

The British Academy

Response to the Gowers Review of Intellectual Property

1. About the British Academy The British Academy welcomes the establishment of the Gowers Review of Intellectual Property (IP), and is pleased to respond to its call for evidence. The British Academy seeks to promote the interests of scholarship and research in the humanities and social sciences, and is composed of eminent scholars who are elected to its Fellowship on the basis of their scholarly standing and achievement. As the country's national academy for the humanities and social sciences, it is well placed to consider how the current copyright system is affecting research in these disciplines, especially since Academy Fellows are both producers and users of original copyright work.
2. Because Fellows of the Academy are both producers and users of copyright material, they are especially conscious of the need for balance which is inherent in copyright. Creative activity requires protection of the moral and economic rights of the creators of original material, on the one hand, and the opportunity to use and develop existing material in new and original forms, on the other hand. The maintenance of that balance is a difficult and delicate task, and the key issue for the Review is the assessment of this balance in the light of recent developments in technology, legislation, and practice. The Academy believes that in recent years the balance has swung too far in the direction of protecting existing material at the expense of facilitating the development of original material.
3. Why Copyright is vital for research in the humanities and social sciences. IP in databases, whether it takes the form of copyright or database rights, is also becoming increasingly important for researchers in the humanities and social sciences. Whilst this response focuses on issues of specific interest to the humanities and social science academic community, many of the concerns raised, especially those relating to the growing difficulty of gaining access to material in electronic form are pertinent to the sciences.
4. The Review should emphasise the distinct nature of moral and economic aspects of copyright, since these are often confused. The moral rights of the author relate to respect for his or her creative activity while the economic rights of the rightsholder relate to the economic interests in commercial exploitation. While both kinds of right are important, it should not be taken for granted that the scope of the moral rights of the author should be identical with the economic interests of the rights holder, and distinct issues are involved in the exercise of each right. Copyright must not become censorship: this is inconsistent with requirements of free speech and the stimulation of creative activity and with the broader public purposes that copyright is designed to advance.
5. How the Academy's response was put together This shift described in paragraph 2 has led to a specific concern by a number of Fellows that the exemptions in the Copyright Acts which permit fair dealing with copyright

material for purposes of private study and research and for criticism and review are no longer achieving the intended purpose. The British Academy therefore recently set up an inquiry under the chairmanship of Professor John Kay, to examine the role of copyright exemptions in the promotion of scholarship. The working group overseeing the Academy's inquiry has taken the lead in preparing the Academy's response to the Gowers Review. Quantitative evidence on the problems that have occurred and their impacts is not easy to come by, so the Academy has had to rely on illustrative examples. The British Academy is aware that many other academic bodies and organisations, such as the Royal Society, the Society of College, National and University Libraries (SCONUL), the Consortium of Research Libraries (CURL) (and others) share several of the concerns we raise, and we are confident therefore that the problems referred to in this response are widespread within the research community.

6. Main recommendations In summary, the Academy's main concerns are that:
- The Review should recognise that all creative activity builds on the creative activity that has gone before. 'If I have seen further', said Newton, 'it is because I have stood on the shoulders of giants'. A regime which is unduly protective of the interest of existing rights holders may therefore inhibit, or even stifle, the development of original material.
 - The scope of the existing exemptions to copyright for private study and research and for criticism and review should be clarified, and interpreted in as expansive a manner as is consistent with the legitimate economic interests of rights holders
 - These exemptions covering fair dealing for private study and non-commercial research and for criticism and review should apply to all copyright material, including recorded music and film.
 - Any extensions to copyright or related intellectual property rights should incorporate these exemptions, and should include any necessary safeguards to ensure that the rights they confer on users of the material can be exercised in practice. The lawful use of copyright material should not be restricted solely because that material is protected by a digital rights management system or incorporated in a database. This means that users must be accorded a right of access to the material, if necessary on reasonable terms.
 - Extension of the current term of protection on sound recordings should be contemplated only if it has been clearly demonstrated that such protection would enhance, rather than restrict, access to and exploitation of the UK's cultural heritage. Extensions in the US have achieved the opposite of the intended effect. The Review should not permit similar developments to occur in the UK.

