

Review of UK Intellectual Property Law

Commissioned by HM Treasury, 2006

Response from the Royal National Institute of the Blind (RNIB)

1. Executive Summary

In this submission, we put forward a number of proposals on changes to copyright law and regulation at the UK, European and international levels. All are based on our fundamental belief in the rights of blind, partially sighted and other print disabled people to have full and equal access to the same sources of information, knowledge, culture and inspiration as their peers. This should obtain from the moment of publication, and should be realised with no additional cost to the individual. Any additional costs incurred in achieving this should come from the public purse, and not from charitable funds.

We start, after introducing ourselves and our work, by highlighting the barriers to equitable access to information faced by people with sight loss. We briefly examine the range of ways in which these should be tackled, and show how intellectual property law should sit as part of an integrated approach to the correction of current inequalities.

We refer to international treaties and conventions to illustrate the firm foundation of our stance.

We then examine a series of specific issues, making recommendations on each. The order in which the issues are presented does not necessarily reflect any hierarchy of priorities.

In Section 6, we examine current UK copyright exceptions for the benefit of visually impaired people, highlight their strengths, and indicate ways in which they could be further improved.

Section 7 highlights barriers to the international exchange of accessible works and urges the prioritisation of steps to overcome them.

Section 8 puts forward the case for extending UK copyright exceptions to other people with a reading related disability.

Section 9 calls for the extension of copyright exceptions for visually impaired people to films and other audiovisual products. This is necessary to facilitate the spread of audio description.

Section 10 highlights the fact that the Database Directive does not allow exceptions for visually impaired people, and calls for action to remove this anomaly.

Section 11 examines the problems posed by technological protection measures and suggests improvements in UK law to counter these.

Finally, Section 12 proposes the recognition of a fundamental Right of Access to underpin the creation of a more level playing field in the balance of rights between creators and people with reading related disabilities.

2. List of Recommendations

Recommendation 1. That Sections 31 A and 31B of the Copyright, Designs and Patents Act 1988 be amended to

- incorporate simplified notification requirements
- enable educational establishments to work under exactly the same terms as not-for-profit bodies.
- remove the scope for licensing bodies to levy any charges under their schemes.

Recommendation 2. That the UK Government should commit itself to working towards the elimination of current barriers to the transfer between jurisdictions of accessible works created under a national copyright exception.

Recommendation 3. That the UK Government also undertake to implement expeditiously, at national and European levels, any recommendations from WIPO aimed at facilitating such international transfer, within and beyond the European Union.

Recommendation 4. That the current Review actively consider ways of removing copyright-related barriers faced by certain other categories of disabled people, not covered by the term "visually impaired".

Recommendation 5. That the terms of the Copyright (Visually Impaired Persons) Act 2002 be extended to films, DVDs and other audio visual products.

Recommendation 6. That the UK Government press at European level for the extension of copyright exceptions to all forms of database.

Recommendation 7. That the UK Government extend UK copyright exceptions for the benefit of visually impaired people to databases as soon as European legislation permits.

Recommendation 8. That the Review consider ways of strengthening the provisions in Statutory Instrument 2003:2498 designed to prevent negation of copyright exceptions through technological protection measures.

Recommendation 9. That the Review recommend that the Right of Access be accepted as part of the basis of copyright law.

Recommendation 10. That the Review support the active examination of moves towards establishing a legally-based deposit scheme, at least for educational material.

3. Introduction - RNIB and its credentials

3.1 RNIB is delighted to have an opportunity to contribute to this extremely important review of UK intellectual property law.

3.2 We are the largest and most diverse voluntary agency for people with sight loss in the UK, with a turnover of more than £80m per year and a wide range of services to individuals and organisations. Our current corporate strategy has at the fore the aims of:

Campaigning for positive change;

Running exemplar services;
Further developing our role as a centre of knowledge and expertise.

3.3 We have been producers of accessible reading material for blind and partially sighted people since our inception in the nineteenth century. We pioneered the widespread use of braille and later of talking books.

3.4 In the digital age, we have been at the forefront of international moves to establish the DAISY standard as the leading open standard for the production of multi-format accessible information.

3.5 We continue to deliver our own direct services, such as the RNIB Talking Book Service, RNIB Learning and Skills Library and a range of braille, audio and electronic magazines and information products. We also undertake work on a commercial basis for bodies such as examination boards, banks, utility companies and other organisations wishing to make their own material accessible to all.

