

## **Gowers Review of Intellectual Property**

### **SUBMISSION BY THE RESEARCH INFORMATION NETWORK**

The Research Information Network has been established by a consortium of the four UK Higher Education Funding Bodies, the three UK National Libraries, and the eight Research Councils. Its key role is to give the strategic leadership necessary to establish a national framework for research information provision, and to generate effective and sustainable arrangements for meeting the information needs of the professional research community in the UK.

The UK research base is world-class in quality, productivity and reach: we undertake 5% of the world's research, publish over 12% of cited research publications, and are second only to the US in the excellence of our research publications as measured by citations. This excellent research base lies at the heart of the UK's innovation system, but we lag behind the US, Japan and the EU-average in innovation performance. Information and intellectual property issues are of critical importance both to the continuing success of the UK research base, and to enhancing the effectiveness of its role in the innovation system. Success in research depends on speedy and effective access to the information generated by other researchers and by a wide range of other individuals and bodies. And it generates in turn yet more information that needs to be effectively disseminated to the research community and to other stakeholders and innovators in society and the economy at large. Ensuring that these information flows work effectively and with as little restriction as possible is central to the Government's aim for the UK to develop its position as a key global knowledge hub, with a reputation not only for generating new knowledge, but for turning that knowledge into innovative products and services.

New information and communications technologies have changed the ways in which research is conducted, and have greatly facilitated the exchange and dissemination of ideas, information and knowledge. We have not reaped the full benefits of these changes, however, because IPR regimes – and the law of copyright in particular – have not kept pace with technological developments. Our systems for providing and managing dissemination and access to the information and knowledge that researchers generate and need are thus sub-optimal; and they present a barrier to realising the full potential of Government and industry investment in science and technology.

We therefore support the case made by the Adelphi Charter that changes to the UK's current IP regime are required in order to make it fit for its fundamental purpose of supporting and promoting research, creativity and innovation. In making such changes, however, it is of critical importance that IP – still more the protection of IP – is not regarded as an end in itself, but

rather as a mechanism to promote wider economic, social and cultural benefits.

## **General Questions**

### ***1. How IP is awarded***

The key difficulty for the research community and those who support them in the higher education and other sectors is the complexity and the associated lack of understanding of the IP system in this country. We make some suggestions below as to ways in which the current complexity may be reduced.

The Patent Office has made some efforts to make educational material and guidance notes available, but they have had limited impact. The Association for University and Industry Links (AURIL) has also helped to develop awareness and expertise on IP matters in the higher education sector. The work done following the Review of Business-University Collaboration to produce model “Lambert Agreements” has also been valuable. Even these and other such model agreements, however, witness the complexity of the system and the associated decision-making processes. Researchers are typically ignorant of or misunderstand their rights, and this is exacerbated by the complexity and ambiguity of many of the agreements they sign, particularly with regard to copyright. Much remains to be done to reduce complexity and uncertainty, and, with Government support, to raise awareness and understanding of the issues.

A specific problem relates to copyright in unpublished works. There is of course no procedure for registering or claiming copyright in such works, which come in the form of letters, diaries, memoirs, photographs and many other kinds of material created in the past with no expectation of gain from exploitation. Such materials held in libraries and archives are the very stuff of research for many areas of scholarship in the humanities. But the copyright term is extremely difficult to determine (as is acknowledged by the Patent Office in the FAQs on its website) and it is frequently excessive. We see no public policy or other reason why – as is the case elsewhere in Europe - the copyright term for unpublished works should not be brought into line with the standard term (life plus 70 years or creation plus 70 years where the work is anonymous). This would significantly reduce the regulatory burden on librarians and archivists.

### ***2. How IP is used***

Research, creativity and innovation all depend fundamentally on access to the information, knowledge and ideas produced by others past and present. Creativity and the investment required to translate new knowledge and ideas into innovative products and services should be recognised and rewarded. But we believe that the current IP regime in the UK has lost sight of its fundamental purposes of ensuring both the sharing of knowledge and the rewarding of innovation. In answer to question 2f and 2j, therefore, it is important to stress three points about the linkages between IP and innovation.

