COMMISSION OF THE EUROPEAN COMMUNITIES

GREEN PAPER

Copyright in the Knowledge Economy

Response by the Museums Copyright Group

The Museums Copyright Group

The Museums Copyright Group is the only group of its kind in the UK and, to its knowledge, anywhere in the EU.[1] It was founded in 1996, and brings together museums, galleries and other cultural establishments (including archives and libraries) to represent their perspective on copyright issues, and disseminate knowledge and best practice in the sector. It is funded by subscriptions paid by its members, who include individual institutions of all sizes, as well as other representative or membership bodies such as Collections Trust, the Museums Association and the National Museum Directors' Conference (NMDC).

Introduction

Museums and galleries, with libraries and archives, make a vital, but arguably under-valued contribution to the knowledge economy, and to the wider information society. They are responsible for collecting and preserving much information which would be lost if such activities were solely reliant on commercial investment.

Museums and galleries are emblems of a different perspective on the "knowledge economy", one which views knowledge not simply as a raw commercial asset, but as part of the common good, an entitlement of all citizens in a civilised society, and something which, if nurtured, preserved and reflected upon, will result in benefits that are social and cultural as well as economic. This wider perspective is enshrined in the copyright system itself, and the existence of exceptions and limitations to the absolute rights of rights holders (even if the activities of museums are not always acknowledged by appropriate exceptions under the laws of every Member State).

At the same time, museums and galleries are themselves actively engaged in the promotion of the free movement of knowledge and innovation (and not simply in the 'passive' preservation of knowledge). Some are directly engaged in large scale research and innovation activity – witness the research activities of an institution such as the Natural History Museum, whose staff publish over 500 research papers a year, and the British Library's Research and Innovation, and Business and IP Centres.

[1] http://www.museumscopyright.org.uk/index.htm.

Museums and galleries are heavily involved in wider educational activities, engaging not only with academics and researchers, but also with schools and lifelong learners.

As Commissioner Reding has said:[2]

> "information technologies encourage participation, facilitate access to information and offer new ways of learning and communicating".

Museums: some facts

The following facts and figures relate to museums and galleries in the UK.

- There are 1883 Accredited museums and a further 600-700 non-Accredited organisations which broadly fit the definition of a museum.
- 16.54 million adults visited a museum at least once in 2007-08.[3]
- 56.8% of 11-15 year olds visited a museum at least once in 2008.
- in 2005-06, DCMS sponsored museums reported 34.0 million visitors.[4]
- 4.0 million children visited Renaissance-funded museums in 2007/08, an increase on the previous year of 4.1% and up 29.4% on 2002/03.
- 16.5% of adults reported that (in 2007-08) they had visited a museum website in the last 12 months.[5]
- national museum websites received over 60 million unique web visits in 2004-5 – an increase on 40% on the year before.

Museums and galleries make a significant contribution to the economy. They nurture and promote the values, qualities and skills that are essential for the sustenance and development of the knowledge economy and a resource that inspires, feeds and supports the creative industries.[6] The UK's museums and galleries are a global resource.

The central role of museums has always been to communicate information about their collections to the public. Today, it is expected that museums will communicate not simply with those who visit their premises, but also with existing

[2] Hearing of Mrs. Viviane Reding, Commissioner designate for Information Society and Media, Brussels, 29 September 2004: see: http://ec.europa.eu/information_society/newsroom/cf/itemdetail.cfm?item_id=1354

[3] See:- http://research.mla.gov.uk/evidence/documents/Attendance%20of%20Museums%20and%20Galleries.pdf

[4] http://research.mla.gov.uk/evidence/view-publication.php?dm=nrm&pubid=275

[5] Department for Culture, Media and Sport 'Taking Part Survey': http://www.culture.gov.uk/global/research/taking_part_survey/

[6] In 2004/5 36% of the audiences at the V&A identified themselves as practitioners, students or teachers in the Creative Industries.

and new audiences by using new technology. This expectation is held by the public, by those that fund museums, and by museum professionals themselves. Government policy supports this expectation and considerable amounts of public money have been made available to enable it to happen.

Copyright is central to enabling museums to meet these expectations. Communication to the public is itself an act requiring the consent of the copyright owner. For some projects, ranging from large scale digitisation programmes to one-off website projects, copyright is absolutely critical to delivering the project's objectives.

