



## The Gowers Review of Intellectual Property Extending the UK's copyright exceptions

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### Introduction

The *Gowers Review*<sup>1</sup> was the first independent look at the UK's intellectual property (IP) system since the *Copyright Designs and Patents Act* of 1988 (CDPA) which is our basic law in this area. The UK Government commissioned the Review in December 2005 in explicit recognition of the importance of IP to the UK economy. It was led by Andrew Gowers, former editor of the *Financial Times* and its purpose was to establish whether the IP system was still fit for purpose in the changing economic and increasingly globalised environment of the digital age. The terms of reference were largely aimed at improving the functioning of the IP regime for business, but included consideration of whether the current IP infringement framework reflects the digital environment, and whether provisions for 'fair use' by citizens are reasonable. Gowers reported in December 2006. The Government welcomed the report and announced its intention to take forward all the recommendations made to it.

In all, 54 recommendations<sup>2</sup> were made: the Review concentrated on reducing costs for businesses large and small, strengthening enforcement of IP rights (in particular, the UK's implementation of the proposals concerning ISPs and illicit peer-to-peer file sharing<sup>3</sup> has been much in the news), and "improving the balance and flexibility of IP rights to allow individuals, businesses and institutions to use content in ways consistent with the digital age." The Review also sensibly concluded that future IP policy needs to be strategically formulated and **recommended** *the establishment of a new and independent Strategic Advisory Board for IP Policy (SABIP) with a research budget of £500,000 p.a. (R46)*. SABIP was formally established on 2 June 2008.<sup>4</sup> The library and information professions are fortunate in that the membership includes Dame Lynne Brindley, Chief Executive of the British Library.

One immediate change since April 2007 was the implementation of Gowers' **recommendation** *to change the name of the UK Patent Office to the UK Intellectual Property Office (UK-IPO) (R53)*. So when I refer to the Patent Office or the UK-IPO they are one and the same thing depending on the dates.

<sup>1</sup> *The Gowers Review of Intellectual Property 2005-06*. [http://www.hm-treasury.gov.uk/independent\\_reviews/gowers\\_review\\_intellectual\\_property/gowersreview\\_index.cfm](http://www.hm-treasury.gov.uk/independent_reviews/gowers_review_intellectual_property/gowersreview_index.cfm) See also <http://www.cilip.org.uk/policyadvocacy/copyright/lobbying/laca2.htm>

<sup>2</sup> <http://www.ipo.gov.uk/policy/policy-issues/policy-issues-gowers.htm>

<sup>3</sup> *Consultation on Legislative Options to Address Illicit Peer-to-Peer (P2P) File-Sharing*. BERR, July 2008 <http://www.berr.gov.uk/files/file47139.pdf>

<sup>4</sup> <http://www.sabip.org.uk/home.htm>

## Balance and flexibility in the IP system

14 recommendations were aimed at achieving balance and flexibility in the IP system and I focus on this area. A first consultation<sup>5</sup> on the following **six recommendations** to extend the UK's copyright exceptions took place in the first quarter of 2008. The Government's public position as of August 4<sup>th</sup> is that it intends to begin the second stage of the consultation later this year. If this timetable persists (and it probably will slip), we would expect to see secondary legislation enacted during 2009 or at latest by April 2010.

**1. To enable educational provisions to cover distance learning and interactive whiteboards (R2)**

This should allow for the scanning and electronic delivery of extracts from works to students, and extend the very narrowly drawn educational copying exception to film, sound-recordings and broadcasts, beyond its current limitation to text, drama, and printed music.

**2. To allow private copying for research to cover all forms of content. This relates to the copying, not the distribution, of media. (R9)**

This recommendation extends the 'fair dealing' rules.

**3. To amend the CDPA to permit libraries to copy the master copy of all classes of work in permanent collection for archival purposes and to allow further copies to be made from the archived copy to mitigate against subsequent wear and tear. (R10a)**

**4. To enable libraries to format-shift archival copies to ensure records do not become obsolete. (R10b)**

**5. Introduce a limited private copying exception for format-shifting for works published after the date that the law comes into effect. There should be no accompanying levies for consumers. (R8)**

This is only for personal, private use. The Government is proposing a new limited private format-shifting exception without compensation to rightholders, allowing people to copy any class of work they lawfully own into another format, so that they can run it on another device they lawfully own. The copy may not be sold, loaned, given away, or shared more widely, or retained if no longer in possession of the original (though the last would be impossible to enforce). Third parties may not copy on behalf of consumers.

