

Gowers review of intellectual property

SCONUL (the Society of College, National and University Libraries) represents the directors of the library and information services in all the universities of the United Kingdom and Ireland, and in most other institutions of higher education in the UK. We also represent the directors of the national libraries of the UK and Ireland.

Our submission is limited to questions concerning copyright. Our members deal with copyright issues daily. Universities and national libraries both consume and produce large quantities of information, mostly protected by copyright. Our members seek to maximise the productive use of information while encouraging respect for copyright, which we recognise as a vital mechanism. We believe that recent attempts to modernise copyright have sometimes had the perverse effect of suppressing rather than encouraging innovation, by adding new limits to what the Review documents have termed 'spill-over' benefits.

Summary of SCONUL's submission

'Prosperity in a knowledge economy depends as much, if not more, on the knowledge distribution power of the system than it does on its knowledge production power – OECD, *National innovation systems*, 1997, p.43

- 1 We welcome the review. Copyright is critical to the knowledge economy, which now operates on a far broader scale than the traditional creative industries. New technology offers unprecedented opportunities for the dissemination of knowledge, which underpins all innovation.
- 2 We note with some concern the continued widely-held belief that 'the present UK system strikes broadly the right balance between consumers and rights-holders' (as suggested in your call for evidence). In our view that belief has become out of date.
- 3 In our view the UK system indeed offered broadly the right balance until the extension of copyright term (Copyright Term Directive 1993) and in particular the coming into force of the Copyright and Related Rights Regulations 2003, implementing the Information Society Directive 2001. By virtue of those measures the rights of consumers, including academic and scientific end-users, were seriously diminished and the position of rights-holders correspondingly strengthened. The result was a double loss to the information economy since the internet has extended the reach of information to virtually all citizens – not merely those professionally interested in information, such as researchers.
- 4 We outline below the disturbance of the UK's traditional balance of rights and exceptions to rights. In our view the changes are detrimental in the short term, by causing additional administrative and financial burdens on academic study and research, and in the long term, by hampering the innovation that copyright, in principle, seeks to encourage. Though their effect may be gradual, obstructions in the arteries of knowledge transfer will cause eventual damage. This is a significant risk to the position of the UK's knowledge-based industries, which ultimately depend on research and invention.

- 5 The rationale for the Information Society Directive (in its recital 5) acknowledged that existing concepts of IP were adequate but called for legislative changes in response to 'economic realities such as new forms of exploitation'. Thus, despite the recognition that 'digital is not different', the basic driver for key provisions in the Directive was the fear of widespread economic loss through infringement – the fear expressed in the penultimate bullet point of the introduction to your Call for evidence on pages 2-3.
- 6 In all recent considerations of copyright reform, the possibility of endless perfect illicit copies has been constantly put before legislators as the major consequence of technological change. The rights-holder has been judged to deserve protection from the end-user or consumer. Yet new technology together with the European Union's legislative reforms are paradoxically more restrictive of the general use of information than the provisions of the former print-based regime. This is all the more true in the UK where the implementation of the Information Society Directive has not introduced (as it has in Ireland, or in the Database Regulations) a provision to protect the exceptions to copyright in contracts relating to copyright material.
- 7 In general, the *legitimate* consumer is put at a new and significant disadvantage by the fact that the communication right in a digital publication is never exhausted during the copyright term. This means that a digital publication, unlike its printed equivalent, need not be sold, but can be leased with infinite repetition, even repeatedly to the same customer. Consequently the supply of the information can be, and usually is, governed not by copyright law at all but by private contract which can set aside any privileges or exceptions enjoyed by the individual end-user under statute. And because a copyright product is by definition a monopoly product, a contract issued by a rights-holder is, if the rights-holder chooses, virtually non-negotiable. The availability of exceptions to copyright formed part of the UK's traditionally balanced approach. Because the exceptions are no longer automatically available, free though restricted uses of copyright material that cause no harm to rights-holders can less often be used for productive knowledge transfer or further creative purposes.
- 8 In retrospect it is clear that those who framed and approved the Information Society Directive were so concerned to combat digital piracy that they overlooked the additional powers conferred by digital technology on rights-holders. The fundamental flaw in the Directive, carried through into UK law, is that it seeks to control illicit copying by inappropriate curtailment of legitimate copying. The UK's long-standing exceptions to copyright have been severely diminished by the new supremacy of contract law over copyright law in regulating access to information, and by the absolute legal protection of any technical system installed to control access to information.
- 9 We believe that two fairly simple adjustments to copyright law would go a long way to correcting the current imbalance. First, an amendment should provide that no contractual term may purport to prohibit or restrict any act permitted by statute. This would restore the exceptions to copyright to their original effectiveness. Since by international convention all exceptions are neutral in

their effect on rights-holders, such a reform would be unobjectionable. It would also be within the UK Government's power to enact it. Secondly, it should be lawful, at least in certain circumstances, to circumvent technical protection systems solely for the purpose of benefiting from a statutory exception (and in order to avoid that last resort, better mechanisms should be introduced to encourage rights-holders to remove technical protection systems in certain circumstances to facilitate the use of an exception).