First, most research in the UK as in other countries is undertaken by researchers who are motivated not by potential IP rights, but rather by the

desire to generate new knowledge and understanding and to secure the recognition of their colleagues for their achievements.

Second, the advancement of knowledge and understanding – as has been recognised by scientists from Sir Isaac Newton onwards - depends on access to the works of others.

Third, it is important that those with entrepreneurial skills should have access to the knowledge created by researchers in order to generate new products and services. The recent Hyperion record company case shows how the protection of IP can actually stifle the creation of innovative products and services – in this case in the form of new recordings of little-known music that have up to now brought significant economic and cultural benefits. And the notorious case of the aggressive protection by a US scholar of the copyrights he purchased in the unpublished poems of John Clare demonstrate how such actions can hinder both proper scholarly debate and access to major literary works that should be in the public domain.

It is also important to stress that most of the research supported and undertaken by public sector bodies such as the Research Councils and in the higher education sector is undertaken for public good purposes. Those purposes require that the results of the research should be made available and disseminated as widely and rapidly, and with as few restrictions, as possible. In answer to question 2h, on the use of IP as a measurement of innovation, it is important therefore to emphasise that while metrics such as licence income have a role to play as indicators of public sector support for innovation, they should not be overstressed; most of the fundamental underpinning for innovation provided from the public sector through basic research will yield no such metrics. Similarly, it is important that universities and other bodies that are funded from public sources to undertake basic research should not be required to generate income from the knowledge, data and other outputs they generate in the course of the research. We would not support the extension to the UK of the provisions of the US Baye-Dohl Act.

### ***3. How IP is licensed and exchanged***

As noted above, access to information is critical to the research endeavour. But even with the assistance of bodies such as JISC, the current arrangements under which research libraries have to negotiate and manage scores of licences – each with different terms and conditions - for access to electronic journals and other digital content required by researchers are inefficient and unnecessarily burdensome. Similarly, the lack of clarity in the research exemptions regime causes many difficulties for researchers and for the information service providers who support them, not least in managing the different terms and conditions imposed by different licences from publishers, aggregators and collecting societies. These difficulties are exacerbated by the natural desire of librarians, archivists and others to be diligent in their handling of copyright and IP issues. For all these reasons, libraries and archives are devoting considerable resources to managing licences, access and IP restrictions, resources which could and should be put to more effective uses.

The efficient and effective operation of the scholarly communications process is fundamental to the advancement of knowledge and understanding; and

researchers, particularly in the public sector, relatively rarely wish to use information for commercial purposes. The failure of the IP regime to keep pace with the digital revolution, the over-zealous protection of copyright, and unreasonable restrictions on the research exemption all constitute barriers to effective scholarly communications. We deal with these issues in more detail below, in answer to the specific questions raised in the consultation paper.

#### ***4. How IP is challenged and enforced***

The risk of infringing IP rights, and the financial and reputational costs of litigation, are dominant thoughts in the minds of those who provide information services to the research community. They thus constitute barriers to effective scholarly communications. We wish to highlight three specific issues at this point. Other issues are dealt with below in answer to the specific questions raised in the consultation paper.

First, we believe that the remedies for ill-found threats of litigation provided for in relation to patents, trade marks and designs should be extended to copyright.

Second, fear of litigation in relation, for example, to orphan works is stifling the development of major digitisation projects that would create and make accessible research resources of fundamental importance to the social, economic and cultural history of the UK and of other countries with which it has close relations.

Third, the fear of infringement imposes complex and excessively-costly burdens on librarians, archivists and other information providers in seeking to educate their users, and to police and regulate their activities. And these activities, while necessary under the current regime, are not cost-effective in advancing the fundamental requirement for an efficient scholarly communications system that serves the needs of research and innovation.

### **Specific Issues**

#### ***1. Protection of sound recordings and performers' rights***

As the British Library has noted, an extension of the protection of sound recordings and performers' rights from 50 to 95 years would bring virtually the whole of the UK's recorded history into copyright. We do not see any justification for such an extension. Indeed, evidence from the US suggests that extending protection in this way means that historical sound recordings become inaccessible, since they cannot be copied or distributed without permission, and yet the rights-holders themselves re-issue only a very small proportion of them. Extension is therefore in the interests neither of rights-holders, nor of composers, nor of the public. The interests of all would be better served by providing incentives to promote re-issues, including by specialist and innovative companies such as the Hyperion label to which we refer under General Question 2 above.

