

COVER SHEET FOR RESPONSES

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Please indicate below which issues are covered by your response. Not all issues will be relevant to all respondents – please feel free to skip questions that are not relevant to you.

General Questions covered:	
How IP is awarded	✓
How IP is used	✓
How IP is licensed and exchanged	
How IP is challenged and enforced	

Specific Issues covered:	
Current term of protection on sound recordings and performers' rights	✓
Copyright exceptions – fair use and fair dealing	✓
Copyright – digital rights management	✓
Copyright – orphan works	
Copyright – licensing of public performances	
Copyright – designated archive status	
Patents – utility patents	
Pharmaceutical Supplementary Protection Certificates (SPCs)	
Trade Marks – international issues	
Designs – registered designs and unregistered design rights	
Legal sanctions on IP infringement	
Parallel Imports / International Exhaustion	
Coherence between competition policy and IP policy	

Have you raised any other issues in your response?

Y

Details of accompanying documents (Please continue on additional sheet if necessary)
The accompanying document outlines the RSA's position on intellectual property within the scope of the Gowers Review. In particular, the RSA is interested in the copyright of databases and fair-use exemptions and the impact an overly rigorous intellectual property regime can have on creativity, innovation and the economy. The RSA recently commissioned economic research into the economic impact of the copyright of databases in the UK and fair-use exemptions. The findings of this research are included in the submission.

- Please TICK BOX if you DO NOT want your response posted on the Gowers Review website.**

RSA

*The Royal Society for the
encouragement
of Arts, Manufactures & Commerce*

**Submission to the
Gowers Review on
Intellectual Property**

RSA Adelphi Charter project
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Executive Summary

The RSA is an independent, non-aligned, multi-disciplinary registered charity with over 25,000 Fellows. Many of these Fellows are involved in creative and innovative industries – areas greatly affected by intellectual property (IP) protection.

The encouragement of learning and creativity has been the fundamental aim of the RSA since its inception in 1754. The RSA believes the main purpose of IP law now, as it was in the past, is to ensure the sharing of knowledge as a stimulus to further creativity. It encourages this by offering a *temporary* monopoly to the creator, so that widespread dissemination of their innovation offers an opportunity of stimulating yet further creativity.

Managing the ownership of ideas is crucial to any country's economic and creative success – it holds out the prospect that speculative effort can be rewarded and encourages innovation. However, the existing copyright system is complex and slows down innovation. Expansion in the scope and term of IP laws over the last 30 years has resulted in an intellectual property regime that is out of line with modern technological, economic and social trends.

The RSA's work on intellectual property is currently primarily focussed on access to public sector information, copyright protection of databases, and fair-use exceptions in copyright law. The RSA was disappointed that public sector information is outside the scope of this review. However, the key issue is free access to information, where this does not disproportionately infringe on people's rights to see their effort rewarded.

Copyright on Databases

A knowledge-driven economy depends on the accessibility of data at fair market prices. Yet, ten years ago, the EU created a broad, new Community-wide "*sui generis*" IP right over compilations of facts under the Databases Directive (1996). Databases had long been considered immune from IP protection, not least following the landmark Supreme Court ruling that prevented US telephone companies from treating telephone directories as protectable.

The *sui generis* right protects any database in which there has been a "substantial investment" in obtaining, verifying or presenting the data content. There is no requirement for creativity or originality to obtain this right and it creates a monopoly in collections of facts and other non-copyrightable items making it difficult, sometimes even impossible, to "invent around" them.

While overly strong IP rights in databases may be advantageous to a few big producers, enabling them to extract unusually high rents from end users, they prevent market entrance for would-be database providers and hinder research and development, presenting barriers to innovation.

This IP right was introduced to stimulate the production of databases in Europe, but a study by the European Commission showed that the production of databases had fallen to below pre-Directive levels. The US database industry, which has no such intellectual property right, was growing faster than the EU's, and the gap appears to be widening. The study found that the US information industry was five times larger than its European counterpart, even though the two economies were almost equal in size. The main difference, the Commission stated, was the much more liberal rules on re-use of federal information in the USA. The ratio of European to US databases fell from nearly 1:2 in 1996 to 1:3 in 2004.

Our firm view is that liberalising IP protection on databases will enable creative and economic activity that would otherwise not be undertaken. The RSA commissioned research on the economic impact of copyright on database and fair-use exemptions. This research is included as part of this submission.

Current term of protection on sound recordings and performers' rights

The RSA believes the current term of protection on sound recordings and performers' rights is more than favourable to creators. There is absolutely no evidence whatsoever that extending the protection term further would encourage artists to be any more creative. Since the underlying public policy purpose of the grant of copyright is to stimulate further creativity, there can be no justification for an increase in term so that yet more monopoly rents can be extracted.

The Government should not extend such rights unless a comparative economic study (between the UK and other domains with longer terms) clearly demonstrates that there is significantly more creativity and economic value in countries with longer copyright terms.

Further, the Government should reintroduce a requirement that any longer term should be conditional on the rights holder actively asserting their desire to extend the term in the year before the expiry of 50 year term or, preferably, before some shorter "break" period, and paying a fee, even if this fee is nominal. Such a proposal would prevent the overwhelming majority of works – more than 95% of which have no economic value – from being needlessly ensnared in a copyright term which was not desired by the rights holder.

In addition, Government should consider making extended terms limited to the life of the original rights holder, even if that is less than would otherwise be the full term. By definition, dead people cannot be incentivised to further creativity by prolonging rights terms beyond their deaths.

Fair-Use Exceptions to Copyright

Examples of acts that may be considered as fair use or fair dealing include copying or reproducing extracts of original works for the purposes of research or private study, criticism or review, or to report current events.

Areas where there has been controversy regarding the application of fair use and fair dealing have included the systematic copying of texts for students by university libraries, the copying of broadcast programmes for private viewing by means of videotape, and the availability of material for news reporting purposes.

