentary photographs and other artistic works, where the proportion is in many cases 50% or below. This particularly applies to the thousands of photograph collections gathered or taken by private individuals that have been deposited with museums throughout the UK. Extrapolated across the holdings of all museums in this country, this means that millions of works are in a copyright 'no man's land'. Although the risks of sizeable claims for infringement might seem remote, the risk-averse and 'good citizen' attitudes prevalent in the museum sector mean that in practice decisions are taken to de-prioritise the publication, digitisation or other exploitation of these works. This impoverishes the content and information that museums can make available to the public. In order to fulfil their obligations to both the public and the many donors who wanted their photographs to be made accessible, many museum collections find themselves in a particularly invidious situation. A particularly good example of this is the uncertain status of many of the collections of railway photographs donated to the National Railway Museum.

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

There are a number of potential solutions. The simplest one would appear to allow for a 'notice and takedown' procedure to operate, whereby on receipt of notification of ownership in relation to a particular work, the institution in question would not be liable in damages if it ceased publication or other infringing use of the work. In particular, the ability to publish such works would also enable museums to encourage rights holders to make themselves known. It would be possible, for example, to require museums and libraries to publish such works in catalogues (printed and online) for a period of time before they are permitted to use them elsewhere.

Another part of the solution may lie in providing incentives to rights holders to deposit details about themselves or their authorised representatives in databases. A resurrection of copyright registration is not being suggested here. However, if one solution is to say that copyright in a work is not infringed where the copyright owner cannot be traced without the use of reasonable efforts, then 'reasonable efforts' should be interpreted as including the inspection of any suitable databases. An example of the type of database that could play a role here, and which already exists, is the WATCH database.<sup>27</sup>

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<sup>27</sup> A joint project of the Harry Ransom Humanities Research Center at the University of Texas and the University of Reading Library in England: see <http://tyler.hrc.utexas.edu/>