It would be quite erroneous to think that copyright only affects a tiny proportion of museum collections. An increasing number of items in museum collections are affected by copyright, both because of the increased period of protection and because of the acquisition of materials that are still protected. A recent survey conducted by the MCG showed that the percentage of artistic works held in museum collections that remain in copyright ranged widely, but in no fewer than 36 cases out of 71 institutions polled, the percentage was 20% or more, and in 18 cases out of 71 the percentage was 50% or more.[7] Indeed, in some museums, the proportion of two-dimensional material still in copyright can be as high as 95% (for example, the National Museum of Photography, Film & Television and the image collections of the Witt and Conway Libraries in the Courtauld Institute). This should serve as a corrective to anyone whose views of museums is that they are simply repositories of old (and therefore out of copyright) material.

Use of copyright material has therefore become an increasingly prominent element in the fulfilment of the public task of museums – informing and educating members of the public about collections and their meaning. These activities certainly generate new copyright material, for example text written by curators and photographs of objects. However, in the main these activities necessitate the clearance of third party rights, that is to say the licensing in of copyright material for use in the context of exhibitions, catalogues, websites and other publications, electronic and non-electronic. This applies particularly to the two-dimensional material in museum collections – including everything from old trade literature to a variety of photographic and illustrative material – that has often been deposited with museums because its value has passed from the commercial to the cultural and historical. In addition, much of this material will have been deposited without any accompanying documentation or identification.

This clearance activity now accounts for a significant expenditure of resources, not only in terms of licence payments to the relevant copyright holders, but also in terms of the time spent trying to identify copyright holders and to negotiate licence terms with them.

A balanced picture should also encompass the publishing and related trading activities of museums, often conducted through separate trading entities. These activities rely on the management of intellectual property (whether the museums'

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[7] These are generally estimates. The numbers of items in some collections (especially those of members of NMDC) are in the tens of thousands.

own IP or that of third parties) and, because of the commercial nature of these activities, licences of third party copyrights are negotiated on arm's length terms.

This breadth of activity means that museums and galleries, as users of copyright works, and as publishers, fully support the principles of a balanced approach, and accept the three-step test as a central part of the copyright system. The responses given to the Green Paper in this submission should be read in that light.

General Issues (Questions 1 to 5)

The Green Paper correctly identifies two key problems with the exceptions and limitations as framed in the Directive. The first is their general nature. From a UK perspective, greater certainty is desirable, and is a feature of national legislation. Given that all the exceptions must be applied within the constraints of the three step test, this might be argued not to be a serious problem. However, lack of certainty can reduce the incentive for investment in new works, and also reduce the use made of the exceptions due to fear of infringement. Either way it is inimical to the dissemination of knowledge, whether by means of commercial publications or uses falling within the three-step test.

The second is the limited degree of harmonisation achieved in relation to the exceptions and limitations since only one of them is mandatory. This is a more serious problem. Museums have not seen the acknowledgement of their activities which is reflected in Article 5 of the Directive translated into corresponding provisions in national law. This is not because the arguments in favour of such implementation have not been made. Indeed, the force of these arguments has been acknowledged. But UK government policy has been only to implement into national law what is mandatory (to avoid so-called 'gold plating') which means that only those non-mandatory exceptions in the Directive that already corresponded to existing exceptions under the Copyright, Designs and Patents Act 1988 have been implemented. This has been extremely frustrating for museums and galleries, whose educational and cultural activities are precisely analogous to those of libraries, archives and educational establishments, which do benefit (albeit subject to some significant limitations) from existing exceptions.

The thrust of much recent thinking about the exceptions and limitations has (consistently with other changes that have advanced rights holder interests, such as the extension in the term of protection, and the prohibition on circumvention of technical protection measures, even to allow for statutory exceptions) been defensive, that is to say, concerned with ensuring proper protection in the digital environment, or assisting intellectual property-based businesses recoup their investment. These are sensible goals, but if the agenda is focused on them to the exclusion of other social and cultural objectives, then there is a risk that the balance rightly inherent in the copyright system will be lost.