Fair use provides a mechanism for the law to recognise the need to allow the uncompensated transfer of the property right in circumstances where it might otherwise not be possible in order to ensure the advancement and dissemination of culture and knowledge and in circumstances where the creator's rights would not be significantly adversely affected.

The exceptions or defences to copyright comprised within the fair use or fair dealing doctrines form a critical factor in the effectiveness of copyright law in ensuring that the correct economic incentives exist for the encouragement of the creation of new works.

The exceptions were largely defined in a pre-digital age, and the Government should review whether new technologies are enabling rights holders to reduce the scope and effectiveness of exceptions by, for example, using Digital Rights Management systems to prevent what were previously regarded as legitimate uses.

Summary of Recommendations

- The Government should use the Public Interest Test set out in the RSA's Adelphi Charter before deciding on any changes to intellectual property legislation – in particular, the Government should undertake a thorough review of the wider costs and benefits of any proposed changes to copyright terms.
- The Government should undertake a thorough empirical analysis of the economic effects of the transposition of *sui generis* database rights in the UK, with adequate representation of all stakeholders.
- Intellectual Property law should be simplified, and tools should be developed that digest and present the law in pragmatic, situation-specific guides.
- There should also be better industry-practices for the licensing of databases. Practices which overreach privileges granted by intellectual property (IP) legislation or seek to curtail opportunities for new entrants must be justified. Existing limitations and exceptions are overly narrow and fail their purpose within the overall IP framework. The introduction of a general public interest test that can be relied upon against a claim of database infringement should be considered.
- There should not be an extension to either the current term of protection on sound recordings nor performers' rights. However, the RSA is aware that there are those calling for such an extension so, in line with the Adelphi Charter, the Government should not extend such rights unless a comparative economic study (between the UK and other domains) clearly demonstrates that there is vastly more creativity and economic value in countries with longer terms.
- If a decision is taken to extend terms beyond the existing 50 year period, the Government should reintroduce a requirement that any longer term should be conditional on the rights holder actively asserting their desire to extend the term in the year prior to the expiry of the 50 year term or, preferably, before some shorter "break" period, and paying a fee, even if this fee is nominal. Such a proposal would prevent the overwhelming majority of works – more than 95% of which have no economic value – from being needlessly ensnared in a copyright term which was not desired by the rights holder.

- In addition, Government should consider making extended terms limited to the life of the original rights holder, even if that is less than would otherwise be the full term. By definition, dead people cannot be incentivised to further creativity by prolonging rights terms beyond their deaths. It is difficult to see what public policy objective is being met by offering monopoly rents which extend beyond the life of the original creator.
- Given the number of grey areas and lack of empirical evidence on fair-use exceptions, it is necessary that further research is conducted into the following areas:
 - the measurable impact on schools and educational establishments of a market failure approach to fair use, ie, an empirical study of the costs of copying works for educational uses under licence and the effect on incentives to produce such educational works;
 - whether the terms of copyright law need to be amended in light of the development of digital technology and multimedia access, eg, if the main act restricted or controlled by copyright now needs to be the right of access to the content of a work rather than, eg, translation of the work to a different medium; and
 - the extent to which any changes proposed to UK legislation will in future be restricted by the terms of the EC Copyright Directive and therefore whether the Directive requires amendment or reinterpretation.
- The Government should ensure that the use of digital rights management (DRM) systems does not infringe people's fair-use rights.

Introduction

I am delighted to make this submission to your inquiry on behalf of the Adelphi Charter project of the Royal Society for the encouragement of Arts, Manufactures and Commerce (RSA).

The RSA is an independent, non-aligned, multi-disciplinary registered charity with over 25,000 Fellows. Many of these Fellows are involved in creative and innovative industries – areas greatly affected by intellectual property (IP) protection.

The encouragement of learning and creativity has been the fundamental aim of the RSA since its inception in 1754. The creation, protection and utilisation of bright ideas is critical to this, as the RSA recognised when it drew attention to the parlous state of the country's patent laws in the 19th century and continues to do so with its various projects today.

One such project, the *Adelphi Charter on Creativity, Innovation and Intellectual Property*, responds to a profound challenge of the 21st century: how to ensure that everyone has access to ideas and knowledge, and that intellectual property laws do not become too restrictive.

Humanity's capacity to generate new ideas and knowledge is its greatest asset. It is the source of art, science, innovation and economic development. Without it, individuals and societies stagnate.

The Adelphi Charter is an initiative by the RSA aimed at putting a stop to the unwarranted extension of intellectual property laws. It lays down the principles against which all new copyright and patent laws should be judged.

The firm view of the RSA is that in the areas of social and economic activity, IP laws are no longer serving the public good. The RSA has been campaigning for nearly a year on these issues and welcomes the opportunity to make our submission.

Paul Crake
Programme Director
RSA
21 April 2006

IP Principles and the Adelphi Charter

The RSA believes the primary purpose of IP law, such as copyright and patents, should be, now as it was in the past, to ensure the sharing of knowledge to stimulate further creativity for the benefit of all humanity. IP law does this by granting a monopoly right that is sufficient to offer the opportunity for the innovator to achieve a reasonable reward for their creativity. As in almost every aspect of human endeavour, a private economic monopoly is regarded as a bad thing which should be kept as short and as tightly drawn as possible.

Managing the ownership of ideas is crucial to any country's economic and creative success: it holds out the prospect that speculative effort can be rewarded and encourages innovation. The contention of the RSA Adelphi Charter is that today's intellectual property laws often fail to serve the public interest, and frequently work against it.

Drawn up by an international commission comprising distinguished scientists, artists and legal experts, the RSA Adelphi Charter sets out simple principles about the granting of copyrights and patents, and calls on governments to apply a new public interest test to any systemic change. A full copy of the Adelphi Charter is attached to this Submission as an appendix, as well as a list of the members of the Commission who wrote the Charter.

