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**Gowers Review of IP.
(Call for Evidence)
Tertullian Project Response**

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1 Introduction

1.1 About the Tertullian Project

Summary

The Tertullian Project is an amateur-led effort to make available to everyone out-of-print and out-of-copyright material by or about the 2nd century Christian writer Tertullian. Now that we have the internet, many people have created such sites on topics of scholarly interest. There is no money to be made in such minority subjects. The sites are maintained as a labour of love by their authors. But copyright legislation is a real barrier to the creation and enhancement of such sites. This means that the public is denied access to material of no commercial value, through a meaningless copyright.

Detail

The World-Wide Web became generally available to the public as a method to disseminate information in 1995. Over the next few years a large amount of content was placed online, almost all of it by members of the public. Much of this was of limited value.

But some material of great educational value put online. Various individuals or groups of individuals – all amateurs – chose to place out-of-copyright material on the internet in order to promote the study of areas of research which had previously been the exclusive preserve of tiny numbers of scholars. The value of the internet for information still depends mainly on the work of these people.

The Tertullian Project is one of these websites, and is mainly the work of such an amateur, Roger Pearse. The purpose of the website is to encourage the study of the works of the second century Christian writer Tertullian; to promote the knowledge of these works, and also of the medieval and ancient manuscripts in which they are preserved; and to facilitate the activities of scholars and laymen alike by making primary and secondary sources available online freely to all. This includes manuscript images. An ancillary activity has been to scan and place online English translations of other Church Fathers not otherwise available online, in order to promote the study of early Christianity by people not involved in full-time education at major universities. The website has been recognized by scholars in the field and mentioned in journals such as the *Revue des Études Augustiniennes* (1997, 2003) and the *Journal of Early Christian Studies* (2000).

In the course of this work, we have become aware of shortcomings in the IP framework of the United Kingdom, which obstruct initiatives of this kind. In fact it is unlikely that the World-Wide Web could ever have developed in the manner that it has under UK copyright law, and certain features of US copyright law are responsible for almost all the useful content now online.

There is no money involved in such websites. They are invariably a labour of love. There seems to be no money involved in this subject area either, and publications are restricted to very short print-runs.

It seems that the briefing document supplied by the Gowers Review only looks at ways in which IPR can be created, and money made from this. But surely it should also consider whether the interests of the general and academic public are being

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addressed, and when such IPR should lapse into the public domain? This submission is designed to point out some problems which benefit no-one and harm the community.

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2 PROBLEMS WITH UK IP

2.1 Denial of access to valueless material

The existing provision is that copyright is automatically created, and extends for the life of the author plus 70 years.

I make no objection to such a term where the material has commercial value for this period.

The difficulty is that the majority of published material in the area of concern to me has no commercial value soon after it goes out of print. Modern academic works containing translations of Tertullian are often published in editions of 500 copies or less. I can think of very few books or articles on Tertullian that have ever run to a second edition. This means that the item becomes scarce almost at once. On the other hand, few people wish to consult it, and of that few, fewer will want to do so more than once. A scholar working in another field may do so, for instance. But because it is in copyright, organisations such as the British Library will not supply photocopies. Thus the public is unable to access the material, and the scholar is little better off unless his library should happen to contain a copy. Such materials are often very difficult to obtain by inter-library loan, and each currently involves a British Library charge of more than £10 per item, on which VAT is also levied. This in turn restricts access further. Here the community of interested scholars and amateurs on the internet should come into its own; except that copyright restrictions mean that it cannot.

For the amateur wishing to benefit the community by scanning this now valueless material and placing it online:

- It is very difficult to determine whether a text is in copyright or not, particularly for a journal article by an obscure writer
- It is impossible usually to locate the copyright holder
- It is almost impossible to get the attention of a busy publisher if he can locate one
- He may well face a demand for money from a publisher who doesn't make the work available but sees no reason not to demand a fee anyway; the 'dog in the manger' problem
- He risks prosecution if he gets it wrong, while he gets no benefit other than satisfaction.
- As a result people in the UK and EU have been very backward in scanning material, when compared to the US.

Here are a couple of examples of unreasonable copyright causing problems which benefit no-one.

2.1.1 Photocopy denied by libraries of 1893 Latin thesis on copyright grounds

In 1893, a scholar named Emil Kroymann published his 150-page PhD thesis, *Quaestiones Tertullianae Criticae*, entirely in Latin at 'Oeniponte' (Innsbruck) through a publisher 'Libraria Academica Wagneriana' in what was then the Austro-Hungarian empire. This volume is rare, but important for Tertullian scholars, and I determined to obtain a copy. I wanted to place it online. I suspect that I am the only person in the UK interested in this book.