Finally, the exceptions and limitations are, currently, a closed list. This seems unnecessarily rigid at a time of phenomenal change in the ways in which works are created, used and exploited. It would be sensible to allow for some degree of 'future-proofing' of the Directive, to allow for exceptions or limitations covering unforeseen uses that do not fit into any of the existing exceptions, but which can be defined and which do satisfy the three-step test. These, perhaps, could be permitted to develop at Member State level, so that their advantages and disadvantages could be tested before adoption across the EU.

(1) Should there be encouragement or guidelines for contractual arrangements between right holders and users for the implementation of copyright exceptions?

No.

This question seems predicated on an odd presumption, namely that contractual arrangements are somehow necessary for the implementation of the exceptions. This is not, and should not be, a legal requirement, and the exceptions and limitations should apply without being conditional on agreement with rights holders, and should not be capable of being excluded by contract.[8] It is surely wrong, as a matter of public policy, that exceptions which have been considered appropriate by the legislature, should be subject to the unilateral veto of rights holders. This would severely undermine the balance enshrined in the copyright system.

This may, of course, require the exceptions to be drawn with greater certainty (a point separately made below).

The Directive should be amended by the addition of a provision similar to those contained in the Database Directive (art 15) and the Computer Programs Directive (art 9(1)), which declare null and void any contractual clause which seeks to limit or exclude certain exceptions specified elsewhere in those directives. The laws of some Member States (but not many) already contain such a provision.[9]

(2) Should there be encouragement, guidelines or model licences for contractual arrangements between right holders and users on other aspects not covered by copyright exceptions?

Yes – subject to the critical proviso that these relate to uses not covered by the exceptions.

It has been found in other sectors (and in relation to other forms of intellectual property) that model agreements can facilitate transactions. One of the recommendations made by Richard Lambert in his report to the Chancellor on the interaction between universities and business was that transaction costs were unnecessarily high on account of a lack of common approaches to the handling of intellectual property in research results. Model agreements were his proposed solution, and the 'Lambert

8 The evidence suggests that contractual exclusion of statutory limitations and exceptions is unfortunately fairly widespread: see the British Library's survey of 100 contracts at www.bl.uk/ip/pdf/ipmatrix.pdf , which found that 93% over-rode the exceptions provided by copyright law.

9 Such as Ireland: see Section 2(10), Copyright Act 2000: "*Where an act which would otherwise infringe any of the rights conferred by this Act is permitted under this Act it is irrelevant whether or not there exists any term or condition in an agreement which purports to prohibit or restrict that act*".

agreements' have become an accepted part of the landscape, and indeed have recently undergone recent revision and updating.[10]

However, there are few (if any) model agreements of this type in the cultural sector, ie model agreements negotiated by properly authorised representatives of each side, relevant to the activities of museums and galleries.

Where there are large numbers of low value transactions that can be easily classified, then it can make good sense to manage these through a collective licensing solution.

However, for such a solution to be fair and to work in the interests of users as well as rights holders requires certain conditions to apply:

- the relevant collecting society should operate in an efficient and transparent manner, and should not abuse the monopoly position inherent in a situation where there is usually only one collecting society managing certain categories of rights;

- the terms of any licensing scheme should be negotiated with properly mandated representatives of the relevant class of users;

- any the terms of any licensing scheme should not contractually purport to exclude the operation of the exceptions;

- legislation must not cancel the application of relevant exceptions where a licensing scheme exists: if an exception satisfies the three-step test it should be absolute, and any uses falling outside the exception should require a licence.

If these conditions are satisfied, then the details of licensing schemes can generally be left to the market. Market failure is more likely to occur where there is an inability to access licences on reasonable terms and the mechanisms for resolving this need periodic review.

However, it should also be noted that, in the museum sector, there is a huge variety of institutions, the vast majority of which are small and under-resourced. These institutions may not find it easy to resource even modestly-costed licensing schemes, and in the absence of public subsidy this may make the economic basis of a licensing scheme harder to justify, especially if the licensed uses, though not falling under any of the exceptions, are non-commercial or non-revenue generative in nature.

It should also be noted that there are many works for which no collecting society currently exists – and indeed it is unlikely that a collecting society would ever exist, because of the economics of managing such works (see the answer to question 7 below).