Expansion in the scope and term of IP laws over the last 30 years has resulted in an intellectual property regime that is out of line with modern technological, economic and social trends. Copyright and patents must therefore be limited in time and their terms must not extend beyond what is proportionate and necessary.

The Charter is predicated upon a public interest test, which requires that:

- Intellectual property protection must not be extended to abstract ideas, facts or data
- Patents must not be extended over mathematical models, scientific theories, computer code, methods for teaching, business processes, methods of medical diagnosis, therapy or surgery
- Copyright and patents must be limited in time and their terms must not extend beyond what is proportionate and necessary.
- Government must facilitate a wide range of policies to stimulate access and innovation, including non-proprietary intellectual property models such as open source software licensing and open access to scientific literature

- Intellectual property laws must take account of developing countries' social and economic circumstances.
- There should be an automatic presumption against extending intellectual property laws. The advocates of change must demonstrate why their proposals are in the public interest

The charter calls upon national governments and the international community to adopt the following fundamental principles:

- The purpose of intellectual property laws should be to enhance creativity and innovation
- Governments should ensure their IP laws serve as a means of achieving creative, social and economic ends and these laws must not take priority over basic rights to health and education
- The public interest requires a balance to be struck between the monopoly rights implicit in intellectual property laws and the free competition that is essential for economic and creative vitality

Addressing specific points within the Gowers Review's Terms of Reference

The RSA has recently focussed its intellectual property work on access to public sector information, copyright protection of databases and fair-use exceptions in copyright law. The RSA was disappointed that public sector information is outside the scope of this review. However, the key issue is free access to information, where this does not disproportionately infringe on people's rights to see their effort rewarded.

Our firm view is that liberalising IP protection will enable creative and economic activity that would otherwise not be undertaken. This would help innovation, as it allows everyone access to information which they could use for a variety of purposes. It would promote greater consumer choice and more effective competition within the market.

The RSA commissioned research on the economic impact of copyright on databases. This found that the *sui generis* right for databases is intended to protect the database industry in the EU and therefore stimulate its growth, but figures show that it has not had the desired effect. The ratio of European to US databases fell from nearly 1:2 in 1996 to 1:3 in 2004. Overly strong IP rights in databases may allow a few big producers to extract high rents from end users, but they also prevent competition in the industry and hamper innovation.

The RSA also commissioned economic research on fair-use exemptions. The RSA believes the fair-use and fair-dealing exceptions form a critical factor in the effectiveness of copyright law in ensuring that the correct economic incentives exist for the encouragement of the creation of new works. However, we are concerned the scope of these exemptions is not clear, particularly as technology has advanced. There are a number of grey areas, such as photocopying by teachers and lecturers for their students. It is therefore necessary that further research is conducted in a number of areas to assess the impact of these exemptions and their impact, and for such grey areas to be clarified in line with the public interest.

Copies of both reports are attached as appendices and will be discussed in more detail later in this submission.

I have answered the general and specific questions that are of particular interest to the RSA in the order they were listed in the call for evidence.

How IP is awarded

The existing copyright system is complex. As you are aware, the three forms of IP – patents, copyright, and trademarks – work in quite different ways. It is generally felt that the trademark system is working reasonably well, albeit with some concerns regarding access to essential pharmaceuticals in the developing world. The RSA's comments are almost all directed at copyright, with some lesser concerns about patents.

Patents and copyright create private monopolies, albeit ones with time limits. These monopolies are granted for the public good – as a device that offers innovators a chance to secure a reward for their creativity. By definition, they restrict competition and, inevitably, they lead to higher prices for consumers. They often also restrict the flow of knowledge that is vital to further advances. For these reasons, governments have always sought to limit their scope.

Patents and copyright slow down the cycle of innovation. By locking-away an innovation for a period of time, they prevent others from using ideas and knowledge and developing new, improved products. The monopoly-holder's primary economic interest then becomes one of maximising their return on their existing investment – often launching legal battles to protect their privileged monopoly or engaging in widespread government lobbying to secure term extensions – rather than encouraging them to continue to develop and innovate.

For an example of how this can perversely work against a corporation's long-term interests, you only have to see that the market-leader in internet music downloads is a computer hardware manufacturer and not a leading rights-holding music company. This may be because the music companies became so engrossed in fighting their "war on piracy", and on protecting and where possible extending their current monopoly and their existing business models, that they took their eyes off the development of future business opportunities.

How IP is used

The RSA and Intellectual Property

The RSA has been interested in intellectual property since its foundation more than 250 years ago. From our origins, we offered what we called “premiums” – which were either cash awards or gold medals – to people who developed significant innovations. We put together panels of experts who devised competitions to stimulate specific innovations, and the winners of these competitions received the award. Early competitions included the development of a stable red dye for textile manufacture, and the encouragement of new forms of machinery at the start of the industrial age.

Interestingly, almost everyone who applied for one of our premiums took it in the form of the Society’s gold medal rather than the somewhat larger sum of cash that was offered as an alternative – at least 50 guineas in the late 1700s.

One of the most stringent conditions for receiving one of the premiums was that the innovation had to be written-up and published in our *Transactions* – what later became the *RSA Journal* – and, as intellectual property law was gradually strengthened, the premium winners had to guarantee that they would not patent their innovations. Instead, we believed that the rapid and free distribution of knowledge would enable yet further innovations to take place, multiplying the benefits to society. As an organisation founded on Enlightenment principles, which counted among its early members people such as Adam Smith, you would also expect us to be instinctively opposed to the idea that the creation of private monopolies would be the best way of rewarding innovations.