3.6 However, neither we alone nor the voluntary sector as a whole could possibly make all publications accessible ourselves, even if it was desirable for us to do so.

3.7 We led the campaign to reform UK copyright legislation which culminated in the Copyright (Visually Impaired Persons) Act 2002. We then worked closely with the Copyright Licensing Agency and the Music Publishers Association on the formulation of the licensing schemes they have developed under the terms of that legislation.

3.8 We continue to lead the World Blind Union delegation to the World Intellectual Property Organisation (WIPO). As a result of our work there WIPO has amended its "draft law" on copyright. This now recommends exceptions for the benefit of visually impaired people, including most significantly rights to distribute material imported from other countries with similar exceptions. It has also commissioned a study into the issues surrounding the transfer between jurisdictions of accessible copies of works created under national copyright exceptions for people with reading related disabilities.

3.9 We maintain contacts with WIPO, with the Copyright and Knowledge Based Economy Unit in the European Commission and the UK Patent Office.

3.10 We are also working closely with rights holder groups representing publishers and authors in projects aimed at increasing the proportion of titles available in formats accessible to people with reading related disabilities.

4. Background - Barriers and Solutions

4.1 One of the major challenges faced by people with sight loss is accessing information - the term is used here to cover all published material, whatever its nature or purpose.

4.2 The tools with which to overcome these barriers include:

Magnification - on paper or on screen;

Audio, human or synthetic, on a range of platforms;

Tactile - again on paper or via refreshable displays linked to a computer.

4.3 The barriers created by inaccessible information need to be tackled in a range of complementary ways.

4.3.1 Anti-discrimination legislation

In the UK, the Disability Discrimination Acts of 1995 and 2005 have placed duties on public bodies and on the providers of goods services and facilities. These duties can have the effect of requiring information providers to make their material available in accessible formats, and to design web sites according to accessibility guidelines.

These measures appear to be most effective when applied to the providers of

“citizen information” - from Government and other public bodies; or;

“customer information” - from commercial service providers, utilities, financial institutions, retailers etc.

However, this legislation does not oblige publishers, booksellers or librarians to provide accessible copies of publications.

4.3.2 “Inclusive Design” principles.

Applied to web design or to the way in which digital content is structured, this can alleviate some access problems.

4.3.3 Intellectual property law

This will be discussed in greater detail below, but measures include:-

a) Exceptions or limitations to copyright for the benefit of print disabled people.

b) Legal and administrative provision for overcoming technological protection measures which impede access by those who need to modify presentation in order to read.

4.3.4 Stimulating Commercial markets

This can include:

a) **Fiscal measures**, such as the equalisation of the VAT regime which currently discriminates against audio and e-books.

b) **Exploiting new business models** such as on-demand printing

4.3.5 Greater and more structured collaboration between publishers and specialist agencies, aimed at achieving the convergence of standard and alternative format publication processes.

4.3.6 Government funding

It is essential that Government accepts an obligation to fund the production of accessible formats. Few of the measures listed above alone will achieve the goal of full accessibility without public funding.

4.4 In the UK blind and partially sighted people face what can only be described as a book famine. Research conducted in 2004 by the Libraries and Information Statistics Unit at Loughborough University indicates that less than 5% of published titles find their way into any accessible format. This is because reliance on charity is neither adequate nor sustainable.

4.5 Thus the improvements in copyright law which we propose below should form part of a package of co-ordinated measures by the Government to redress the huge imbalance in access to information faced by blind, partially sighted and other print disabled people.

5. Copyright and Equality

5.1 As suggested above, our interest in intellectual property focuses essentially on copyright.

5.2 We approach copyright from the perspective of the fundamental rights of blind, partially sighted and other print disabled people to access the same information as all other citizens, over the same period of time and under the same terms and conditions.

5.3 We campaign for the Right to Read. We believe that the fundamental rights enshrined in Articles 19 and 27 (i) of the United Nations Universal Declaration on Human Rights (and echoed in the UN Convention on the Rights of the Child) cannot be realised without the ability to read on a par with everyone else.

5.4 It is not our role to question the basic tenets of copyright law. However, it has long been accepted in international treaties such as Bern and WCT that exceptions or limitations to exclusive rights are sometimes justified in the overall public interest.

5.5 The exceptions to exclusive rights which we require are essentially different from, but just as valid as any of the other existing exceptions. While most exceptions focus on how much of

a work it is reasonable to reproduce in certain contexts without rights holder permission. Our demands focus on the need to ensure that the works are accessible in the first place.