This is currently illegal in the UK though it is certain that nearly all the population has infringed! It supports the principle that one should not have to repurchase content because of frequently changing formats and platforms.

**6. Create an exception to copyright for the purpose of caricature, parody or pastiche. (R12)**

This new exception is one allowed by the exhaustive list in the European Information Society Directive, but had not been implemented in the UK. We have reason to support it since it affects libraries and museums and galleries because such an exception would remove the risk of their committing a secondary infringement by making such works available, displaying or lending them.

Worryingly, this first consultation exposed what seemed to be serious flaws in the UK-IPO's understanding of current UK and EU copyright law on exceptions to the reproduction right, and their application in real life. In places, their interpretation of copyright law was just plain wrong. This revealed a lack of experience and in depth knowledge, perhaps caused by high staff turnover of significant players in the last few years. This trend is of concern not just to us, but to some rightholders as well, and risks resulting in badly drafted law.

## Fair dealing and 'library and archive privilege' copying

Of particular concern were the consultation questions with regard to extending the fair dealing rules. Fair dealing is the bedrock of the UK copying exceptions regime and allows individuals to copy from artistic, dramatic and musical works for the purposes of private study or non-commercial research. To

<sup>5</sup> *Taking Forward the Gowers Review of Intellectual Property: Proposed Changes to Copyright Exceptions*. UK-IPO, January 2008 <http://www.ipo.gov.uk/about/about-consult/about-formal/about-formal-archiveresponse/about-formal-archive/consult-copyrightexceptions.htm>

implement Gowers, the UK-IPO is considering extending this exception to film, sound-recordings and broadcasts, yet appears very muddled and unsure about it. They asked whether or not the extension to fair dealing should apply to all types of work, to all fields of study or just specific areas, only to people affiliated to an educational or research establishment, or only to research but *not* private study. They seemed unaware both of the Government's lifelong learning policies, or that non-commercial research is also conducted outside the academic and research institute environment and is crucial to not-for-profit activity.

We have an existing library and archive 'privilege' copying exception which more or less mirrors the fair dealing exception. This allows not-for-profit or 'prescribed' libraries and archives to copy extracts for individuals engaged in private study or non-commercial research, yet the consultation ignored this obvious relationship and made no proposals to apply any fair dealing extension to the library and archive copying exceptions. Various remarks in the document suggest that the Government was thinking that this would just 'happen' by osmosis if they change fair dealing.

Our response<sup>6</sup> was forthright: it is essential that the library and archive 'privilege' mirrors the extended fair dealing exception since most copying in libraries and archives for research or study is done *for* the user rather than *by* the user. Furthermore, to make the exceptions fit for the digital age, all classes of work in all formats, both digital and analogue, should be covered by fair dealing and the library and archive 'privilege'. To restrict the extended parts of fair dealing as posited by the consultation, would not only be unfair, but lead to huge confusion and be largely abused by users as the law would become an ass.

### Copying for preservation

With regard to the two recommendations for library and archive copying for preservation, currently UK libraries and archives may make one copy of an analogue format literary, dramatic or musical work (including any embedded artistic works) from their reference collections, in the same format in order to preserve it. To implement Gowers, the Government proposes to allow libraries and archives, and for the first time also museums and galleries, to copy from any class of work for preservation and whenever needed to make as many on-copies, shifted into any format, as are needed for preservation purposes or for shifting platform. This will also solve the problem of preserving orphan works. However, no exception is proposed for circumvention of technological protection measures (TPMs) for preservation, such as is allowed in Norway<sup>7</sup> and in Finland's new law, and these countries also must comply with the Information Society Directive. The proposal by LACA, the UK Libraries and Archives Copyright Alliance<sup>8</sup>, is that legislation be provided to allow 'trusted institutions', such as the legal deposit libraries and certain other prescribed libraries, archives and designated museums, to be given the keys to the TPMs or clean TPM-free copies for specific purposes such as preservation or to provide accessible formats for disabled people. Despite the caveat about TPMs, we very much support Gowers' proposals.