All this was done in line with our founding Mission, which stated that our aim was:

“The encouragement of Arts, Manufactures & Commerce, in Great Britain, by bestowing Rewards, from Time to Time, for such Productions, Inventions, or Improvement, as shall tend to the Employing of the Poor, to Increase of Trade, and to the Riches and Honour of this Kingdom, *by Promoting Industry and Emulation.*”

Note that reference to “emulation”, or copying. Creativity and innovation have always been founded on emulating what already exists and attempting to improve upon it. To use Sir Isaac Newton’s phrase, we are all “standing on the shoulders of giants” – we are using what has gone before.

The creative cycle is wholly dependent on our ability to access elements drawn from common knowledge and recombine them into new scientific, technological and cultural products.

You will also note that, from our origins, the Society has believed in “bestowing rewards”: in rewarding creativity. Nothing in this Submission should be taken to mean that the RSA does not believe that creativity should be fairly rewarded – far from it. We are interested in the development of a system that properly rewards creativity and innovation while balancing that with the need for a system that encourages yet more creativity and innovation in the future.

This is not just a feature of the RSA in the past but this tradition continues into the present; many of our more than 25,000 Fellows are involved in creative and innovative industries and uphold these principles.

How IP is used

The RSA believes problems with IP rights are increasing. For instance, term limits seem to have been inexorably lengthening. In the early days of copyright, terms were granted for 14 years, with the opportunity to ask for a further single extension of 14 years: that is, 28 years in total. In most jurisdictions today, copyright terms for most items have now extended to the lifetime of the author plus a further 70 years. The US Supreme Court stated that existing terms already mean that more than 95% of the economic value of any innovation is captured by the rights holder, whereas the original 28 year term led to a more equitable 50% rate of return. There is pressure for copyright terms to extend yet further – the cry is usually for rights to be globally “harmonised”, but only ever harmonised *upwards*. For all practical purposes, the majority of the cultural output of the twentieth century will be in copyright for most of the twenty-first century. We have never before experienced a system which has created such extensive copyright terms.

The fields covered by intellectual property also appear to be extending: in the US, it is now considered acceptable to patent business processes (like Amazon’s “one click shopping”). In principle, this seems no different from patenting concepts like “going shopping on Sundays”, especially since the original US requirement – that the business process was in some way dependent on innovative computer technology – has itself now been removed. We have also seen the EU extending copyright protection to databases: mere assemblages of facts that have for long been considered immune from IP protection, not least following the defeat suffered by US telephone companies in 1991 in

a landmark Supreme Court ruling that prevented them from treating telephone directories as protectable.

Everyday things that individuals used to take for granted, such as making a tape copy of an album bought by the consumer so that they could listen to it in their car, are now not only treated in many jurisdictions as criminal offences, they are also made impossible by the adoption of digital rights management software.

The climate has changed to such an extent that documentary filmmakers, filming in public places, are now expected to pay royalties to the owners of logos on advertising posters or shop-fronts, or even the owners of rights for objects which may appear in the background of their films. This seems absurd – if even the use of the physical public domain can now be secured only by the payment of royalties to holders of individual monopolies.

There is a question of proportionality. Only 4% of published copyright works more than 20 years old are commercially available. Almost by definition, the remaining 96% of works have little commercial value in themselves, but they could have enormous value as the building blocks for new innovations. Yet we lock away that 96% beyond easy reach. The harm to the public interest – and to wider economic development – is large, the benefit to the authors tiny.

In addition, individuals have rights granted to them whether they want them or not, although it is also true to say that they can go through legal processes specifically rescinding their rights or licensing them in such a way that anyone can use their creations. However, this requires the knowledge that these options are available as well as the effort to go through the required processes. People would generally be willing to take time to opt *into* licensing their creations where they wished, rather than making people opt out. This issue also illustrates a point that is frequently forgotten – the majority of people are creative in many ways, and are not being creative for economic gain. It seems disproportionate that the by-products of billions of everyday non-economic activities – such as taking holiday photographs – should be ensnared in a web of copyright protection that, subject to the life-span of each owner, is likely to last more than a century.

These examples illustrate a range of ways IP rights have expanded. However, my intention in this submission, as I mentioned earlier, is to focus on databases, fair-use exemptions and proposals to extend copyright terms for performers. Your inquiry might like to consider seeking further specific studies on some of these other points.

Cost of IP Rights on the Economy

The existing copyright system is complex and impedes economic activity. Ten years ago, the EU created a broad, new Community-wide *sui generis* IP right over compilations of facts under the Databases Directive (1996).

The European Commission recently conducted an empirical evaluation of whether the Database Directive was doing any good. The Commission found that:

“the economic impact of the *sui generis* right on database production is unproven. Introduced to stimulate the production of databases in Europe, the new instrument has had no proven impact on the production of databases.¹”

The study showed that the production of databases had fallen to pre-Directive levels and that the US database industry, which has no such intellectual property right, was growing faster than the EU's, and the gap appears to be widening. The study found that the US information industry was five times larger than its European counterpart, even though the two economies were almost equal in size. The main difference, the Commission stated, was the much more liberal rules on re-use of federal information in the USA. Hopefully, the study may be part of a larger – and welcome – transformation in which a more professional and empirically-based look is being taken at the competitive effects of IP protection.

RSA's economic data on the current IP system for databases

The RSA recently commissioned a group of economists at Oxford University and the London School of Economics (LSE) to undertake some research into the loss to the British economy as a result of the current IP system on databases.

The report focuses on an area of increasing economic importance: the treatment of data under the current IP regime in the UK. Taking a cross section of economic findings, stakeholder opinions and concerns from policymakers, it presents evidence of a growing imbalance in the IP framework protecting databases. The paper reviews the general background of database protection, the *sui generis* right and compares it to the US situation. It also looks at the effect of existing IP regulation on the price of access to information held in databases, and the complexities of the existing legal framework pertaining to databases.

¹ European Commission DG Internal Market and Services Working Paper – ‘First evaluation of Directive 96/9/EC on the legal protection of databases’.