10 Additionally, we recommend

- (a) a new statutory exception for the exploitation of orphan works – they constitute a severe problem for academic research and could offer profitable opportunities for the publishing industry
- (b) the extension of fair dealing in the UK to all classes of copyright material – in order to reduce the complexity and illogicality of the law
- (c) the adoption by all Member States of all exceptions permissible under the Information Society Directive – in order to achieve the intended harmonisation across the EU, and to reduce confusion and inconsistency of copyright law which lead to lack of respect for it
- (d) the extension to all people with disabilities in the UK of the exception for the benefit of disabled people (which is currently enjoyed only by the visually-impaired and those unable to hold a book).

11 We have seen and we support the submissions of the British Library, the International Association of Music Libraries, the Libraries and Archives Copyright Alliance, the National Archives, the RNIB and Share the Vision.

Answers to the Review's general questions

- 1 (a) There is no complexity in obtaining copyright since it arises without formality of any kind.
 - (b) Too few people realise that they enjoy copyright in their work automatically. Most efforts to educate people about copyright emphasise what is prohibited and what must be licensed. It would be helpful to general respect for copyright to have truly neutral, readily-available guidance emphasising equally what may be legitimately copied. Scientists' and researchers' ignorance of their own rights is exacerbated by ambiguities in the publishing agreements they sign. A recent article in the journal *Learned publishing* illustrates this [SCONUL evidence 1: see the paragraph 'Publisher self-archiving policies'].
- 2 (a) University and national libraries handle published and unpublished documents (printed and electronic) and therefore deal with copyright on a daily basis.
 - (b) University libraries do not seek, but are faced with, overlapping protection in the form of copyright works whose use is further restricted by contract.
 - (f) We believe it is questionable whether copyright always promotes innovation. It protects the results of innovation. This is valuable but promotion and protection should not be confused. To take an obvious example from the general field of IP rights: if Tim Berners-Lee had decided to protect his rights in his World Wide Web software, the world would have lost the massive opportunities for innovation that have since come to fruition through web technology and its new business models. Conversely copyright can certainly inhibit innovation. For example a researcher at UK University A who is visiting UK University B may well find it difficult to consult particular electronic journals at University B, even though a subscription to them is held by both universities. His entitlement, arising at University A, may not be recognised at University B. This is a non-trivial problem noted by the House of Commons Science and Technology Committee (see *Scientific publishing: free for all?*, House of Commons Science and Technology Committee, 10th report of Session 2003-04, HC 399-1, Volume 1, paragraphs 34-43). A recent informal summary appears in a paper prepared for a meeting under the auspices of the Research Information Network by Sally Curry, Inspire Project Manager, University of Newcastle upon Tyne [SCONUL evidence 2: see the paragraph 'Administrative burden']. This is a problem that universities are working to solve together: but it does not arise in the case of printed journals and in essence it represents friction in the knowledge transfer system arising from mechanisms to protect copyright material. Similarly, database right has potential adverse effects in non-commercial environments. Database right has to be almost entirely disregarded in the academic world or researchers would spend excessive amounts of time giving permission to each other to share material in databases. Database right is a good example of something devised for the benefit of commerce that potentially inhibits research and knowledge transfer outside commerce. [SCONUL evidence 3]

- (i) The indirect costs in higher education (through delays and difficulties in clearing rights) are very hard to estimate. We have attempted an estimate of the static costs in higher education and have arrived at a minimum figure of the order of £30M/year [SCONUL evidence 4].
- (j) The only example known to us is the 'John Clare' case mentioned in the submission from the National Archives. It is not uncommon for the estate of a deceased author to object to uses of the author's work for the purposes of higher education, particularly if the use is deemed by the estate to be adverse criticism. In the context of research, where all reasoned criticism is regarded as legitimate, such objections can never be acceptable.
- 3 (a) Licences for the use of electronic journals are difficult for university and national libraries to negotiate:
- the supplier, holding the copyright, is by definition a monopoly supplier and therefore in a powerful position to propose non-negotiable terms
 - for both supplier and customer it is in principle more efficient for suppliers to offer a multiple offering of many journals, and for universities (for example) as customers to negotiate as a consortium (thus reducing the number of negotiations): but the supplier's portfolio of journals rarely suits exactly the needs of any particular university, and any consortium of purchasers will need to compromise by paying for some journals that it does not require
 - in practice the availability of journals subscribed to by any customer is sometimes problematic: because during the currency of a licence
 - (i) the supplier's portfolio of journals may change (he may sell, or buy a range of titles)
 - (ii) the electronic delivery mechanism may change
 - (iii) any university inevitably subscribes in total to dozens of licences, mostly with totally different terms (only the licences negotiated by the Joint Information Systems Committee and the agency Eduserv are standardised, and few universities can survive with those alone): the lack of standardisation makes both negotiation and administration complex.