6. Existing Exceptions to Copyright in UK Law

6.1 The coming into force in October 2003 of the Copyright (Visually Impaired Persons) Act 2002 finally introduced into UK law exceptions to copyright in literary, dramatic, artistic and musical works for the benefit of "visually impaired" people. On the whole, the exceptions introduced by the Act are working satisfactorily.

6.2 In this legislation, we particularly support

- the functional definitions of visual impairment;
- - the functional definition of accessibility;
- - the broad range of individuals and bodies entitled to make accessible copies.

6.3 We had initial reservations about the need for and impact of licensing schemes. The fact that these schemes can levy charges on bodies creating accessible formats remains an issue of concern, although we happily acknowledge that no such charges are currently under discussion.

6.4 The licensing schemes set up under the terms of the Act by the Copyright Licensing Agency and the Music Publishers Association have built on the requirements of the Act by:

- greatly simplifying the notification process required under the Act for multiple copies;
- removing the quirk in the Act limiting the scope for action by educational establishments.

6.5 The current provisions of the Copyright, Designs and Patents Act 1988,, as amended by the Copyright (Visually Impaired Persons) Act 2002, could usefully be amended to transfer these advantages from the licensing schemes to the Act itself, so that they apply to all works, whether covered by a scheme or not.

6.6 There are some differences in detail between the two existing licensing schemes which could usefully be ironed out.

Recommendation 1. That Sections 31 A and 31B of the Copyright, Designs and Patents Act 1988 be amended to

- incorporate simplified notification requirements
- enable educational establishments to work under exactly the same terms as not-for-profit bodies.
- remove the scope for licensing bodies to levy any charges under their schemes.

7. Import and Export

7.1 There remains one major problem which current copyright exceptions have not resolved for visually impaired people. The legislation is understood not to cover the export of material to other countries ,nor its import.

7.2 The terms "import" and "export" are used here as short hand, though they may not be the most appropriate, since we are not always talking of a financial transaction.

7.3 Throughout the World there is a huge shortage of accessible reading material for blind and partially sighted people. Paragraph 4.4 above illustrates the position in the UK. While the situation will be better in those countries where governments fund the production of accessible formats, it will be much worse in others, especially in the developing world. Even countries such as the United States or Sweden, where government support is particularly good, would not claim to provide access to anything like all the titles available to the print reader.

7.4 As indicated in Section 4 above, a number of developments are required to overcome this shortage, including closer collaboration with publishers, the development of larger commercial markets and increased government funding. Copyright legislation also has a crucial role to play.

7.5 If a work has been created under a copyright exception in one jurisdiction, it is desirable that it be made available to visually impaired people elsewhere in the World. Otherwise either readers in those countries will be denied access to it or valuable resources will be wasted in duplicating work already carried out.

7.6 At the moment, UK charities are unable to supply individuals abroad without the express permission of the copyright holder, and as a result some still resort to the onerous permission process which the recent copyright reforms were meant to eliminate. Equally, people in the UK have been denied access to accessible versions of material created in other countries, especially the USA, because agencies there have been advised they are not authorised to export them.

7.7 There are differences of opinion as to the extent to which import or export are in fact prohibited by copyright law. It is unclear how much of the received wisdom emanates from copyright specialists and how much is asserted by rights holder groups anxious not to lose control of their assets. It has been asserted that principles of exhaustion mean that export is in fact allowed.

7.8 At the request of the World Blind Union the World Intellectual Property Organisation (WIPO) has agreed to undertake an authoritative study into this matter. We have asked that the Study:

- a) Examine the perceived and real barriers to transfer of accessible material between jurisdictions;**
- b) draw authoritative conclusions; and**
- c) make recommendations on any need for changes to national laws or international treaties.**

7.9 This study has just been commissioned. It is not yet clear when its findings will be complete. However, we would urge the current Review to take account of its work, and in the meantime to acknowledge that a very real problem exists and flag up the need for action. It should recommend prompt action to clarify UK law in the light of the WIPO Study's eventual recommendations. This may have to be done within the context of the European Union Copyright directives, and we would urge the UK government to take a lead in pursuing the required changes.

Recommendation 2. That the UK Government should commit itself to working towards the elimination of current barriers to the transfer between jurisdictions of accessible works created under a national copyright exception.

Recommendation 3. That the UK Government also undertake to implement expeditiously, at national and European levels, any recommendations from WIPO aimed at facilitating such international transfer, within and beyond the European Union.