General Questions

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

7. Copyright law provides specific exemptions to enable creative and scholarly work to advance. However, it is clear to us that these exemptions are in some

cases not achieving their objectives, because the scope of the provisions are increasingly narrowly interpreted. Historically, the main issues related to printed material. Scholarly publishers, along with scholars themselves, had a common interest in securing both the protection of existing original material and the dissemination of new material. There was therefore a distinction between commercial use, mainly directed at the economic exploitation of original material, and scholarly use, mainly directed to the academic exploitation and development of original material, and permissions were (if required) readily granted for the latter use. This distinction has now broken down because copyright holders are actively looking to maximise the revenues from copyright material, and are demanding high fees for its use even in academic publications; and publishers are insisting that unnecessary permissions nevertheless be obtained, since they are becoming increasingly risk averse and are not prepared to stand up to unreasonable demands from copyright holders. Even if the legal basis for these claims is weak, uncertainties about the outcome, and the risks of substantial damages and costs, inhibit a robust negotiating response. There is in consequence an absence of case law. Scholarship in many disciplines within the humanities and social sciences is thereby being impeded. The British Academy considers that many of these difficulties would be resolved if there is greater clarification regarding the various exemptions, so that less reliance is placed on custom and practice.

Specific Issues

Current term of protection on sound recordings and performers' rights

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

8. The Academy believes it is essential that the copyright regime provides proper and enforceable exemptions for private study and research and for criticism and review and would strongly oppose any extension of copyright term which was not accompanied by an extension and/or clarification of the exemption for study and research and for criticism and review to sound recordings and a clear commitment by the music industry to respect the exemptions which already exist for the use of scores and lyrics for these purposes
9. Popular music involves major commercial interests which have no interest in or wider understanding of scholarship. Musicologists wishing to quote short extracts from song lyrics or sheet music which in our view fall clearly within the scope of the existing legal exemptions have faced outrageous financial demands, lack of response, or even refusal coupled with a threat of litigation. We are aware that major works of research have been delayed for a number of years because of this, and also that some books have never been published because of it. For example, a book which was badly held up in press because of copyright difficulties is Sheila Whiteley's *Too much too young; popular music, age and identity*, Routledge, 2003, where copies had been printed and had to be pulped owing to a copyright dispute. The main result is that academic researchers do not use music examples, which reduces the value of their analyses, or do not work on popular music at all. These problems will be increased if the term of copyright for sound recordings is extended unless the

exemptions for private study and research and for criticism and review are extended, clarified, and can be utilised with greater confidence.

10. We do not consider that harmonisation of UK and US law is an objective in itself. Moreover, the claimed public benefit of extended protection – the incentive for major record companies to ensure that their back list is available – has not materialised in practice. A study for the Library of Congress has shown that the majority of the US recorded heritage is unavailable. The economic benefits of such extension go to a handful of established artists and their publishers, and relate to works created many years ago. We believe that the incentive to create new works generated by an extended term is negligible and that the back list would be better protected if it were available to specialist publishers – by securing them a right of access.

Copyright exceptions – fair use/fair dealing

- (a) *What are your views on the current exceptions in copyright law?*
 - (b) *Could more be done to clarify the various exceptions?*
11. Taking these two questions together, the British Academy considers that greater clarification is required regarding the various exceptions, to take account of the following: (a) what is commercial as opposed to non-commercial research? (b) what constitutes fair dealing in private study and research and in the criticism and review provision? (c) what is the status of unpublished letters and other personal material held on gift or deposit in publicly accessible national or local repositories? and (d) the need for uniformity of application across media.
 12. What is commercial as opposed to non-commercial research? The term non-commercial research has no well-established meaning. Academic publication has a commercial purpose even if the material contained in such publications does not. We consider that research is non-commercial where the primary objective is to put material into the public domain for the public benefit, as distinct from commercial research which is undertaken either for the private purposes of a client or in the expectation of recovering the costs of the research through the proceeds of sale. Accordingly, scholarly research would in almost all cases be non-commercial. It needs to be put beyond question that the publication of research conducted in universities, other educational institutions and publicly funded research institutes is non-commercial. The fact that such institutions are in some sense in a market for their activities should not make the publication of research ‘commercial’.
 13. What constitutes fair dealing? We believe the fundamental principle governing the exemptions for private study and research and for criticism and review is the one enshrined in the language of the Berne convention, i.e. any use for these purposes constitutes fair dealing provided it does not prejudice the normal exploitation of the work. ‘Normal exploitation’ is the sale of the original work itself. The use of the work for private study and research or for criticism and review, which are the specific subject of copyright exemptions, do not represent ‘normal exploitation’ by the originator and should not, in themselves, be seen as activities in which the rightsholder has an economic interest. Use for an

exempt purpose which does not compete with sale of the original work would accordingly generally fall within the scope of the exemption. In most cases, of course, criticism and review benefits the normal exploitation of the work – authors and their publishers are normally anxious to stimulate criticism and review. Thus, there is normally no conflict between the general objectives of copyright protection and the objectives of the exemptions.