#### ***2. Copyright exceptions – fair use and fair dealing***

It is clearly important to distinguish between the fairly narrow regime of fair dealing in British law and the much broader concept of fair use employed in the US. For the research community, it is the exceptions for educational and

research purposes that are of critical importance. As we note above in answer to General Question 3, the exceptions regime has not kept pace with the digital revolution. As the World Intellectual Property Organisation (WIPO) has clearly indicated, digital is not different with regard to the limitations and exceptions provided for in international law. But new technology has brought fundamental changes in how information is created, distributed and used, and it is important that legislation should be brought up to date to reflect this new world. Lack of clarity brings at present a number of difficulties.

- i. UK law is currently unclear as to whether a copy (of either a born-digital or an analogue record) can be made in digital form under the exemptions regime. Some publishers have thus sought to argue that digital copies are not allowed, and thus to restrict the exemption to the analogue world. It is essential that new legislation should make clear that the right to copy is irrespective of the medium of either the original or the copy, with safeguards to prevent inappropriate use or the passing of copies to others. It is also important to make clear that in providing copies for research under the exemptions regime, format shifting – for example from specialised database software into a PDF file – should be allowed, but that it should not create new rights alongside those of the original rights-owner.
- ii. The library and archive provisions for copying for research and private study relate only to literary, dramatic and musical works. They do not apply to artistic works, or to sound recordings, film or broadcasts. This gives rise to a number of absurdities where, for example, images accompanying a literary text may be copied, but illustrations on their own may not be copied. Similarly, it is difficult to explain why – particularly in a multi-media environment - an excerpt from a musical score can be copied, but an excerpt of an associated recording cannot.

We wish to draw attention to three further points. First, the definition of “non-commercial” research is potentially problematic. The recent Information Society Directive limits copying by librarians and archivists to use for research that results in no direct or indirect economic or commercial advantage. That limitation will result in additional licensing and administrative costs to universities. Moreover, it could be interpreted by the courts to exclude any research from which the researcher may ultimately gain some royalty or licence income, or research of a non-commercial nature undertaken by an agent on behalf of a public body or private citizen. It may indeed ultimately prove fruitless to determine any satisfactory definition of research that is commercial or non-commercial. The act of research itself can rarely have any impact on IP rights-owners. Rather, it is the use and dissemination of the information and other outputs secured during the course of the research that may bring such an impact. Hence we believe that the research exemption should be applied without limitation, and that commercial uses should be dealt with under the fair dealing provisions.

Second, there is a need to extend to museums, galleries and similar institutions the copying provisions for libraries and archives.

Third, the exceptions regime amended as we suggest involves no damage to the interests of rights-owners, and there can thus be no grounds for compensation as implied in Question (e).

### **3. Archiving and Preservation**

The preservation in digital form of copyright works in libraries and archives presents new problems and challenges. One of the most important relates to digital rights management technologies, and we deal with that in the following section. Here we outline a number of other important issues that need to be addressed.

Existing legislation allows libraries and archives to “make a copy from any item in the permanent collection” for the purposes of preservation. This is generally interpreted to mean a single copy, although in the digital environment it is considered best practice to preserve a number of copies in different locations, on different servers. And in the case of digitised materials, hard copies and microfilm may be required in addition. New legislation is needed to make clear that creating, reformatting and holding for preservation purposes an appropriate number of multiple copies is allowable, and indeed necessary. It also needs to allow for regular re-copying and migration of content to new formats. We suggest that such copying should be restricted only by a reasonableness test such as is applied in countries such as Denmark and Japan. Without such amendments to current legislation, the archiving and heritage role of libraries, archives and similar institutions will be fundamentally weakened.

Consideration should also be given to the definition of a “permanent collection”. A significant proportion of the content that libraries once purchased in hard copy they now rent access to in digital form. Licensed on-line content should be regarded as part of the permanent collection of libraries, and they should have the same right to make preservation copies as in the print environment.