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10 See: - http://www.innovation.gov.uk/lambertagreements/

(3) Is an approach based on a list of non-mandatory exceptions adequate in the light of evolving Internet technologies and the prevalent economic and social expectations?

Definitely not. It will be argued by publishers that the variety of cultural, social and economic factors in different Member States argues for the maintenance of variety in the sphere of exceptions and limitations. This however strikes at the very heart of the principle of harmonisation, and it seems inherently unfair that the rights of rights holders should be harmonised, while the exceptions and limitations for users remain an unharmonised patchwork: indeed it is implicitly patronizing of users, in that it suggests that some users deserve more generous treatment in some countries than others. This seems to fly in the face of the aspiration to achieve free movement of knowledge and innovation.

In addition, it is unhelpful to publishers and other users of material to be faced with a palimpsest of different regimes – this adds to transaction costs and creates legal uncertainty. A publisher wishing to invest in the costs of developing a new on-line product with potential appeal to users in a number of Member States, and who wishes to allow for the exceptions and limitations in any technical protocol permitting access to the product currently has to research a very varied legal terrain. Yet such a publisher is one that the Commission doubtless wishes to encourage. Although the use of technical protocols are not yet widespread (and the main one, Robots.txt, has no ability to discriminate between uses, allowing only a simple 'yes'/'no' approach to access), initiatives such as ACAP[11] suggest that it may only be a matter of time before publishers can build the exceptions and limitations into automated access to on-line material.

The evolution of web-based technologies, though it is producing variety from experimentation, is also leading to a broader set of similar expectations across cultures as to what material should or should not be accessible. Museums – as publishers themselves – understand the fears of publishers that the medium facilitates unauthorised uses, but all the more reason for developing a new, harmonised regime for exceptions and limitations that facilitates a common market of 'limited' uses. The threat to publishers of such a regime is greatly exaggerated. All exceptions and limitations have to be construed within the three step test.

(4) Should certain categories of exceptions be made mandatory to ensure more legal certainty and better protection of beneficiaries of exceptions?

No: ideally all the exceptions should be mandatory. For all the reasons set out in the answer to question 3, it is felt that the objectives of harmonisation, legal certainty and reduced transaction costs would be immensely advanced by a unified, harmonised and mandatory code.

11 See http://www.the-acap.org/.

However, it would be better to have at least some basic mandatory exceptions than none at all.

(5) If so, which ones?

In the context of the Green Paper, that is to say in view of its focus on the dissemination of knowledge for research, science and education, and from the perspective of museums, the following exceptions should be mandatory:

Art 5(2)(a)	reprographic copying
Art 5(2)(b)	private use
Art 5(2)(c)	reproduction by publicly accessible establishments
Art 5(2)(d)	archival preservation of broadcasts
Art 5(3)(a)	use for teaching or scientific research
Art 5(3)(b)	use for the benefit of the disabled
Art 5(3)(d)	criticism and review
Art 5(3)(j)	advertising of the exhibition or sale of artistic works
Art 5(3)(n)	making available electronic works on the premises of publicly accessible establishments.

Exceptions for Libraries and Archives (questions 6 to 12)

For many museums and galleries, in the UK at least, some of the questions posed in the section are academic until the relevant exceptions and limitations are implemented in UK law. As noted above, their role in society is very similar to that of libraries and archives (although there are some important differences). The references in this section of the Green Paper to museums and galleries are welcomed, because they acknowledge what museums and galleries have been arguing for some time.

However, some museums and galleries contain libraries within them and museums would therefore support the responses that have been made to these questions on behalf of libraries and archives.

(6) Should the exception for libraries and archives remain unchanged because publishers themselves will develop online access to their catalogues?

This is presumably a reference to Article 5(2)(c), which also, of course, refers to museums. It is difficult to see how the activities of *publishers* in developing online access to their catalogues (we understand that 'catalogues' is intended, here, to mean the works they have published

rather than lists of them, but the word is ambiguous) will have a bearing on museums although, of course, it may have an important impact on libraries.

However:

(i) There is no evidence of publishers in the cultural sector developing significant online access to their back catalogues.