### People with disabilities

Although Gowers had not made any recommendations on disability issues, we pointed out that this basket of legislation furnishes the UK with an opportunity to fully implement the Information Society Directive's exception for disabled people<sup>9</sup>. We have a shameful state of affairs whereby dyslexia and learning difficulties are not included in the existing definition of visual impairment in the CDPA and thus the affected people are denied enjoyment of the existing exception for visually impaired people. For example, dyslexia accounted for 60% of the Specific Learning Difficulties recorded at Oxford University in 2007<sup>10</sup>, which suggests that the biggest group of visually impaired users in a university library is likely to be dyslexic. This conflict of laws means that copyright law prevents libraries from providing materials in accessible formats to people generally recognised in law as having a disability,

<sup>6</sup> <http://www.cilip.org.uk/policyadvocacy/copyright/lobbying/ukipoconsultation08.htm>

<sup>7</sup> NORWAY: Copyright Act 1961 ss.16, 53a-b (as amended). Act No. 2 of 12 May 1961 relating to Copyright in Literary, Scientific and Artistic Works, etc., (as amended, latest of 17 June 2005). Unofficial English translation on Kopinor website [http://www.kopinor.org/opphavsrett/node\\_2182](http://www.kopinor.org/opphavsrett/node_2182).

<sup>8</sup> LACA is convened by CILIP, the UK library association. See <http://www.cilip.org.uk/laca>

<sup>9</sup> Information Society Directive 2001/29/EC Art. 5(3)(b) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:NOT>

<sup>10</sup> University of Oxford Disability Equality Scheme Annual Report December 2007. <http://www.admin.ox.ac.uk/eop/disab/des.shtml>

but who are not recognised as visually impaired by CDPA, yet our equality legislation<sup>11</sup> entitles them to equal access to goods and services, education and employment.

## European Commission Green Paper

On 16<sup>th</sup> July 2008 the European Commission published a consultative *Green Paper on Copyright in the Knowledge Economy*.<sup>12</sup> It asks questions concerning the general copyright exceptions and limitations and whether there should be guidelines for copyright licensing. In particular, it asks about the narrow library and archive exceptions to the reproduction right with regard to digitisation for preservation and for making available (including online document delivery which currently can not be done without permission), orphan works, exceptions for people with a disability, the dissemination of works for teaching and research purposes, and whether, as **recommended** by Gowers, *to create a new exception for creative, transformative or derivative works within the parameters of the Berne Three Step Test*<sup>13</sup> **(R11)**. Since the Commission is covering much of the same ground on exceptions as Gowers, it may delay the enactment of legislation to implement the Gowers exceptions recommendations in the UK. It is a 'chicken and egg' situation, since there are already precedents of pre-existing Member State legislation shaping EU legislation.

## Orphan works

A big success for our lobbying to Gowers was to get official recognition of the orphan works problem in the UK and Europe. After commissioning a special study on orphan works from the film industry<sup>14</sup>, which also has a great concern about clearing rights in orphan works, he made three recommendations.

### 1. *Propose a provision for orphan works to the European Commission, amending the Information Society Directive. (R13)*

The Commission's Green Paper is consulting about orphan works. The UK is also informally consulting the stakeholder community and may take some action at national level but will probably wait to see what will happen in Europe. An exception for orphan works would require amendment to the Information Society Directive. However, national legislation to back extended collective licensing schemes such as those prevalent in Scandinavia would not. Both LACA and EBLIDA favour a mixed economy approach combining an exception for orphan works to enable us to at least deal with works which can not be licensed such as unpublished works, with statute backed extended collective licensing, which, although not perfect, provides a neat and workable solution. Indeed, some of the UK collecting societies are thinking about this.