14. Where there is no normal exploitation of the work – because the work is out of print or otherwise unavailable, or where there was no commercial purpose to its original production – the presumption should be that *any* use for private study or research or for criticism or review constitutes fair dealing.
15. In the past – and in particular under the now withdrawn guidelines drawn up by the Publisher’s Association – fair dealing was defined mainly by reference to the proportion of the original work quoted. This is one approach to the question of whether the work of criticism and review might be regarded by some potential publishers as a substitute for the original work – and hence interfered with normal exploitation. But it is only one approach, and other relevant factors might include: the price of the work which uses the copyright material, the channels and method of distribution of the new work, and the style and tone of the work of criticism or review. In relation to art and photography, in particular, guidelines based on the proportion of the work reproduced will normally be inappropriate, since the activity of criticism and review may require reproduction of the whole work.
16. Our consultations have shown that there is uncertainty and confusion about the present scope of these exemptions. The British Academy believes that the right approach is a new set of guidelines which, while they could not represent a statement of the law, would clarify the current situation and would have considerable moral force in the event of dispute. Such guidelines might be an outcome of the Review and the Academy would itself be willing to take a lead in proposing guidelines based on the general principles described.
17. In cases where fees for the use of copyright material can legitimately be demanded, we are concerned by the imposition of charges which inhibit or prevent the use of copyright material for scholarly purposes. There are two aspects to this: the levying of excessive charges by the copyright holder, and the imposition of charges by institutions which have (possibly unique) access to material in which they do not hold the copyright, or which may be out of copyright, when these charges greatly exceed the costs of providing access.
18. For these reasons, we hope the Gowers Review will consider this issue, and the Academy would like to draw to the Review’s attention the statement in the motion on copyright that was passed by the Union Académique in 1999 that:

“Whenever possible, institutions that supply visual materials should waive reproduction fees for a scholarly publication. If this is not possible, fees should be substantially lower than for a commercial publication. Visual materials for scholarly research should be obtainable by scholars from institutional and commercial sources for a reasonable fee.”

The Academy considers that the preferable approach is through a marginal cost recovery model. A recent report of the Office of Public Sector Information reported that most analyses had found that low-pricing models give the highest benefits for society as a whole, and it also drew attention to the findings of a report for the European Commission which had reviewed the number of databases exploited by public sector bodies and concluded that ‘charging marginal costs for reproduction and dissemination leads by far to the highest economic impact’. (see <http://www.opsi.gov.uk>).

19. Letters Further clarification is needed with regard to copyright in material such as unpublished letters and other personal material held on gift or deposit in publicly accessible national or local repositories. The Academy is aware that scholars have encountered problems when seeking to reproduce unpublished letters of deceased public figures, because their heirs have refused copyright permission to quote material that they have seen or have imposed excessive charges on its use. An example of the kinds of difficulty that occur is shown below.

“I was obliged to omit all reference to an important letter because the owner of the copyright claimed the right to read (and presumably censor) the entire book.”

While it is appreciated that those holding such private material may simply refuse access to it, where it is made available it is not enough to say that copyright law permits the researcher to refer to the content of the letter without using its actual expression. That only leads to disputes about what is expression and what is merely idea. As to access itself, the author of the material may well have a legitimate interest in preserving his or her privacy during his or her lifetime, but the preservation of such interest for long periods after death can seriously interfere with historical scholarship.

20. Uniformity across media (particularly in relation to recorded music and film). The fair dealing and fair use exemptions for private study, non-commercial research and criticism and review should apply equally across all resource types, including music and film reproduction. Given the importance of these materials for both specialist and more broadly cultural historians and other scholars, we see no valid reason why the general exemptions for private study and research and for criticism and review do not apply to these areas. An example of the kinds of difficulties that arise in Film Studies is shown below.