E-mails between librarians, seeking advice over difficulties, often come to SCONUL's attention. Some examples are attached. [SCONUL evidence 5]

Moreover universities need licences to use, for educational purposes, sound recordings, films, and photocopies and scans of text. Different agencies grant licences depending on the nature of the material. Some licences are available off the shelf, while some have to be negotiated. All have different terms and conditions. Some illustrative e-mails are attached. [SCONUL evidence 6]

- (b) Higher education institutions have three principal sources of licensing partners: the Joint Information Systems Committee (www.jisc.ac.uk) and the charitable company Eduserv (www.eduserv.co.uk), both of which negotiate licences on behalf of all the UK higher education; and thirdly the regional or

national joint purchasing consortia of universities (such as the Southern Universities Purchasing Consortium). When it comes to partners who issue licences for copyright material to be used in higher education, the issue is more complex, as described at 3(d) (f) (h)

- (c) (i) For printed materials, research exceptions are well understood, though the recent removal of the exception for research for a commercial purpose (a requirement of the Information Society Directive) will result in additional licensing costs for all universities combined of the order of £40,000 - £50,000/year, and administrative costs will add to this figure. This exception appears to have been originally designed to allow researchers to use trivial amounts of copyright material without having to seek permission. It is counter-productive to the knowledge economy to restrict the exception to non-commercial circumstances. There is no reason in principle why commercial researchers should pay to use exceptionally small quantities of copyright information within the terms of the Berne Convention. They are now required to do so apparently on the practical grounds that they can afford licence fees. An unintended consequence is the additional licensing burden on universities, which often engage in a small way in truly 'commercial' research.
 - (ii) For databases, research exceptions are rarely relevant since, because of its complexity, university researchers generally disregard database right in practice (neither respecting it nor seeking to protect it)
 - (iii) For electronically-published textual materials, research exceptions established by international conventions and statute are not necessarily available since the material is delivered under contract
- (d), (f), (h) It is difficult for an individual author to offer a free licence if she chooses not to assert her copyright in certain circumstances (e.g. for non-commercial uses). Until Creative Commons is better known and used, collecting societies will continue in effect to collect unjustified royalties in respect of uses of copyright material whose author is not a member of the collecting society and who has no objection to the uses concerned (the users infringe copyright *de iure* but the author would sanction them if her permission were asked).

Generally speaking it is complex for individuals, small businesses and non-commercial bodies to secure licences. Licensing may work well for agreements between large enterprises in respect of high-value material. Smaller entities generally need rapid clearance of rights for many one-off uses of disparate low-value material. Licensing is cumbersome in those situations.

The special problem for universities is that they need licences for the educational use of virtually all classes of copyright material and have had difficulties with the licences issued by collecting societies. [SCONUL evidence 7, 8]

- (e) The monopoly of power of licensors, and its possible effect on costs, has been extensively discussed, particularly in the House of Commons Science and Technology Committee report referred to in answer to 2(f).
- 4 (b) See answer to 3(d) (f) (h)
- (g) Universities and national libraries are highly risk-averse in the field of legal compliance. The cost to reputation is as important as potential cash cost. Their tendency is to comply with demands from rights-holders that they regard as questionable, for example, claims for payment in respect of reproduction for criticism and review, notwithstanding CPDA 1988 s 30, or doubtful conditions in the licences of collecting societies.

SPECIFIC ISSUES

Current term of protection on sound recordings

We support the views of the British Library and the International Association of Music Librarians. In our view no extension of term is justified or desirable.

Copyright exceptions

- (a) Apart from the illogical and unhelpful exclusion of commercial research from fair dealing, the current exceptions are sound but are sometimes unavailable through the operation of TPMs (which by law may not be tampered with), through the use of contracts in the supply of copyright material, or, in combination with the above, through a refusal by rights-holders to accept that an unconditional exception applies equally to digital material. Please see also (c) immediately below.
- (b) The application of exceptions to all material including digital versions should be made clear by statute or government guidance. Contractual terms purporting to eliminate statutory exceptions should be void.
- (c) The Information Society Directive permits exceptions not available in the UK. Copyright would be easier to administer across the EU if all Member States adopted all the permissible exceptions. And if 'fair dealing' automatically included educational use, as does 'fair use' in the USA, education would be released from frustrating legal shackles which inhibit the use of IT at all levels of education. Licences for reasonable educational use are burdensome to negotiate, cumbersome to operate, and often do not permit the use of foreign copyright material.
- (d) The illegality of 'platform-shifting' is the major element causing disrespect and disregard for copyright amongst ordinary people. When copyright material has been paid for, the purchaser should have the right to use it by any technological means for his own purposes.
- (e) Compensation should be provided up-front in the purchase price (or leasing cost) of the material. To take an analogy from the printed environment, large