8. Other People with a Reading Related Disability

8.1 The current UK legislation applies to "visually impaired people". The definition in the Act is broader than "blind and partially sighted", encompassing some people with physical disabilities which prevent them from manipulating a conventional book or focussing on written text. However, it does not extend to:

- a) people with learning disabilities who may need "easy to read" or illustrated versions of text;
- b) people with disabilities such as dyslexia;
- c) hearing impaired people who may wish to have sub-titled or sign language versions of published material.

8.2 RNIB's core purpose is to campaign for positive change for people with sight loss. We have therefore not taken a lead in campaigning for the extension of copyright exceptions to other categories of people with a reading related disability. However, we have always acknowledged that there is a sound case to be made for such extension.

8.3 Public and academic libraries would find it easier to have the same set of rules to apply to everyone with a reading related disability, and some charities who used to supply both visually impaired and dyslexic readers would be able to revert to their previous practices.

8.4 Article 5.3(b) of the European Copyright Directive is framed in such a way as to permit such an extension.

Recommendation 4. That the current Review actively consider ways of removing copyright-related barriers faced by the categories of disabled people referred to above.

9. Films and DVDs

9.1 The Copyright (Visually Impaired Persons) Act 2002 does not cover audio visual fixations such as videos, films and DVDs.

9.2 These art forms can be rendered more accessible to people with sight loss by the addition of "audio description". This is an additional audio channel which describes elements not evident from the dialogue, such as movements, facial expressions, how characters are dressed or in what setting an event is taking place.

9.3 RNIB has over the years commissioned the production of a number of audio described videos, with the permission of the rights holder, but the thrust of our work today is to encourage film and dvd producers to do this themselves. We find that several DVDs do now have an audio described channel, but that it is impossible to find this without using sight to read menus. This somewhat defeats the purpose.

9.4 We therefore believe it is desirable to be able to do two things, if necessary without the rights holders' explicit permission:

a) Add audio description to a commercial product for onward sale or loan to visually impaired people;

b) "re-author" a commercial product so that it defaults to audio description when first loaded, again for onward distribution either by ourselves or through commercial or public library channels.

9.5 We would accept the need for the same sorts of checks and balances as are currently incorporated in the existing exception for literary works.

9.6 Hearing impaired people requiring sub titles or sign language interpretation of audio visual products should benefit from the same dispensation.

Recommendation 5. That the terms of the Copyright (Visually Impaired Persons) Act 2002 be extended to films, DVDs and other audio visual products.

10. Databases

10.1 The current formulation of the Database Directive means that exceptions for the benefit of people with a reading related disability cannot be extended to databases, whether original or non-original. If access to literary, dramatic, artistic and musical works can be justified in terms of fair and equitable access for those unable to read standard print, then so can access to databases.

10.2 The European Blind Union, to which we are affiliated, has expressed this view in its response to the Commission's recent Evaluation of the Database Directive. It made the same point when responding to the Commission's review of the copyright *acquis communautaire* in 2004. However, the Commission is very focussed on issues surrounding the value or otherwise of the *sui generis* right, and we cannot be certain that they will move towards the eradication of the anomaly of concern to us.

Recommendation 6. That the UK Government press at European level for the extension of copyright exceptions to all forms of database.

Recommendation 7. That the UK Government extend UK copyright exceptions for the benefit of visually impaired people to databases as soon as European legislation permits.

11. Technological Protection Measures

11.1 Blind, partially sighted and other print disabled people read electronic material by modifying the way in which it is presented, without modifying the content. They may do this through magnification, transformation into synthetic audio, or the use of a temporary, or "refreshable" braille display. In some instances the software with which to make these changes is incorporated in mainstream packages, but the most flexible and adaptable solutions are achieved via dedicated "screen reader" software. The term "assistive technology" is used below to refer to this form of access.

11.2 Digital rights management schemes, or the technological protection measures within them, can react to assistive technology as if it were an illicit operation. Thus, the DRM systems applied to

e-Books and e-Documents can prevent access by people who use assistive technology to read the screen or to control the computer.

11.3 In those circumstances, the blind user is prevented from achieving the same degree of access as his sighted counterpart, or indeed any access at all.

11.4 A second problem can be the "disabling" of speech functions in a particular publication. While e-book readers may have the facility to reproduce synthetic speech, the rights holder can apply a level of security which prevents this from working. A person with sight loss can thus buy a book but find herself unable to read it.