(ii) Many of the holdings of museums that remain protected by copyright have never been published or, if they have, they are no longer accessible from publishers. A good example of this is the huge quantity, numbering millions, of photographs in public collections across Europe. Even where works have been made available through reproductions in commercially available publications, some of those publications are out of print. A related point is that many of these works are of doubtful commercial value. Museums are not besieged by legions of commercial publishers with imaginative proposals for commercially available publications reproducing all items in museum collections, no doubt because only a small proportion of such items are perceived as having commercial value.

(iii) Even more fundamentally, the existing exceptions in UK law that correspond to Art 5(2)(c) not only do not permit the reproduction of works by museum and galleries, but they do not apply to artistic works, the category of work of most interest to members of the public, researchers, academics, teachers and students in the collections of museums and galleries.

(iv) More generally, Art 5(2)(c) is only an exception to the Art 2 reproduction right, and not to the Art 3 communication to the public right. However, there is no doubt that members of the public, as well as researchers, academics, teachers and students, and indeed politicians, have come to expect a significant amount of material to be made available by public institutions online. In 2004 /05 it is estimated that there were six times as many virtual visits to museums as visits by individuals to the physical premises, and this ratio is only increasing.[12] As these trends increase it can only make sense for the exception to be technology-neutral, and for to permit libraries, archives and museums to make copyright material available on-line.

Of course, if the recommendations made in this submission to the effect that exceptions should be mandatory and more certain in scope are followed, then consideration needs to be given to the three-step test, and how an extension of Art 5(2)(c) to the acts of communication to the public should be defined so as to avoid unreasonable prejudice to the legitimate interests of rights holders. This could, for example, look at the exclusion of works (if any) currently available commercially; or imposing a time limit on

12 Department for Culture, Media and Sport 'Taking Part Survey': http://www.culture.gov.uk/global/research/taking_part_survey/

the unauthorised publication by these means of unpublished works, perhaps of 50 years from creation.

(7) In order to increase access to works, should publicly accessible libraries, educational establishments, museums and archives enter into licensing schemes with the publishers? Are there examples of successful licensing schemes for online access to library collections?

There have been licensing schemes allowing limited online access, developed for the higher education sector.[13] However, these are restricted to downloading of materials placed on a secure network (and not from the Internet at large), and apply only to published literary works.[14] However, there would seem to be no objection in principle to publicly accessible libraries, educational establishments, museums and archives entering into licensing schemes with the publishers. Indeed, this could allow much greater quantities of material to be made available online.

However, it may be worth examining in more detail why such licensing schemes have not yet appeared. Possible reasons are:

- the fact that publishers are not, in fact, empowered to grant licences of relevant works – the appropriate licensors of much material relevant to museums and galleries are either the individual rights holders, or collecting societies representing them (eg artists), not publishers (who are merely intermediaries);

- a related point: the absence of any collecting societies representing the rights holders of many categories of works held in the collections of museums and archives, such as unpublished literary works, oral history recordings, orphan works etc;[15]

- the caution of rights holders in permitting their works to be made available in an uncontrolled environment, and the lack of precedents to suggest that such schemes would be economically viable;

- the fact that many rights holders (especially primary rights holders such as artists and their descendants, rather than secondary rights holders such as publishers) are in fact happy to provide licences to such institutions at no charge, which reflects an understanding of their public, essentially non-commercial remit;

- the reluctance of publicly accessible institutions to prejudice their ability to rely on the exceptions;

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13 The CLA 'Comprehensive HE Licence' - http://www.cla.co.uk/UUKguildhe_members.php

14 Including artistic works in published editions.

15 The introduction of an exception for orphan works would facilitate their inclusion in schemes offered by collecting societies, because these would be more prepared to offer the indemnity against claims that is one of the chief benefits of such schemes.

- last but by no means least, the risk that such schemes – partly for some of the above reasons – may not be economic to administer. There is a chicken and egg issue here. Until such a scheme is launched it is not possible to test this proposition, but unless the activities licensed by a scheme are themselves generating a revenue stream that can support the fees payable to the collecting society, publicly funded institutions with limited resources are inevitably going to be reluctant to pay for something unless it is essential, and collecting societies will be reluctant to offer schemes unless there is a market for them.