The report highlights concrete disadvantages for business, consumers and science. Amongst other findings, it suggests that while overly strong IP rights in databases may be advantageous to a few big producers, enabling them to extract unusually high rents from end users, they also prevent market entrance for would-be database providers and, perhaps most importantly, hinder research and development, presenting barriers to innovation.

A knowledge-driven economy depends on the accessibility of data at fair market prices. Driven by advances in computing and network technology, databases have become the key means of collecting and organising information. Hundreds, thousands, or even millions of entries can be instantly searched. Businesses from banks to travel agencies depend on them, as do research and development in both the commercial and academic domains. This increased reliance on electronically available information resources has fundamentally reshaped the database industries and their relationships with end-users. At the very least, consideration should be given as to whether the rights granted to database producers are optimal in terms of growing the database industry whilst serving the needs of all other communities reliant on access to data.

There is evidence that the orthodox attitude to regulating the database industry (which may be crudely summarised as “more protection equates to more benefits”), is in need of reassessment. The logic driving copyright in the area of data compilations is that it provides a tool to protect investment; but certain aspects of copyright also hinder re-use of data. More precisely, it can work against the most innovative examples of database developments. Some of the fastest growing databases, like the Wikipedia or the Open Directory Project, rely on open copyright licenses to foster decentralised collaboration and produce a higher social benefit by providing access at zero cost. It is interesting to note that there are large scale database projects which rely on hundreds, even thousand of contributors with non-monetary and non-proprietary incentives, producing high quality datasets. This is in sharp contrast to commercially produced databases.

Access to accurate and timely data is vital to business, science and society in the UK. However, this data is increasingly locked into electronic databases which are protected by a mass of different regulations. Many observers have called the current approach to regulation of databases in the European Union and the UK “one of the least balanced and potentially anti-competitive property rights ever created”¹.

¹ J Reichman & P Samuelson (1997) ‘Intellectual Property Rights in Data?’ 50 Vanderbilt L Rev 51

Criticism centres on the controversial *sui generis* right, which protects any database in which there has been a “substantial investment” in obtaining, verifying or presenting the data content. On this basis, creators of databases within the EU can demand payment for use of content that is already freely available in the public domain, asserting de facto ownership over the content as part of a collection. This includes content that would otherwise not be applicable for copyright protection.

Though there is no requirement for creativity or originality to obtain this right, it creates a monopoly in collections of facts and other non-copyrightable items making it difficult, sometimes even impossible, to “invent around” them.

This *sui generis* right is intended to offer protection to the database industry in the EU and therefore stimulate its growth, but figures show that it has had no such effect. The ratio of European to US databases fell from nearly 1:2 in 1996 to 1:3 in 2004. Overly strong IP rights in databases may allow a few big producers to extract high rents from end users, but they also prevent competition in the industry and, perhaps most importantly, hamper innovation. This “chilling effect” on innovation and growth pertains not only to the database industry but to the wider economy, where potentially innovative firms and individuals are kept from information they might use to produce valuable goods and services. The overall impact of such restrictions on access to knowledge cannot be underestimated. The UK economy has shifted away from industrial and towards service sector production in which informational resources now play an essential role.

The European Commission’s recent review of current legislation stated that the usage of database rights adds to:

“legal uncertainty, difficulty in accessing data, increased administrative burdens, increasing costs relating to database creation and fewer business opportunities”.¹

Therefore, the legal uncertainty and complexity of the *sui generis* right dissuades potential market entrants from making the investments necessary to properly establish themselves and thereby ensure continued trading and expansion. The Database Directive does not offer much guidance in interpreting the notion of “substantial investment”. It does not clarify how much innovation or work the database producer must input in order to qualify for *sui generis* protection. Start-ups tend not to possess the capital to employ the legal expertise required to discern whether a particular use of information, which may or may not be protected by the *sui generis*

¹ European Commission DG Internal Market and Services Working Paper – ‘First evaluation of Directive 96/9/EC on the legal protection of databases’.

database right – or indeed by another form of legal protection – is a violating or infringing use, and therefore prohibited. Yet it is in such smaller, dynamic, progressive firms that innovation is generally fostered and encouraged.

Problems with the current approach to regulating databases are not, however, restricted to business. Too often policy reports regarding copyright protection afforded to creators have relied on input only from industry stakeholders.

However, there are many other constituencies who bear the brunt of the Directive. Librarians and teachers, for example, have suffered under the Directive's discarding of "fair-use", a historically important exception to owners' rights that has long been essential to research and learning. The concept of "illustrative use" with which it is replaced is not clearly defined but current interpretation suggests "illustration" is far more restrictive.

As resources like the Human Genome Project, a plan to determine the complete human genome sequence by an international consortium, demonstrate, there is a critical need to consider the social value of particular kinds of information and the dangers posed by granting private groups too much control over it. The Human Genome Project has avoided monopolistic privatisation, keeping its genetic information in the public domain to encourage and sustain future scientific and medical research. Thanks to the progressive approach of the Project's leaders, the database remains open for public access – but a lack of legal understanding might have placed this crucial scientific resource under private monopoly control, subject to subscription fees and restrictions for reproducing data in related experiments. The effects on science and health would have been devastating.

The current regime of IP rights for databases does not take into account these wider economic social benefits of the information contained in databases – popularly referred to as a "spillover" effect. Even private investments rely on some form of complementary public resource: the results of publicly funded research and investment projects often either inspire or incentivise private sector work. In fact, the Directive enforces tight control over the re-use on database content, putting massive limitations on the integration and re-mixing of existing data into new material that would otherwise provide new more specialised and useful research resources.

The United States takes a fundamentally different approach to legal regimes that protect databases creation. Since a seminal 1991 US Supreme Court case, copyright protection in the US has been interpreted as not applying to the unoriginal compilations of facts which the European *sui generis* right was expressly designed

to protect.¹ Were it the case that stronger protection for databases encouraged economic growth, we would expect to see the European database industry outperforming that of the US.