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Now Kroymann is dead, I presume. His But I cannot place his work online without determining whether his work is in copyright. I cannot determine that without knowing his biography, and this I have no means to do. Thus the enthusiastic amateur is immediately obstructed by the difficulty of determining whether a work is in copyright.

- Is it reasonable for members of the public to be obliged to obtain the biography of a man long dead and probably obscure before they can comply with the law?

Kroymann's publications cease ca. 1942. Life plus 70 years means that his work of 1893 must still be in copyright in 2012, if not later.

- Is it quite reasonable that a Latin thesis should remain a subject of copyright for so long a period? Who benefits from this?

Copies of this work are rare. The only copy in the UK is in the British Library (BL), who do not lend their books. But a 150-page thesis in Latin is not accessible to any normal person unless you can study it at home through a photocopy, or spend several days with it.

I tried to locate the publisher, 'Libraria Academica Wagneriana,' in order to obtain copyright permission. Whoever they may have been, the Hapsburg empire is now history and war and revolution have passed over the land many times. It was impossible to find any copyright holder.

- Is it quite reasonable for members of the public to be obliged to carry out such an exercise to locate a copyright holder?

I asked the BL for a photocopy. This was denied on copyright grounds.

I asked them to loan it to me to my local library. This was denied on general policy grounds.

I then placed a request for an international library loan through Cambridge University Library. This was denied on the grounds that there was a copy in the British Library, and such loans were never made unless there was no UK copy.

- Who if anyone benefits from preventing scholars from consulting research material because of copyright law?

2.1.2 Website author deterred by copyright from scanning Latin text

There is a website devoted to the works of the obscure 5th century writer, Fulgentius the Mythographer. I wrote to the author and asked whether he intended to place online the Latin texts.

The author advised me that the Latin had been published in the 1890's by Rudolf Helm, who died during the 1960's. If copyright applied to the work, this meant that the edition would continue to be in copyright until 2030-40, and thus that he could not do so. Furthermore he was unclear as to who if anyone owned that copyright.

- If some enthusiast is willing to dedicate his time to placing an ancient Latin text online, not printed by anyone for more than a century, is it in the interests of anyone that our copyright law should discourage him?

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2.1.3 Photography and upload of manuscript material prevented

Many libraries in the United Kingdom have collections of ancient and medieval manuscripts of ancient texts. These are out of copyright. But most of these unique documents have never been photographed. No-one, except a tiny handful of scholars and persons such as this writer, has the ability to look at these.

The manuscripts and their contents are centuries old, and must be out of copyright. Now that all have digital cameras, we could take photographs and put them online. Some years ago I approached the British Library to get the three Tertullian manuscripts onto the web. For the last two years, my Member of Parliament, the Rt. Hon. John Gummer, has been in communication with them, so far without result. They have fought to prevent public access to the manuscripts, unless done by themselves at vast expense.

One of the reasons that they give is a copyright-related issue. Now libraries always use the argument 'the books are too fragile' as an excuse for anything that they do not wish to do. That is a different issue. But they also allege that taking a photograph of the page creates a copyright. This, they suggest, is their property to be exploited by them; such photographs would not be 'their' copyright, and so they are justified in obstructing this process. Meanwhile, every couple of years another library burns down and its collection is lost – unphotographed, of course.

The main problem here is the obscurantist attitude of the libraries. But the copyright issue – which may be bogus – shouldn't be a excuse that they can use. But it is. Surely if the libraries will not digitise their holdings – and they won't – then they should not be able to use copyright to keep those holdings off the web?

2.2 Possible solutions

The problem is less acute in the US because their copyright system automatically places all material published or composed before 1923 in the public domain. This single feature of their law is the clause upon which sites such as Project Gutenberg and the Christian Classics Ethereal Library rely for their huge collections of English texts. Since US copyright has this provision, it seems quite pointless for UK law to consider such texts in copyright.

- Can we bring in a similar 'horizon' of copyright with a view to facilitating the migration of material onto the internet by ordinary people.

The real problem is an unreasonably long period of copyright for works which are no longer of commercial interest. In times gone by the USA had a 'sunset' clause on copyright; it expired after 26 years unless renewed. I have been told that only 15% of copyrights were renewed. But surely if a copyright holder is not interested in the minor activity of submitting a renewal, why should the rest of us be interested in doing it for him? People who expect to make money will make the renewal.

- Can we consider some method that will allow works in which the copyright holder is no longer actively interested to drop into the public domain? Particularly if public money is involved in their production, as is usually the case for this sort of material?

Finally there is the issue of manuscript material being kept off the web by obscurantist curators in public libraries.

- Is it possible to modify the law to state explicitly that photographs of out-of-copyright material cannot be in copyright? I suspect that the law already takes

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this line, but, if so, no-one knows it and the British Library act as if it was not so.

Most people wish to conform to the law. As it stands, it is very difficult to do so.