

INTELLECTUAL PROPERTY: A BALANCE

The British Library Manifesto

Striking the right balance

The digital revolution has transformed the way in which information, ideas and artistic works are created, disseminated and accessed. Anyone can now be a creator, a publisher, a music producer, a film-maker in their own front room and traditional business models are changing rapidly. Whole new forms of material have quickly developed – websites, podcasts, wikis, mash-ups – all, and more, can be accessed by anyone, anywhere, at any time via the internet.

Copyright law has traditionally sought to strike an appropriate balance, between the rights of creators to be recognised and rewarded for their work, and the public interest in ensuring access to information and ideas. Getting the balance right is intrinsic to a healthy creative economy and our education sector, for without reward there is nothing to be gained in innovation, and without access to the ideas that have come before, there is no inspiration for the future. For the British Library, wider Intellectual Property (IP) debate is crucial but is underpinned by a need to simplify and clarify discrepancies in the copyright framework. This paper outlines the issues that the UK faces and the British Library's recommendations in support of a healthy and innovative knowledge economy.

The British Library position

- The British Library is in a unique position to act as both a leading voice and an honest broker in the debate that the digital revolution has generated. The British Library has always played a particular and important role in the copyright framework, operating at the fulcrum of the copyright balance and we are recognised for this balanced view. Because of this, the Library has a valuable role to play in ensuring Britain's leading edge in the new digital world.
- We are recognised for speaking with an independent voice: in favour of access, but not unfettered access ignoring the rights of creators; working with DRMs, but not at the expense of existing statutory limitations; wishing to protect the rights of those who have created but not at the expense of those who wish to create.
- As a publisher in our own right, The British Library understands the opportunities and threats presented by digital to the publishing industries. As a legal deposit library we embody the nation's cultural and intellectual memory.
- We are facing up to the challenge of capturing and preserving the nation's creative output in a fast-moving digital world to ensure it is not lost for future generations. This is forming the nation's digital memory – for example we have signed an agreement with Microsoft to digitise and make free at the point of access on the web 25,000,000 pages of out of copyright material.
- We are living through exciting times but the traditional copyright framework is creaking under the strain. This is the challenge: to update our copyright framework and ensure that the balance required for a thriving creative economy and education sector is maintained in the digital age, to maintain a competitive advantage in a changing international environment.

WHAT AREAS NEED TO BE ADDRESSED

1 Digital is not different

Fair dealing access and library privilege should apply to the digital world as is the case in the analogue one.

A book or its digital copy are both equally valid and relevant research items yet there are different opinions on the applicability of fair dealing. Without clarity, access to material by researchers and the public could be eroded as a price is increasingly attached to more and more granular levels of knowledge.

- The World Intellectual Property Organisation, the organisation that frames copyright law internationally, is clear that limitations and exceptions such as fair dealing and library privilege are equally as relevant to the digital environment as the analogue one.

- However currently UK law is silent on this matter – allowing some rights holder groups to challenge whether these rights in UK law are applicable to the new digital environment. Limitations and exceptions in law are designed to foster education, creativity and therefore enterprise in our society, and are in no way altered by the advent of new technology.
- We believe that if limitations and exceptions are not clearly extended to the digital environment, knowledge will potentially become simply a commodity to be bought and sold by those that can afford it. This contradicts our existing copyright system, and would undermine in the UK the great economic and educational benefit of the digital age.

We recommend that limitations and exceptions are explicitly extended to the digital environment as is the case in international law.

2 Fair Dealing

New, potentially restricting technologies (such as DRMs / TPMs) and contracts issued with digital works should not exceed the statutory exceptions for fair dealing access allowed for in the Copyright, Designs and Patents Act.

As the Library prepares for legal deposit of digital items we are discovering that DRMs can pose a real, technical threat to our ability to conserve and give access to the nation's creative output now and in the future. Contracts can also prevent users' legitimate access to databases. In fact, twenty eight out of thirty licences offered to the British Library and selected randomly were found to be more restrictive than rights that currently exist within copyright law. It is of concern that, unchecked, this trend will drastically undermine public access, thus significantly undermining the strength and vitality of our creative and education sectors.

- DRMs are given close to total legal protection within the UK, with no practical processes allowing for legal circumvention in the interests of disabled access, long-term preservation or where the DRM prevents fair-dealing use.
- DRMs do not have to expire, and can effectively prevent the work entering into the public domain at the expiry of the copyright period.
- Licences, rather than contracts of sale, are emerging as the key transaction method in the digital environment. The majority of these licences deliver lower-level access and copying rights than are available under existing copyright law.

We recommend that contract and DRMs /TPMs are not allowed to undermine the longstanding limitations and exceptions such as fair dealing in UK law.

3 Archiving

Libraries should be allowed to make copies of sound and film recordings to ensure they can be preserved for posterity in the future.

Currently the law does not permit copying of sound and film items for preservation. Without the right to make copies, the UK is losing a large part of its recorded culture.

- The British Library Sound Archive is one of the largest archives of music in the world with over a

million discs, 185,000 tapes and holdings of every other medium upon which sound can be recorded.

- As the Library is not able to make copies of items, many original audio and film formats we hold are becoming increasingly more fragile and require the urgent creation of a preservation surrogates or face irretrievable decay.

We recommend that copying for preservation purposes is extended to all copyrightable works as is the case in many other countries.