### 2. *The Patent Office should issue clear guidance on the parameters of a 'reasonable search' for orphan works, in consultation with stakeholders. (R14a)*

UK-IPO is unlikely to do this since there now exist voluntary diligent search guidelines<sup>15</sup> agreed by rightholder organisations, EBLIDA and certain cultural institutions for the European Commission's *Europeana*<sup>16</sup> digital library<sup>17</sup>, which were published in June. Although they largely reflect current good practice and only the parts relevant to the search need be followed, the drawback is that these guidelines have no legal status, do not provide indemnity, and may be unsuitable for the purpose of mass digitisation because certain rightholder organisations refused to discuss their adaptation (such as by a sampling regime) in the context of mass digitisation – which is what the *Europeana* project is all about. It is therefore likely that a number of

<sup>11</sup> UNITED KINGDOM: Disability Discrimination Act 1998; Special Educational Needs and Disability Act 2001

<sup>12</sup> [http://ec.europa.eu/internal\\_market/copyright/copyright-info/copyright-info\\_en.htm#greenpaper](http://ec.europa.eu/internal_market/copyright/copyright-info/copyright-info_en.htm#greenpaper)

<sup>13</sup> Berne Convention Art. 9(2) [http://www.wipo.int/treaties/en/ip/berne/trtdocs\\_wo001.html#P140\\_25350](http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P140_25350). See also Wikipedia [http://en.wikipedia.org/wiki/Berne\\_three-step\\_test](http://en.wikipedia.org/wiki/Berne_three-step_test)

<sup>14</sup> *Copyright and Orphan Works. A Paper Prepared for the Gowers Review by the British Screen Advisory Council*, 2006. (scroll down) [http://www.hm-treasury.gov.uk/independent\\_reviews/gowers\\_review\\_intellectual\\_property/gowersreview\\_index.cfm](http://www.hm-treasury.gov.uk/independent_reviews/gowers_review_intellectual_property/gowersreview_index.cfm)

<sup>15</sup> See High Level Expert Group (HLEG) meeting papers for 5<sup>th</sup> meeting, 4 June 2008 (scroll down) [http://ec.europa.eu/information\\_society/activities/digital\\_libraries/experts/hleg/index\\_en.htm](http://ec.europa.eu/information_society/activities/digital_libraries/experts/hleg/index_en.htm) and [http://ec.europa.eu/information\\_society/activities/digital\\_libraries/experts/hleg/meetings/index\\_en.htm](http://ec.europa.eu/information_society/activities/digital_libraries/experts/hleg/meetings/index_en.htm)

<sup>16</sup> <http://www.europeana.eu/>

<sup>17</sup> European Commission: DG Information Society. i2010: Digital Libraries Initiative [http://ec.europa.eu/information\\_society/activities/digital\\_libraries/index\\_en.htm](http://ec.europa.eu/information_society/activities/digital_libraries/index_en.htm)

institutions engaged in mass digitisation will still need licensing solutions, which may or may not be found. The risk remains that orphan works from some countries may form a 20<sup>th</sup> century black hole in *Europeana* for some time to come.

**3. The Patent Office should establish a voluntary register of copyright; either on its own, or through partnerships with database holders. (R14b)**

The UK-IPO's official line is that it "would not want to duplicate or to undermine commercial enterprise capable of delivering what is required".<sup>18</sup> With EU grant funding, some European rightholder organisations are now developing databases for literary and artistic works.<sup>19</sup>

## Retrospective legislation

Gowers also **recommended** that *policy makers should adopt the principle that the term and scope of protection for IP rights should not be altered retrospectively (R4)*. The classic example is the *European Term Directive 1993*<sup>20</sup> which retrospectively extended the copyright term from life+50 to life+70 years in all Member States, so Germany could retain its pre-existing longer term. It was surely the comments that Gowers received about that which led him to make this recommendation.

## Copyright term

It is generally accepted that the *Term Directive* has led to term creep around the world, and now it threatens to come home to roost with the Commission's latest draft Directive<sup>21</sup>, also published on 16<sup>th</sup> July, which proposes to extend the copyright term in sound recordings, and in the performances in them, from 50 years to match the US term of 95 years.