11.5 RNIB has been contacted by several people who have purchased e-Books from both major retailers and small publishers, only to find that they are unable to read them because of the way that the DRM has been applied.

11.6 This situation is in fact deeply ironic, since an e-Book has the potential to be a very effective way of making publications accessible to people who cannot read print. It is unsatisfactory and unnecessary because technology companies such as Adobe have actually taken steps to ensure that content can be protected and yet access still provided to disabled customers.

11.7 The European Copyright Directive, while seeking adequate safeguards for rights holders against the circumvention of technological protection measures, does also state in Article 6.4.1:

"...in the absence of voluntary measures taken by right holders, including agreements between right holders and other parties concerned, Member States shall take appropriate measures to ensure that right holders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3)(e) the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned."

11.8 The UK Government transposed this part of the Directive into UK law in Section 296Z of Statutory Instrument 2003: 2498. The procedures set out in that Section have not yet been fully put to the

test. However, they appear slow and cumbersome, and are unlikely to help someone such as a student with an urgent need to consult a particular document. Furthermore, they appear to lack teeth in situations where a rights holder is reluctant to comply with a determination by the Secretary of State.

11.9 We also refer the Review team to our submission to the All Party Internet Group in December 2005.

Recommendation 8. That the Review consider ways of strengthening the provisions in Statutory Instrument 2003:2498 designed to prevent negation of copyright exceptions through technological protection measures.

11.10 To permit circumvention in certain well-defined circumstances could well be part of the solution. That alone, however, would not be the total answer, as the potential user might not have the necessary skills to circumvent. Prompt legal or administrative measures are also required.

12. The Right of Access

12.1 Copyright discussions usually focus around the rights of reproduction, communication to the public and distribution. However, it seems to us that there is a strong case to formulate a newer concept: the right of access.

12.2 All our representations on copyright are based on the assertion that blind, partially sighted and other print disabled people have the same right as anyone else to access anything in the public domain. They should be able to do so without undue difficulty and without additional cost either to themselves or to charitable institutions. They should be able to buy or borrow in the same way as anyone else.

12.3 There are two areas in which a right of access could helpfully underpin more detailed legislative arrangements.

12.4 Firstly, any rights management schemes, or elements within them, which by their operation negate the exercise of legally

established exceptions should be challenged on the basis that equitable access is being denied.

12.5 Secondly, current copyright exceptions only go so far in overcoming the huge shortage of reading material available in accessible formats. They prevent rights holders from unreasonably standing in the way of others who wish to create accessible formats, but they do not put rights holders under any obligations to assist.

12.6 We have recognised for some time that we need to build working relationships with publishers and develop new business models, harnessing technology and integrating mainstream and specialist publishing processes. New models of this nature would also recognise the entitlement of creators to a return on all copies of their work, in whatever format.

12.7 Digital technology offers ample scope for this, and we have already had useful contacts with the publishing industry. This is for the time being advancing on a purely voluntary basis, and like all accessible format production is not yet blessed with any significant amounts of Government money.

12.8 While voluntary arrangements may well be the best way to move forward, there is a good case for ensuring that in due course all publishers conform at least with the minimum requirements needed to assist equitable access by all potential readers. This is particularly acute in the field of education, where time is of the essence and where students need to read the same material as their peers at exactly the same time.

12.9 The Individuals with Disabilities in Education Act 2004 in the United States has set up a Federal deposit into which all publishers of educational material must place their works if they are to be used in the public education system. Importantly, it prescribes the format in which the content must be deposited. The National Instructional Materials Accessibility Standard (NIMAS) is a version of the Daisy specification, and greatly facilitates the creation of accessible formats. The establishment of the depository was supported by American publishers who saw the advantage of a single system and a single standard, rather than the differing legal requirements springing up in individual states within the USA.

12.10 A similar arrangement in the UK would require government funding, but would make it more likely that pupils and students could access the material essential to their education.

12.11 Developments in technology may well mean the model set out in IDEA is no longer the most effective one, but the basic principle of demanding accessibility is sound.

Recommendation 9. That the Review recommend that the Right of Access be accepted as part of the basis of copyright law.

Recommendation 10. That the Review support the active examination of moves towards establishing a legally-based deposit scheme, at least for educational material. DTI and the British libraries, as well as bodies representing the primary, secondary and tertiary education sectors are obvious partners in this work.

13. Conclusion

The issues set out above are fundamental to the achievement of fairness and equality under copyright law and in the broader field of access to information, knowledge, culture and inspiration.

DM/RNIB 12th April, 2006