printed reference books were traditionally bought only by libraries and their prices were set high, in recognition that many people from many households would use them in libraries over many years. It is inappropriate for rights-holders to argue that they are entitled to compensation if a purchaser shifts the material to a different platform for his own use. The purchaser cannot simultaneously listen to a CD of music in the car and in the living room. The purchaser should be allowed to benefit from the convenience of new technology. The vendor of the copyright material does not provide the added value of the technology, and merely appears unreasonable if he attempts to use different technological platforms, used by the same customer, as different markets. After all, the constant changes in technological platforms force the purchaser to repurchase the same material periodically in new formats. 'Compensation' sought after purchase is by several degrees of magnitude more awkward to achieve than as an element of the purchase price.

(f) Information technology offers new possibilities that university teachers are eager to exploit and which students anticipate and expect. But copyright law is holding education in the twentieth century in several ways. For example:

(1) Educationally it is imperative to make extracts of published background reading material available on universities' 'virtual learning environments' (student-orientated secure intranets). Obtaining licences for such use has involved further negotiation by Universities UK/Standing Conference of Principals with the Copyright Licensing Agency. The licence is currently no more than a trial, and it is burdensome to operate in that it requires records to be kept in every licensee institution of every extract of copyright material reproduced for every discrete set of students. Fear of massive illicit on-copying by students has no doubt led to this complex (and so far temporary) solution, though it is not clear what motivation students might have for indulging in multiple copying of short extracts of text-book readings. Nor is it clear why universities should not be trusted to police potential infringements themselves (as they are with regard to electronic journals supplied under licence). Some of the intricacies of complying with the licence are illustrated in recent correspondence between administrators [SCONUL evidence 9]

(2) It would be very desirable in educational terms for universities to be able to digitise slides (transparencies) for use solely for teaching purposes. This would save moving slides physically between classrooms, and reduce wear and tear on sometimes fragile originals. No one so far can be found to license such use: so universities' use of images on slides is being locked firmly into the technology of the 1960s.

(3) An exception (s 32) allows copyright material to be reproduced for examination purposes. Hitherto bound sets of examination papers have been held in libraries. Technology now allows such papers to be digitised and held on secure intranets for student use. For universities to digitise their own exam papers lawfully, any extracts from works still in copyright have first to be sought and stripped out. Though required by law, this seems a needless exercise since rights-holders would be at no additional risk from the inclusion

of their works in the digitised version, the extracts being too short to be of general use.

- (g) Any institution seeking to archive copyright material beyond the copyright term should be permitted to use any means to do so, provided the uses of the material during the term are restricted to archival purposes. Dependable records of digital material beyond the copyright term are in the national interest.

Copyright – digital rights management

We refer to our submission to the All Party Parliamentary Internet Group.

Copyright – orphan works

- (a) Orphan works are a constant problem for our libraries particularly with regard to photographs
- (b) We support the solution proposed by the British Library.

Legal sanctions on IP infringement

We are aware of proposals in the European Commission and Parliament to introduce more severe sanctions for IP infringement. Unless the infringement is deliberate and carried out with a view to profit, we oppose more severe sanctions for copyright infringement for the following reasons:

- (1) copyright is extremely complex and inadvertent infringement is all too easy even for someone intending to comply
- (2) copyright is after all a right (which need not be asserted) and the infringing use might have been sanctioned by the rights-holder had the infringer succeeded in consulting them in advance
- (3) severe penalties for trivial infringements would cause disrespect for copyright law

SCONUL EVIDENCE 1 : Ambiguous rights of authors

(Scanned copy of *Learned publishing* **19** (2), April 2006, p.87, Section headed *Publisher self-archiving policies*)

SCONUL EVIDENCE 2 : Complexities of access to e-journals

Paper prepared for a meeting on 13 February 2006 under the auspices of the Research Information Network by Sally Curry, Inspire Project Manager, University of Newcastle upon Tyne

SCONUL EVIDENCE 3 : Database Directive review: response from EBLIDA

Response giving the view of the European Bureau of Library, Information and Documentation Associations about the European Commission's review of the Database Directive

SCONUL EVIDENCE 4 : Estimates of the costs of copyright clearance in higher education

SCONUL EVIDENCE 5 : Administrative burden of e-journal licences

SCONUL EVIDENCE 6 : Complexities of recording/broadcasting licences

SCONUL EVIDENCE 7 : Licences issued by Collecting Societies

SCONUL EVIDENCE 8 : Motion Picture Licensing Company brochure

SCONUL EVIDENCE 9 : Intricacies of the higher education digitisation licence