Dubbed the 'Beatles Extension Directive'<sup>22</sup>, this issue was one which Gowers had been asked to specifically consider and he **recommended** that *the European Commission retain the length of protection on sound recordings and performers' rights at 50 years (R3)*. Sadly, the Commission chose not to follow this advice despite the research evidence commissioned by Gowers<sup>23</sup> which refuted the record industry arguments and despite the evidence and recommendations provided by its own commissioned review of the European Copyright *Acquis*.<sup>24</sup> These arguments were reiterated by the *Bournemouth Statement* (to which LACA was a First Signatory) sent to the Commission in June 2008 by leading European IP academics.<sup>25</sup> EBLIDA, the European library association, also lobbied.<sup>26</sup> The UK Government is currently consulting informally about the draft Directive and LACA has recently written telling them what impact it would have on sound collections and archives and that we expect them to

<sup>18</sup> <http://www.ipo.gov.uk/policy/policy-issues/policy-issues-gowers/policy-issues-gowers-flexibility.htm> (scroll to R14(b) as reviewed by UK-IPO on 4 August 2008).

<sup>19</sup> E.g. Accessible Registries of Rights Information and Orphan Works towards the EDL (ARROW) [http://www.buecher.at/rte/upload/news/arrow\\_final\\_standard\\_presentation.ppt](http://www.buecher.at/rte/upload/news/arrow_final_standard_presentation.ppt); Metadata Image Library Exploitation (MILE) <http://www.mileproject.eu/>; Orphan Works Database <http://orphanworks.ssl.co.uk/>

<sup>20</sup> Term Directive 93/98/EEC repealed and replaced by consolidated Directive 2006/116/EC [http://ec.europa.eu/internal\\_market/copyright/term-protection/term-protection\\_en.htm](http://ec.europa.eu/internal_market/copyright/term-protection/term-protection_en.htm) (scroll down)

<sup>21</sup> *Proposal for a European Parliament AND Council Directive amending Directive 2006/116/EC of the European Parliament and of the Council on the term of protection of copyright and related rights* {SEC(2008) 2287} {SEC(2008) 2288}/\* COM/2008/0464 final - COD 2008/0157 \*/

[http://ec.europa.eu/internal\\_market/copyright/term-protection/term-protection\\_en.htm](http://ec.europa.eu/internal_market/copyright/term-protection/term-protection_en.htm)

<sup>22</sup> Sir Cliff Richard pins hopes on law that will keep cash rolling in until he's 113. *EU proposes royalty extension for performers*. Times, 17 July 2008.

[http://entertainment.timesonline.co.uk/tol/arts\\_and\\_entertainment/music/article4347643.ece](http://entertainment.timesonline.co.uk/tol/arts_and_entertainment/music/article4347643.ece)

<sup>23</sup> *Review of the Economic Evidence Relating to an Extension of the Term of Copyright in Sound Recordings*. Centre for Intellectual Property and Information Law, University of Cambridge, 2006 (scroll down) [http://www.hm-treasury.gov.uk/independent\\_reviews/gowers\\_review\\_intellectual\\_property/gowersreview\\_index.cfm](http://www.hm-treasury.gov.uk/independent_reviews/gowers_review_intellectual_property/gowersreview_index.cfm)

<sup>24</sup> *The Recasting of Copyright and Related Rights for the Knowledge Economy*. IViR, University of Amsterdam 2006 [http://www.ivir.nl/publications/other/IViR\\_Recast\\_Final\\_Report\\_2006.pdf](http://www.ivir.nl/publications/other/IViR_Recast_Final_Report_2006.pdf). Executive Summary [http://www.ivir.nl/publications/other/IViR\\_Recast\\_Exec\\_summary\\_2006.pdf](http://www.ivir.nl/publications/other/IViR_Recast_Exec_summary_2006.pdf). See also *Never Forever: Why Extending the Term of Protection for Sound Recordings is a Bad Idea*. N. Helberger, N. Dufft, S.J. van Gompel & P.B. Hugenoltz, *EIPR*, 2008-5, 174-181. [http://www.ivir.nl/publications/helberger/EIPR\\_2008\\_5.pdf](http://www.ivir.nl/publications/helberger/EIPR_2008_5.pdf)

<sup>25</sup> *Creativity stifled? A Joined Academic Statement on the Proposed Copyright Term Extension for Sound Recordings*, 16 June 2008. <http://www.cippm.org.uk/publications/index.html> To be published in *European Intellectual Property Review* (*EIPR*, 2008-9, 341-347)

<sup>26</sup> <http://www.eblida.org/index.php?page=position-papers-and-statements-2>



abide by their earlier decision to support the Gowers recommendation.<sup>27</sup> There is nothing to commend the proposal.