Available evidence suggests, however, that the US database industry has grown more than 25-fold since 1979 where the European database industry, despite a sharp spike in the numbers of firms entering the market at the time of the Directive's implementation, has seen the rate of entry fall back to roughly pre-Directive levels.² The US, then, is saving on monopoly costs and earning vastly more from industry, while the EU pays monopoly costs without enjoying increased economic growth.

There is a strong coalition against the European approach within the US. There, libraries, consumer organisations, scientists, innovative database companies, and even the US Chamber of Commerce have provided evidence of the Directive's effects on restricting access to knowledge. In the United States, as the consumer group CP-Tech reports³, the view is that a right similar to that recognised by the European Database Directive would impinge on the creation of new databases and inflict stifling restrictions on the dissemination of information to businesses, educators, scientists, other non-profit organisations – as well as the public at large.

CP-Tech argues persuasively in its response to the European Commission's first evaluation of the Database Directive that to date there has been an over-reliance in policymaking on subjective data from the database industry, and an "over-sensitivity to the views of the beneficiaries of [...] special database protection". Of course, industry has a natural disinclination to lose its existing protection, and the approach taken by the Commission – a private online survey – simply gave voice to this. The case for special protection in databases should be decided, the lobby group argues, not just on the needs of the beneficiaries of protection, but on those of *all* stakeholders. One might make the same case for IP policy in general, which, as stated in the Adelphi Charter, should be decided by hard empirical research as opposed to cursory economic investigations and surveys limited to those with most to gain, financially, from the rights in question.

¹ See *Feist Publications v. Rural Telephone Services Co.*, 499 US 340 (1991). This decision does not mean owners of database materials are entitled to no legal protections. There remain a variety of other legal and extra-legal measures available to them. See Hasan (2005) *Sweating in Europe: The European Database Directive*, 9 *Comp. L Rev & Tech J* 479

² Maurer, (2001) 'Across Two Worlds: Database Protection in the US and Europe'; Maurer, Hugenholtz and Onsrud (2001) 'Intellectual Property: Europe's Database Experiment' *Science* 2001 October 26; 294: 789-790.

³ Consumer Project on Technology Comments on DG Internal Market and Services Working paper 'First evaluation on Directive 96/9/EC on the legal protection of databases'.

Given the significant doubts cast on the value of the *sui generis* right in databases, the RSA suggests more in-depth research should be commissioned into the broader impacts of this legislation on, for example, innovation and research, impact on specific regions, sectors and workers, consumer rights, access to social protection, health and educational goods and services.

The policy objectives outlined for the *sui generis* right were :

- legal certainty;
- increased investment in databases; and
- improved access for users.

It is important to note that a decade later not one of these aims has been achieved.

In place of the legal certainty it was intended to create, there are judicial difficulties; there has been no increased investment in databases; and library representatives have expressed fears about the consequences of the “monopolisation of information” on public access to information. The information society and research communities have so far largely responded to a confusing directive by ignoring it, which is dangerous and counterproductive.

The RSA makes the following recommendations regarding the copyright protection of databases:

- there should be more empirical analysis of economic effects of UK implementation of *sui generis* database rights, with adequate representation of all interest groups and a rigorous, empirical and balanced method involving a broad cross-section of stakeholders;
- simplification of Intellectual Property law, and the development of tools that digest and present this complexity in pragmatic, situation-specific guides;
- better industry practices for the licensing of databases. Practices which overreach privileges granted by IP legislation or seek to curtail opportunities for new entrants must be justified. Existing limitations and exceptions are overly narrow and fail their purpose within the overall IP framework. The introduction of a general public interest test that can be relied upon against a claim of database infringement should be considered.

Current term of protection on sound recordings and performers' rights

It has always been argued that rewarding creativity is critical if we are to encourage more creativity (and you can never have too much creativity). Copyright is one of the IP systems that encourages creativity by providing an opportunity for reward.

In the face of several decades during which copyright terms have dramatically lengthened, the Adelphi Charter is the RSA's attempt to limit further extension of the scope and term of IP rights *unless* there is clear evidence of a public benefit. We want to encourage legislators to look for evidence before further extending intellectual property terms and scope, and to suggest that they should always balance the need to reward creativity with the need to stimulate ever more innovation and creativity. The RSA believes that more creative and economic activity would arise from a liberalised IP regime, or at least one that is not extended without thorough analysis beforehand.

For example, by extending the protection term, would artists be encouraged to be any more creative? It seems unlikely that Sir Cliff Richard would have sung *Summer Holiday* less perkily knowing that it would benefit him for "only" 50 years, rather than, say, 70 or 95.

Copyright has always been a delicate compromise between the needs of artistic creators and the cultural richness of a wider public domain. The current term limit is more than favourable to the artists, in terms of this balance. People should not continue to be rewarded far into the future for doing something creative as this will only mean they are being rewarded for *failing* to allow new ideas and innovations to develop.

There are also the interests of lesser-known artists to consider. A blanket copyright extension would encourage record companies to restrict access to their entire back catalogues, even works (the vast majority) that they would never exploit. Yet freely available, on other labels' cheap CD collections, otherwise forgotten performers could discover new life. In that odd way in which markets work, the benefits of such cultural entrepreneurial drive could then accrue to the original owner of the rights.

In the field of music, access to the creative genius of generations is increasingly restricted to serve the interests of large recorded music corporations, not the young artists of today or the general public interest. Many music companies and trade associations have successfully used rhetoric to cloud the debate around IP rights.