“it is absolutely indispensable to have in place the technical assistance necessary for producing compilations of film extracts on digital formats such as DVD and mpeg files. Such compilations are used for research purposes such as power-point supported presentations in conferences, sharing materials in workshops, delivering seminars on issues of textual analysis, etc. However, we find that the technical personnel hired by the University is unable to assist on the crucial issue of extracting and converting clips from films available only on commercial DVD, on the grounds of the BUFVC regulations that permit the University to use only audiovisual texts broadcast and recorded in-house under the terms of the ERA licence. As a result, the staff is severely restricted in their use of film

extracts to....off-air recordings.....This is problematic in two respects. First, we need to consider the far broader availability of specialised titles on commercial release in comparison with the limited selection of films aired by terrestrial television stations: it is simply not possible to research and present effectively on Cinema History or on aspects of World Cinema by limited ourselves to the use of extracts from films shown on air! Secondly, and more important, we are facing a serious problem concerning the integrity of the audiovisual texts we are researching. Films aired by terrestrial channels (and therefore free from copyright restrictions where the extraction of clips is concerned) are subject to systematic distortions of ASPECT RATIO....to provide a better fit for most television screens. This means that only commercial DVD releases meet the standards for the purposes of analysis and illustration, but the limitations (where copying of copyrighted AV materials is concerned) of the current legislation seriously hamper the aims and integrity of research of cinema aesthetics and textual analysis.”

(f) To what extent has technological change presented difficulties in use of copyrighted material in the field of education?

21. With regard to academic research, developments in information technology have greatly changed the context within which IP exists, and are putting great pressure on the existing system of rights. It is increasingly the case that printed source material, especially if out of copyright, is being gathered together in large commercial databases, to which access is only possible, despite the absence of content copyright, on payment of substantial subscription or other charges. These databases enjoy copyright in their selection and arrangement and/or the recently introduced “database right” preventing unauthorised extraction and re-utilisation, which provide the basis for the charges imposed. Increasingly those unable to afford the charges may find themselves cut off from basic research material. So far some of these problems have been circumvented by national agreements between the JISC and the electronic database owners. These appear to have been negotiated on an ad hoc basis and it may be desirable to establish a firmer set of guidelines to secure the availability of such electronic databases for institutions of higher education as a whole. There is a need to establish sound intellectual property models for e-resources.
22. We are concerned that the Database Directive is at once vague and wide-ranging and fails to contain the exemptions for private study and research and for criticism and review, both in respect of database copyright and the *sui generis* database right. These exemptions are essential to the balance of rights and interests inherent in copyright and associated legislation. As an increasing proportion of material takes a digital form, the scope of even the current exemptions may be seriously undermined. Nonetheless there are instances where the building of large databases is putting some publishers in a dominant market position, thanks to their high charges to others for access and/or permission to use material on a database. This appears to arise in cases concerning reproductions of visual art. Whether the works themselves are still within copyright or not, there may be copyright in photographs of them. This may combine with the absence of any ability to acquire separate photographs

of the works. As a result it may be very difficult to find a publisher for scholarly works of art history or criticism.

Copyright – digital rights management

(a) Do you have a view on how the use of digital rights management technologies should be regulated?

23. Given the importance of databases to academic research and the growing amount of work that is being published electronically, it is important that academic researchers are able to access this material, whether through fair dealing exceptions, or on reasonable terms. However, the development of specialist technologies, designed primarily to track music usage for royalties, is threatening to inhibit access for the purposes of academic research even where fair dealing exceptions are applicable or, indeed, the basic material is out of copyright. Digital rights management (DRM) can thus over-ride both fair dealing exceptions and the term of copyright. Furthermore, if a DRM system becomes obsolete or its manager defunct, the material it protected may become inaccessible and lost to the UK cultural heritage. For these reasons, the Academy believes that steps should be taken to ensure that DRMs do not obstruct the advancement of knowledge and that there should be regulation underpinning their use. The objectives should be to ensure that all material can be accessed at the end of the copyright period and, within the copyright period, for lawful use within the terms of copyright. There is a case for making difficulties in securing reasonable DRM licences subject to the jurisdiction of the Copyright Tribunal.

Copyright – orphan works

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

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

24. Scholars seeking permission to reproduce works by authors whose date of death is unknown, along with the current ownership of their literary estates, are frequently left in difficulty about the steps needed to comply with copyright requirements. In practice these problems are often addressed by demonstrating that ‘reasonable efforts’ have been made to trace the heirs of a deceased author. In UK law, however, there is no statutory protection for such efforts. In January 2006, the US Copyright Office published the results of its study of the problems related to orphan works (see <http://www.copyright.gov/orphan>). The report made a number of recommendations, including the ‘reasonably diligent search requirement’ for the copyright owner and the ‘limitation of the remedies that would be available if the user proves that he conducted a reasonably diligent search’. The Academy considers that it would be useful if the Gowers Review could support a similar policy and provide a definition of what should count as ‘reasonable efforts’.

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