Archiving the web is also becoming an increasingly important issue, which is being dealt with currently in developing the secondary legislation under the Legal Deposit Libraries Act 2003. A number of other organisations, primarily in the US, are also active in developing archives of the web. But given the scale and reach of the web, it is impossible for any one institution, even the Legal Deposit Libraries, to preserve more than a small fraction of the documentation that is disseminated on the web. We therefore believe that consideration should be given to the role that libraries and archives in general can play in preserving a permanent record of a selection of the material that is made available on the web.

Finally, it is essential that libraries and archives should be allowed to make copies for preservation purposes of sound recordings and films. Section 42 of the Copyright, Designs and Patents Act 1988 is not clear on whether this is allowed, and libraries and archives have therefore hesitated to copy such works. Since film and sound recording technologies and media have changed so rapidly over the last century, this means that some recordings are already effectively lost. We therefore urge that Section 42 should be amended to make it clear that, as in most other countries, copying for preservation is allowed irrespective of medium.

### **4. Copyright – Digital Rights Management**

We are aware of and support the evidence submitted by the British Library and the Libraries and Archives Copyright Alliance (LACA) to the All Party

Parliamentary Internet Group (APIG). Like those bodies we recognise the value of digital rights management (DRM) technologies in enabling rights-owners to track usage and enforce rights. DRMs should not, however, be allowed to subvert the proper balance between the protection of IP and citizens' rights of access and legitimate use of information. In the academic and research library sector, DRM technologies often make it difficult to the point of impossibility for researchers to gain legitimate access to licensed content when they move from their home institution to visit colleagues in another institution.

DRMs also have the capacity to prevent legitimate copying expressly allowed for under the statutory exemptions for research, fair use and fair dealing, and for preservation. We believe that rights-owners employing DRMs should be required to allow limited copying by users, and all legitimate copying under statutory exemptions by the staff of libraries, archives and related institutions. The staff of specified institutions in the national, university, and local authority library and archives sector should also be provided with access to keys to enable them as trusted intermediaries to override DRMs for the purpose of making preservation copies. This is essential in order to enable such institutions to fulfil their proper – in some cases statutory – responsibilities for preservation. Similarly, we support the case made by the British Library and others to allow them to override DRMs in order to meet their statutory obligations under the Disability Discrimination Act 1995.

We also support the case made by LACA, the BL and others that the current system in the UK whereby users can challenge the restrictions imposed by DRMs only by appeal to the Secretary of State is both inappropriate and ineffective; and it will become the more so as the pace of innovation and technological change increases. We support those who have argued that an independent regulatory body is needed to deal with these issues.

DRM technologies are, however, a mechanism which raise the broader issue of the increasing use by rights-owners of contract rather than copyright law. Digital information is typically held by libraries, and made available to their readers, under the terms of a licensing agreement. And since contract law in effect “trumps” copyright law in the UK, the balance that is sought in copyright between the monopoly rights of the rights-owner and the access rights of users is undermined. We note the evidence provided by the British Library and others as to the extent to which their licence agreements restrict copying far beyond what would be legitimate under copyright law. It is both unreasonable and impractical to expect libraries and other institutions to negotiate these points contract by contract. Rather, we support the case made by others that, as in Ireland and other countries, UK law should be amended so that it expressly does not allow licensing terms to override statutory exceptions and limitations under copyright law.

### **5. Copyright – Orphan Works**

The provision of effective access to orphan works - including unpublished works - presents major problems to libraries and archives. We have noted the evidence from The National Archives, the British Library and others – including studies from the US - as to the extent of their holdings of such works and the often insurmountable difficulties they encounter in seeking to trace

rights-owners. This presents a major barrier to the kinds of digitisation projects that would transform access to research collections of fundamental importance to social, historical and cultural studies. Like many other bodies, we support the proposal put forward by the US Copyright Office in its recent Report on Orphan Works, that use of orphan works should be permitted so long as the user, after reasonably diligent search, has not been able to identify and locate the rights-owner; that users should provide attribution to the author and rights-owner so far as possible; and that if the rights-owner is subsequently identified, reasonable compensation should be provided commensurate with the level of use.

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