The language they often use is loaded and disingenuous when they claim they are trying to protect the rights of individuals, rather than their own profits. If it is indeed determined that it is “unfair” for performers to have shorter term limits than, for example, authors, consideration should be given to achieving harmonisation somewhere in the middle – increasing performers’ terms while also reducing authors’. Such an approach, based on a rigorous economic analysis of wider cost-benefit issues, may indeed be “fairer”: but simply citing the fact that one group has longer rights than another should not lead to an automatic conclusion that the correct resolution is always to harmonise to the longest possible term.

The RSA therefore recommends that:

- there should *not* be an extension to either the current term of protection on sound recordings nor performers’ rights. However, the RSA is aware that there are those calling for such an extension so, in line with the Adelphi Charter, the Government should not extend such rights unless a comparative economic study (between the UK and other domains) clearly demonstrates that there is vastly more creativity and economic value in countries with longer terms *as a direct result of that longer monopoly*;
- further, if a decision is taken to extend terms beyond the existing 50-year period, the Government should reintroduce a requirement that any longer term should be conditional on the rights holder actively asserting their desire to extend the term in the year prior to the expiry of the 50 year term or, preferably, before some shorter “break” period, and paying a fee, even if this fee is nominal. Such a proposal would prevent the overwhelming majority of works – more than 95% of which have no economic value – from being needlessly ensnared in a copyright term which was not desired by the rights holder;
- in addition, Government should consider making extended terms limited to the life of the original rights holder, even if that is less than would otherwise be the full term. By definition, dead people cannot be incentivised to further creativity by the act of prolonging rights terms beyond their deaths. It is difficult to see what public policy objective is being met by offering monopoly rents which extend beyond the life of the original creator.

Copyright exceptions

The RSA also commissioned Europe Economics, a group of leading economists, to review a range of articles and other literature relating to the fair-use and fair dealing exceptions to copyright, and the economic and other justifications for these exemptions.

Copyright, Fair Use and Fair Dealing

The aim of copyright law and its exceptions is to strike the optimum economic and social balance of the benefits and costs of copyright.

Fair use and fair dealing comprise exceptions to copyright or a defence to an allegation of copyright infringement. The US and UK (common law) approaches to fair-use differ considerably. The US doctrine does not define "fair use" but sets out a number of non-exclusive factors for the courts to consider in each case. The UK approach ("fair dealing") constitutes a specific set of pre-defined defences against actions for infringement of copyright, and is therefore considerably less flexible but carries less risk of uncertainty for both creator and user.

Examples of acts that may be considered as fair use and fair dealing include copying or reproducing extracts of original works for the purposes of research or private study, criticism or review, or to report current events. Areas where there has been controversy regarding the application of fair use and fair dealing have included the systematic copying of texts for students by university libraries, the copying of broadcast programmes for private viewing by means of videotape, and the availability of material for news reporting purposes.

Fair use and economic incentives for creativity

The fair use doctrine balances the creator's need for remuneration against the social need for access. By increasing the accessibility and lowering the cost of access to a work, fair use reduces the social welfare loss due to under-utilisation and encourages the creation of new works. As a result, fair use can generate important economic benefits so long as the incentives for the original creator are not significantly adversely affected.

Fair Use as a means to resolve market failure

Fair use can be defined as a means to resolve market failure, the market failure which arises when:

- the user cannot appropriately purchase the desired user right through the market;
- transferring control over the right would serve the public interest; and
- the copyright owner's incentives would not be substantially impaired by allowing the use.

Fair use therefore provides a mechanism for the law to recognise the need to allow the uncompensated transfer of the property right in circumstances where it might otherwise not be possible in order to ensure the advancement and dissemination of culture and knowledge.

The Public Interest

There is a wider debate concerning whether there should be a more generic "public interest" exception for copyright. However, it may be difficult to define what constitutes the "public interest" and, given the uncertainty in this area, devising a rule which could be robustly and predictably applied in practice.

Relevant factors in determining whether a use was in the public interest could include:

- whether the use was for commercial benefit or a non-profit activity, with particular emphasis placed on educational uses;
- communitarian values, the extent to which the use contributes to the common goals of the community, "the greater the relationship of the work of art to the shared values of the community, the greater the need for widespread availability" (Lacey); and
- relatively rare circumstances where copyright is being asserted in a way which would impact on public health or safety, the administration of justice, or freedom of information.

The importance of monetary concerns

The issue of the financial impact on creators has been a primary concern of the courts when considering allegations of infringement of copyright. This is rational since the economic incentivisation of creation is dependent on the creators being able to realise the financial rewards from their work.

However, it may be questioned whether the emphasis on the monetary rewards available to creators always leads to optimal outcomes from an economic and social perspective. Not all creators are motivated purely (or even at all) by the prospect of monetary reward.

Furthermore, an over-emphasis on the rights of creators to maximise their monetary reward may fail to take proper account of the positive externalities arising from wider dissemination of their works.

Conclusions and issues for future consideration

The exceptions or defences to copyright comprised within the fair use or fair dealing doctrines form a critical factor in the effectiveness of copyright law in ensuring that the correct economic incentives exist for the encouragement of the creation of new works.

There is little detailed empirical evidence of the impacts of fair use. The RSA is concerned the scope of fair use and fair dealing exemptions is not clear, particularly as technology has advanced. There are a number of grey areas, such as photocopying by teachers and lecturers for their students. In addition, while there are specific exemptions for educational use in the UK's Copyright, Designs and Patents Act (CDPA), these are relatively limited.

It is therefore necessary that further research is conducted in a number of areas to assess the impact of these exemptions and their impact. The RSA believes it would be valuable to undertake further detailed consideration of:

- the measurable impact on schools and educational establishments of a market failure approach to fair use, ie, an empirical study of the costs of copying works for educational uses under licence and the effect on incentives to produce such educational works;
- whether the terms of copyright law need to be amended in light of the development of digital technology and multimedia access, eg, if the main act restricted or controlled by copyright now needs to be the right of access to the content of a work eg, if the main act restricted or controlled by copyright now needs to be the right of access to the content of a work rather than, eg, translation of the work to a different medium; and
- the extent to which any changes proposed to UK legislation will in future be restricted by the terms of the EC Copyright Directive and therefore whether the Directive requires amendment or reinterpretation.