In the UK, museums and galleries have been in discussions with the Design and Artists Copyright Society (DACS) about a licensing scheme to permit the institutions to make digital copies of artistic works available online (as well within the institutions in a number of ways). DACS represents artists, not publishers, but the objective of such a scheme would be wider dissemination of artistic works, under licence.

As indicated elsewhere, however, it is essential that consistent, harmonised and mandatory exceptions are provided in the legislation, combined with a provision prohibiting the over-riding of the exceptions by contract. This will provide the necessary legal certainty to enable licensing schemes to be developed that add real value to both the grantors and recipients of rights under such schemes.

(8) Should the scope of the exception for publicly accessible libraries, educational establishments, museums and archives be clarified with respect to:

(a) Format shifting;

(b) The number of copies that can be made under the exception;

(c) The scanning of entire collections held by libraries?

At the very least, some guidance on the "specific acts" referred to in Art 5(2)(c) would seem desirable, otherwise there is a risk of national practices diverging, which would operate against the objective of harmonisation. Assuming Art 5(2)(c) is not amended, it potentially allows for a wide range of acts, and is therefore of uncertain application. However, it is impossible to legislate for every circumstance, and it would seem that, in this case, guidance might be the most appropriate way of reducing uncertainty and scope for dispute.

Among the useful examples of "specific acts" that could be listed in any guidance, format shifting is certainly one that would be of assistance to publicly accessible establishments with a responsibility for preserving the items in their collection. Multiple copies should be permitted, but only to the extent necessary for the purposes of preservation or public exhibition.

Permitting the scanning of entire collections may not be strictly necessary – scanning of individual works should be permissible for preservation purposes, and if in a given collection the entirety is at risk of loss unless scanned then the exception should still stand. This could well be the case with materials that are hard or costly to conserve, and which degrade rapidly (such as newsprint). However, given that the proportion of material held in publicly accessible collections that has been scanned currently remains very small, it would be desirable to have incentives to enable more material to be scanned, whether for preservation purposes or as a precursor to making the material available for use by students, researchers or members of the public. Scanning is costly enough as it is without adding the burden of copyright fees in relation to copies that, until used for other purposes, have no independent commercial value.

(9) Should the law be clarified with respect to whether the scanning of works held in libraries for the purpose of making their content searchable on the Internet goes beyond the scope of current exceptions to copyright?

Currently this is already outside Art 5(2)(c). As indicated above, Art 5(2)(c) should be moved to Art 5(3), subject to the addition of suitable safeguards to protect the interests of rights holders.

Art 5(3)(n) would in theory permit scanned works to be accessible online, but only via dedicated terminals on the premises of publicly accessible establishments, which would presumably require a closed network only accessible to authenticated users when on such premises. However Art 5(3)(n) is also circumscribed already by virtue of the requirement that the works in question be free of purchase or licensing terms.

More generally, merely scanning a work for the purpose of enabling it to be *searched* on the Internet seems desirable and does not seem to unreasonably prejudice the legitimate interests of the rights holders. Indeed, arguably it is in the interests of the rights holder for others to know where a copy of his work may be found. Subsequent uses such as downloading, communication of the work in whole or substantial part etc would, of course, still require a licence.

(10) Is a further Community statutory instrument required to deal with the problem of orphan works, which goes beyond the Commission Recommendation 2006/585/EC of 24 August 2006?

Yes.

There needs to be a specific defence to permit reproduction or communication to the public of orphan works otherwise those who copy orphan works, whether publishers or public institutions, and those who authorise them, are vulnerable to infringement claims. A specific exception has been recommended by the Gowers Report in the UK and the difficulties

created by the lack of a solution have been recognised by the i2010 Digital Libraries High-Level Expert Group.

The reason that there has been no solution adopted at national level is because the exhaustive list of exceptions in the Directive precludes it, and no doubt also because collecting societies have found it difficult to evaluate the risk of offering a scheme covering orphan works (even assuming that they can find a way of 'representing' rights holders who cannot be traced). While in principle the cost of infringement claims might be capable of being allocated contractually in a licence agreement or licensing scheme, the cost still has to be borne, increasing the cost of the licence or scheme. The fact that collecting societies have (so far, at least) been reluctant to offer schemes covering orphan works indicates that the sorts of mechanisms envisaged in Commission Recommendation 2006/585/EC have not emerged and a legislative solution is needed.