AS PART OF THE CURRENT IP DEBATE?

4 Term of copyright

The copyright term for sound recording rights should not be extended without empirical evidence and the needs of society as a whole being borne in mind.

A retrospective extension to 95 years would bring nearly the whole body of the UK's audio history into copyright. Given the current legislation on sound recordings this would effectively mean that a significant percentage of our holdings would decay and be unavailable to future generations.

- Maintaining the correct balance in term of copyright will be hugely beneficial to both the music industry and to society, which thrives on the creativity and innovation of its citizens.

- Although the number of case studies on the music industry in this area is not large, a number of US based studies show that less than 2 percent of works have any commercial value at all 55 – 75 years after they were created and that more material is released by publishers when sound recordings enter the public domain than when still in-copyright.ⁱ
- The British Library is concerned from a preservation perspective that any extension will adversely affect our ability to archive sound recordings.

We recommend that the term extension debate needs to be based on sound economic evidence and the needs of all members of our economy and society.

5 Orphan works

The US model of dealing with orphan works should be considered for the UK.

The British Library estimates that well over forty percent of all creative works in existence are potentially orphaned. Tracing owners costs an immense amount of time and money and if they cannot be found, libraries and publishers are still reluctant to go ahead and use material, making it almost redundant for research.

- Many libraries and museums in the public sector, not to mention publishers in the private sector, are put off using orphan works – fearful of the legal ramifications when the rights owner may eventually come forward.

- With no mechanism to deal with orphan works in our society, a vast and potentially valuable set of material is essentially locked up away from publishers and the academic community, and has a “chilling effect” on our education and creative sectors.
- Currently the US Congress and the European Commission are looking at how to make orphan works more available readily available which has a clear economic and academic benefit.

We recommend that the Government to look at how we in the UK can benefit from a “light-touch” system as proposed in the US that actively enables the use of orphan works.

6 Unpublished works

The length of copyright term for unpublished works should be retrospectively brought in line with other terms – life plus 70 years.

Unpublished works are difficult to use. Currently the duration of unpublished works is dependent on many things such as the date of creation of the work, the type of work, the year the author died, whether the work is anonymous and even whether the work sits in a library or archive or not.

- The Patent Office, which is responsible for intellectual property in the UK, readily acknowledges on its website that “it can be quite difficult to work out the exact term of protection”ⁱⁱ for unpublished works.

- In a society such as ours dependent on the creation of a healthy intellectual property environment, where the means to copy thanks to the advances in technology increasingly sit with the individual, we believe it is the duty of Government to make copyright as simple and easy to understand as possible.
- The advantages of harmonisation of duration would be an immediate simplification of our copyright regime with a concomitant rise in its transparency and accessibility for the public.

We would also like to see the end of the transitionally differential term of copyright for unpublished works created before 1988. We recommend that this is retrospectively brought into line with other rights terms – life plus 70 years.

ⁱ Survey of Reissues of US Recordings. T Brooks. Co-published by the Council on Library and Information Resources and the Library of Congress. 2003. Copyright Term Extension: Estimating the Economic Values. E Rappaport 1998.

ⁱⁱ <http://www.intellectual-property.gov.uk/faq/copyright/unpublished.htm>

What we want to see from the Gowers Review of Intellectual Property

The Gowers Review has received more responses than any similar policy review and much of the public debate so far has polarised quickly, pitching Open Access against DRMs, consumer against industry. Our overall aim is that the Gowers Review will embrace the wider picture, looking at our copyright regime and recognising that the traditional IP balance must not be undermined if Britain's creative economy is to flourish. There are the six key areas upon which the review should deliver in creating a framework necessary for Britain's success as a knowledge economy in the digital age.

- 1 **Digital is not different** – Fair dealing access and library privilege should apply to the digital world as is the case in the analogue one.
- 2 **Contracts and DRM** – New, potentially restricting technologies (such as DRMs /TPMs) and contracts issued with digital works should not exceed the statutory exceptions for fair dealing access allowed for in the Copyright, Designs and Patents Act.
- 3 **Archiving** – Libraries should be allowed to make copies of sound (and film) recordings to ensure they can be preserved for posterity in the future.
- 4 **Term of copyright** – The copyright term for sound recording rights should not be extended without empirical evidence and the needs of society as a whole being borne in mind.
- 5 **Orphan works** – The US model of dealing with orphan works should be considered for the UK.
- 6 **Unpublished works** – The length of copyright term for unpublished works should be retrospectively brought in line with other terms – life plus 70 years.

Glossary of terms

Intellectual Property – the four main types of IP:

- patents
- trademarks
- designs
- copyrights

Copyright – is a set of rights which creators have in regard to works such as books, designs, films and sound recordings created by them.

Digital Rights Management (DRMs) – DRMs (Digital Rights Management) and TPMs (Technical Protection Measures) are technological tools used to regulate access to and usage of digital data.

Fair Dealing – the 'right' to make a copy from an in-copyright work without permission from the rights holder for non-commercial research, private study, criticism, review and news reporting. For example most copying by students at university for academic purposes is done under the fair dealing provision in UK law.

Library Privilege – refers to a number of provisions within UK copyright law relating to libraries. It is most commonly used to refer to the role of libraries whereby they are able to make and supply a fair dealing copy to a user upon request.

Orphan Works – Creative works where it is not possible to track down the rights holder because they are not known or they cannot be traced.

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