Copyright – Digital Rights Management

Methods used in Digital Rights Management (DRM) may limit the number of copies consumers can make, or on the equipment that the product can be used on, for example some CDs will not play on computers or car stereos. This raises serious issues as they dictate what consumers can do with the products they buy; and they may prevent them from taking advantage of the fair use rights they have in IP law.

The use of DRM technology acts against the public interest by unnecessarily restricting access to creative output. Their growing prevalence is a concern for the RSA not simply because of what such technologies are capable of in the abstract, but because that prevalence risks becoming self-continuing – the more a company becomes dependent on the restrictive power of software to ring-fence access to content, the more it will invest in ever more sophisticated mechanisms for doing so. Given the Adelphi Charter and the RSA's presumption that there is an economic upside if systems of access to knowledge are as free as possible, this proliferation is clearly a negative development.

This is also the view of the National Consumer Council (NCC), which believes proliferation would undermine consumers' existing rights under consumer protection and data protection law. The NCC and BEUC (the European Consumers' Organisation) have stated that over-use of DRM ignores the range of ways in which value is created in a modern knowledge-based economy – and the role consumers can play in innovation and the creation of products and services.

Conclusion

Managing the ownership of ideas is crucial to any country's economic and creative success – it holds out the prospect that speculative effort can be rewarded and encourages innovation.

The RSA firmly believes that liberalising IP protection on databases will enable creative and economic activity that would otherwise not be undertaken. The RSA commissioned research on the economic impact of copyright on database and separate research on fair-use exemptions.

The RSA has found that the *sui generis* IP right over compilations of facts created by the European Community under the Databases Directive (1996) has impeded economic and creative activity.

A European Commission study found the production of databases had fallen below pre-Directive levels and that the US database industry, which has no such intellectual property right, was growing faster than the EU's, and the gap appears to be widening. The *sui generis* right was intended to protect the database industry in the EU and therefore stimulate its growth, but figures show that it has had no such effect. The ratio of European to US databases fell from nearly 1:2 in 1996 to 1:3 in 2004.

Databases might well be an example of the general principle that "less IP regulation leads to more creativity and greater economic benefit". More research is needed to determine whether or not this is the case.

The RSA has therefore recommended that the Government should undertake a thorough empirical analysis of the economic effects of the transposition of *sui generis* database rights in the UK, with adequate representation of all stakeholders. Intellectual Property law should be simplified, and tools should be developed that digest and present the law in pragmatic, situation-specific guides. There should also be better industry-practices for the licensing of databases.

The US and UK approaches to fair-use also differ considerably. The US doctrine does not define "fair use" but sets out a number of non-exclusive factors for the courts to consider in each case. The UK approach ("fair dealing") constitutes a specific set of pre-defined defences against actions for infringement of copyright, and is therefore considerably less flexible but carries less risk of uncertainty for both creator and user.

The exceptions or defences to copyright comprised within the fair use or fair dealing doctrines form a critical factor in the effectiveness of copyright law in ensuring that the correct economic incentives exist for the encouragement of the creation of new works. Fair use is best defined as a means to prevent (or overcome) market failure.

There is very little detailed empirical evidence of the impacts of fair use. The RSA suggests the Government should undertake a thorough empirical analysis of the impact of fair-use exemptions. This would provide an assessment of the impact of fair-use exemptions and the important contribution they make to the IP regime in order to prevent restrictions being placed on what are effective and necessary tools for a range of groups.

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Adelphi Charter

on creativity, innovation and intellectual property

RSA

Humanity's capacity to generate new ideas and knowledge is its greatest asset. It is the source of art, science, innovation and economic development. Without it, individuals and societies stagnate.

This creative imagination requires access to the ideas, learning and culture of others, past and present.

Human rights call on us to ensure that everyone can create, access, use and share information and knowledge, enabling individuals, communities and societies to achieve their full potential.

Creativity and investment should be recognised and rewarded. The purpose of intellectual property law (such as copyright and patents) should be, now as it was in the past, to ensure both the sharing of knowledge and the rewarding of innovation.

The expansion in the law's breadth, scope and term over the last 30 years has resulted in an intellectual property regime which is radically out of line with modern technological, economic and social trends. This threatens the chain of creativity and innovation on which we and future generations depend.

We call upon governments and the international community to adopt these principles:

- 1 Laws regulating intellectual property must serve as means of achieving creative, social and economic ends and not as ends in themselves
- 2 These laws and regulations must serve, and never overturn, the basic human rights to health, education, employment and cultural life
- 3 The public interest requires a balance between the public domain and private rights. It also requires a balance between the free competition that is essential for economic vitality and the monopoly rights granted by intellectual property laws
- 4 Intellectual property protection must not be extended to abstract ideas, facts or data
- 5 Patents must not be extended over mathematical models, scientific theories, computer code, methods for teaching, business processes, methods of medical diagnosis, therapy or surgery
- 6 Copyright and patents must be limited in time and their terms must not extend beyond what is proportionate and necessary
- 7 Government must facilitate a wide range of policies to stimulate access and innovation, including non-proprietary models such as open source software licensing and open access to scientific literature
- 8 Intellectual property laws must take account of developing countries' social and economic circumstances

In making decisions about intellectual property law, governments should adhere to these rules:

- There must be an automatic presumption against creating new areas of intellectual property protection, extending existing privileges or extending the duration of rights
- The burden of proof in such cases must lie on the advocates of change
- Change must be allowed only if a rigorous analysis clearly demonstrates that it will promote people's basic rights and economic well-being
- Throughout, there should be wide public consultation and a comprehensive, objective and transparent assessment of public benefits and detriments