## Technological Protection Measures (TPMs)

Gowers was additionally asked to consider the effects of TPMs on users but he basically ducked the main issues. His **recommendations** were to *make it easier for users to file notice of complaints procedures relating to DRM tools by providing an accessible web interface on the Patent Office website (R15)* and that the Government *should investigate the possibility of providing consumer guidance on DRM systems through a labelling convention without imposing unnecessary regulatory burdens. (R16)*

The UK Government and the European Commission are separately considering how to provide consumers with information about DRMs in products and the UK-IPO intends to launch the web interface for complaints to it by the end of 2008. This is just window dressing since Gowers failed to address the lack of structure in the UK's complaints procedure and the lack of teeth in the outcome, in that the Government's rulings can only be enforced by the complainant, not the Government, going to court.

## Devaluation of exceptions and limitations by contracts and licences

It was disappointing that, despite representations, Gowers ignored the issue of the increasing devaluation of the exceptions and limitations in the digital environment where access and use of much information is governed by contracts and licenses and often enforced by TPMs. This is also leading to erosion of the public domain as out of copyright works in the digital environment can remain under lock and key due to the terms of contracts and licences giving access to them. In the UK and in most countries, contracts are allowed to override the statutory copyright exceptions and limitations and, through creep, these hard won legal provisions will become redundant. For example, on investigating its own licences, the British Library found that 93% of the contracts offered to it undermine statutory exceptions and limitations.<sup>28</sup>

The message I leave you with, is that it should be the **bottom line** and the 60 second elevator pitch for library and information organisations everywhere, **to seek statutory provision in our copyright laws for contracts not to be able to override copyright law including its provisions for exceptions and limitations.** Precedents already exist in Ireland's copyright Act<sup>29</sup> with regard to all copyright exceptions and limitations, and as a result of European Directives<sup>30</sup>, in all European Member States in the context of licences for databases and computer programs.

## Conclusion

In the Foreword to his Report, Andrew Gowers had written "Getting the balance right is vital to driving innovation, securing investment and stimulating competition. Lasting success will belong to those who get this right." In my view, if the UK Government and also the European Commission *do* actually manage to get it right - and there is still doubt as to whether they will achieve more than a 'curate's egg'<sup>31</sup>, i.e. a result that is 'good in parts' - then the Gowers Review will have brought us a little nearer to perfect balance.

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<sup>27</sup> <http://www.cilip.org.uk/policyadvocacy/copyright/lobbying/termofcopyrightforsoundrecordings.htm>

<sup>28</sup> See British Library intellectual property page <http://www.bl.uk/ip>: *Copyright and Research in the UK - Maintaining a balance in the digital age* <http://www.bl.uk/ip/pdf/maintainingbalance.pdf> and *Analysis of 100 Contracts Offered to The British Library* <http://www.bl.uk/ip/pdf/ipmatrix.pdf>

<sup>29</sup> IRELAND. Copyright and Related Rights Act, No. 28 of 2000. Part 1 Section 2 s.2(10) and Part II Chapter 6 s.57(4) <http://www.irishstatutebook.ie/home.html>

<sup>30</sup> Database Directive 96/9/EC [http://ec.europa.eu/internal\\_market/copyright/prot-databases/prot-databases\\_en.htm#20051212\\_1](http://ec.europa.eu/internal_market/copyright/prot-databases/prot-databases_en.htm#20051212_1); Protection of Computer Programs Directive 91/250/EEC [http://ec.europa.eu/internal\\_market/copyright/prot-comp-progs/prot-comp-progs\\_en.htm](http://ec.europa.eu/internal_market/copyright/prot-comp-progs/prot-comp-progs_en.htm)

<sup>31</sup> See [http://en.wikipedia.org/wiki/Curate's\\_egg](http://en.wikipedia.org/wiki/Curate's_egg)