At least so far as the UK is concerned, the requirement for a licence from the right holder (to avoid any subsequent infringement claim)[16] means that an amendment to legislation is required.

The form of defence could, however, vary depending on whether a licensing scheme is available, and indeed could encourage the launch and take up of such schemes.

(11) If so, should this be done by amending the 2001 Directive on Copyright in the information society or through a stand-alone instrument?

In view of the need for other amendments to the Directive, such an amendment *should* form part of a revised and updated version of the Directive, and this submission supports the recommendation to that effect in the Gowers Review.

(12) How should the cross-border aspects of the orphan works issue be tackled to ensure EU-wide recognition of the solutions adopted in different Member States?

By amending the Directive to include a common, harmonised approach to the issue. The equal treatment principles of EU law would then ensure mutual recognition. Indeed, there is no reason to offer reciprocal treatment to non-EU Member States that offer a similar approach.

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16 "*Copyright in a work is infringed by a person who without the licence of the copyright owner does, or authorises another to do, any of the acts restricted by the copyright*": Section 16(2) Copyright, Designs and Patents Act 1988 (as amended).

The exceptions for the benefit of people with a disability

(13) Should people with a disability enter into licensing schemes with the publishers in order to increase their access to works? If so, what types of licensing would be most suitable? Are there already licensing schemes in place to increase access to works for the disabled people?

There can be no objection to licensing schemes in themselves if they facilitate access to works, but licensing schemes should not be viewed as a substitute for appropriate exceptions, and in that context (and consistently with what is said above) Article 5(3)(b) of the Directive should be made mandatory.[17]

(14) Should there be mandatory provisions that works are made available to people with a disability in a particular format?

Definitely not. This would be unnecessarily inflexible: technological change and the needs of the disabled should determine what format is suitable.

(15) Should there be a clarification that the current exception benefiting people with a disability applies to disabilities other than visual and hearing disabilities?

Yes.

There seems to be no reason to discriminate in favour of visual and hearing disabilities. There is a wider spectrum of disability which affects communication and understanding, and under UK legislation[18] museums and galleries must not only avoid discrimination but, as public authorities, are under a legal duty to promote equality of treatment between persons of differing levels of ability or disability and, in exercising their functions, are required to consider the need to eliminate unlawful discrimination and to promote equality of opportunity between disabled and able bodied persons. These obligations are not limited to specific types of disability, and embrace other disabilities that would affect a person's access to copyright material, such as dyslexia.

(16) If so, which other disabilities should be included as relevant for online dissemination of knowledge?

Museums and galleries would wish to decline from discriminating between different disabilities.

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17 LISU at Loughborough University estimates that fewer than 5% of books currently published are available in a format readily accessible by the visually impaired.

18 Disability Discrimination Act

(17) Should national laws clarify that beneficiaries of the exception for people with a disability should not be required to pay remuneration for using a work in order to convert it into an accessible format?

Yes. Disabled people should not be required to pay remuneration to rights holders to convert works themselves into accessible formats. The cost of acquiring works in different formats is already borne by people with disability and the exception should not be conditional on payment of an additional fee.

(18) Should Directive 96/9/EC on the legal protection of databases have a specific exception in favour of people with a disability that would apply to both original and sui generis databases?

Yes.

Dissemination of works for teaching and research purposes

(19) Should the scientific and research community enter into licensing schemes with publishers in order to increase access to works for teaching or research purposes? Are there examples of successful licensing schemes enabling online use of works for teaching or research purposes?

Not if this is a condition for relying on the exception in Article 5(3)(a) which, as stated above, should be a mandatory exception.

However, to the extent that access to works needs to go beyond the use permitted under Article 5(3)(a), then licensing schemes that satisfy the conditions set out in the answer to question 2 above are a sensible solution. There are, as noted above, a range of examples of licensing schemes offered in the UK that relate to educational use.[19] The Copyright Licensing Agency (CLA) has, in particular, recently launched an updated 'comprehensive' licence for higher education institutions, effective as of 1 August 2008.[20] This permits scanning and the making available of digital copies for a range of uses including teaching and research.

However, such schemes currently only apply to specific types of establishment in the educational sector, and not to related institutions such as libraries, museums or galleries that conduct many activities of an educational and / or research nature. It would, at least in theory, seem desirable to see the emergence of schemes that would permit greater access to works for the purposes of teaching and research within such institutions. However, this would have to be subject to the provisos mentioned in the answers to questions 2 and 7 above, and must not be at the expense of the statutory exceptions.

It should also be noted that related institutions such as libraries, museums or galleries are extremely varied in terms of their size, resources and needs, and it may be harder to establish an economically viable scheme similar to those offered to the (relatively) more homogeneous higher education sector.

(20) Should the teaching and research exception be clarified so as to accommodate modern forms of distance learning?

Yes.

For many students distance learning is a key feature of their studies. Art 5(3)(a) is an exception to the communication to the public right, but a harmonised, mandatory exception, subject to appropriate limits (implementing the three step test) which was technology neutral would be highly desirable. The Gowers Review recommended that exceptions should

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19 See http://www.cla.co.uk/Education_licences.php.

20 See: http://www.cla.co.uk/assets/357/he_uuk_comprehensive_licence.pdf.

be ‘be defined by category of use and activity, not by media or location’, and this submission fully supports that approach.

(21) Should there be a clarification that the teaching and research exception covers not only material used in classrooms or educational facilities, but also use of works at home for study?

Yes.

Modern technology permits greater mobility and flexibility in terms of where people work, study and carry on their day to day business. Many activities that were once limited in space can now be conducted in widely dispersed locations. The Gowers principle mentioned above is equally, if not more relevant here.

In addition, it is clear that teaching and research is conducted not only in classrooms and (formal) educational facilities, or even at home, but also at institutions such as museums and galleries. For example, the Natural History Museum in London employs many scientists who between them publish over 500 research papers a year. Many museums now provide an environment in which schoolchildren are taught albeit outside a ‘classroom’ environment. It is not clear why these activities should be treated any differently from the identical activities undertaken in universities or schools. It should be clear that “educational facilities” should be widely defined so as to cover any places where teaching or research is conducted.

(22) Should there be mandatory minimum rules as to the length of the excerpts from works which can be reproduced or made available for teaching and research purposes?

No.

Such mandatory rules would be too rigid, and would fail to reflect that the value of an excerpt is not simply a quantitative matter, but qualitative, as recognised by English case law on the concept of ‘substantiality’. Under English (and Irish) law, where part of a work is copied, there is no infringement unless that part is ‘substantial’. This is judged by reference to the amount of skill, judgement and labour used in creating the original work.

In addition, even where an extract is potentially infringing, whether it benefits from a defence is subject to a further judgement, namely whether the size of the excerpt of quotation is legitimate for the purpose of the defence. This is enshrined in the English law concept of ‘fair dealing’ (cf ‘fair practice’ in Art 5(3)(d)). Again, this judgement is one requiring a degree of sensitivity to the different circumstances of each situation, and can only be case-specific.

(23) Should there be a mandatory minimum requirement that the exception covers both teaching and research?

Yes.

Teaching and research are both essential to the health of societies and to the generation and dissemination of knowledge. Indeed, the two are indissolubly linked and in many institutions closely related.

(24) Should there be more precise rules regarding what acts end users can or cannot do when making use of materials protected by copyright?

There always needs to be a balance in law between sufficient precision, which aids certainty, and flexibility, which allows for judgment to be applied to individual cases (and justice to be achieved). Excessively detailed or prescriptive rules on what can or cannot be done are, in any case, impossible because they are likely to be left behind by technological, cultural and social changes. However, it does seem desirable for the exceptions in the Directive to be given a greater degree of precision, as signaled in the comments made above.

(25) Should an exception for user-created content be introduced into the Directive?

This is a controversial area, where changing social and cultural perceptions may change the context of what is regarded as 'fair'. However, this submission takes the view that, currently, either there is scope for arguing that the existing regime of exceptions and limitations apply (eg use for teaching, or parody), or the context in which user-generated content is created can be accommodated within a framework of reciprocal permissions, whether express or implied. It is difficult to discern the more general principle of social utility that would justify copying simply because the work copied was being incorporated into another work. This is generally regarded in other contexts as plagiarism or pastiche and there seems no reason to view it differently simply because it is called 'user-generated content'.

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