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## **TAKING FORWARD THE GOWERS REVIEW OF INTELLECTUAL PROPERTY**

The **Museums Copyright Group** thanks UK IPO for the invitation to participate in this consultation, and is greatly encouraged to see that certain specific circumstances of museums and galleries have been explicitly recognised in the current proposals.

The **Museums Copyright Group** is the only organisation whose sole mandate is to co-ordinate, mediate and lobby for the strategic interests of museums and galleries in this area. It is a membership organisation of professionals involved in the management of copyright and related rights, and working in the cultural heritage sector.

There is a great need for a number of small changes in the UK copyright legislation to facilitate improvements in museums' and galleries' delivery of their core activities of collection, conservation, preservation, research, public display, education, access and publishing. Museums and Galleries spend time and resources assessing and managing the risk of copyright infringement. If there were more legal certainty in certain operations like preservation, research and education, these public service institutions would be able to operate more efficiently and effectively. Whereas none of these proposed legislative changes would damage the economic interests of right holders, some of the changes would positively support such important interests.

## **Extension to educational exceptions to include distance learning**

### **Recommendation 2**

As rights-holders in an extensive repertoire of authoritative works, which are highly valuable to learning activity, indeed essential to certain studies, museums and galleries are in favour of extending educational exceptions to include distance learning.

However, museums and galleries are also educational establishments, having responded positively and pro-actively to successive government initiatives to extend their own activities in learning and access, yet they are not able to benefit from the educational exceptions in the CDPA because they are not included in the scope of 'educational establishment' as defined in the Act.

Setting aside those museums and galleries, such as the Ashmolean, the Courtauld and the Fitzwilliam, which are actually part of universities, the statute for the Tate, National Gallery, Wallace Collection and National Portrait Gallery includes an educational remit<sup>1</sup>, staff at the Natural History Museum teach on MSc courses as part of their duties, and a vast range of different institutions in the sector (with or without a statutory remit to do so) deliver engaging and effective educational activities through highly-skilled learning and access departments. Many of these activities are designed specifically to match to and enrich classroom work in the national curriculum, and are delivered to visiting parties of children but also to children who are geographically too far away to visit, through videoconferencing and whiteboard work, and sometimes through published materials, such as the National Maritime Museum's recent and very authoritative online resource and education pack 'Understanding Slavery'.

Given this very serious work across a wide range of educational activity, within the public service, it is anomalous that museums and galleries should be excluded from educational exceptions and that children visiting museums, either physically or virtually, for organised learning activity, cannot perform the same acts of copying as they are permitted to do in a school environment<sup>2</sup>. This clearly indicates tension between the intention and the delivery of government policy within the legislation.

Museums and galleries should be included for these purposes under this exception. The **Museums Copyright Group** requests that UK IPO consider the following two options:

- Add a definition of museums and galleries to the exception;
- Add museums and galleries under a wider definition of non-profit making establishments, according to the criteria in Art. 5(2)(c) of Directive 2001/29/EC ('the Information Society Directive').

The scope of museums and galleries organised educational activities (services to learners) aims to include the whole of their collections. However, in a virtual or

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<sup>1</sup> Museums and Galleries Act 1992 (c. 44) section 2 (5)

<sup>2</sup> *Whilst the principle of providing children with digital media 'free at the point of use' is an important one in a public service approach, it must be noted that this creates a future challenge for the digital economy. Given that generations of children are being educated in the use of digital media in this public service environment, some thought must be given to what happens at the end of their studies, when they leave this environment and find themselves migrated to a new one in which they are suddenly expected to pay for media.*

distance-learning environment, due to the acts of copying which this involves, copyright currently restricts their ability to offer a truly interactive learning experience in respect of the whole collections, and to respond to the curiosity, which has been stimulated in this environment. Yet all of this activity passes the 'three-step' test. The exception should therefore be expanded to include all types of work in all media.

### **Extending the Exception for Copying for Research and Private Study Recommendation 9**

If an expanded exception were to require a formal link to a course of study or a research establishment, this would create a restriction on the scope of current fair dealing provisions at odds with recent government initiatives concerning lifelong learning, and would be to the detriment of the valuable independent research work carried out by enthusiastic but often extremely well-informed amateurs, outside of formal contexts.

The current fair dealing provisions are generally well-understood, and it would be in end-users' as well as rights-holders' best interests to expand access to research and learning materials through extensions to the educational exceptions, as above, and the library privilege exceptions, as below, rather than through redefining the fair dealing provisions.

### **Amendment of library privilege exceptions to extend permitted acts for the purposes of preservation. Recommendations 10a and 10b**

It is anomalous that museums and galleries are currently excluded from the scope of the exception 'for the purpose of preservation and replacement', and the terms of the exception should therefore be extended to include them. Where works in their collections are in an unstable condition, are still subject to copyright protection and the relevant copyright-holders are unknown or untraceable, as is the case, for example, with many hundreds of thousands of photographic negatives and films in their collections, museums and galleries are in the invidious position of being required to break the law and commit infringing acts in order to fulfil their duty of care to the collections in pursuit of the public service. Since museums and galleries have been forced into this invidious position, it is essential that the extended scope of this exception be made retrospective, to address the history of this anomaly.

It is difficult to see how rights-holders' interests are served by continuing to withhold the benefit of this exception from museums and galleries, since the net effect by default is to allow their works to deteriorate<sup>3</sup>, thus destroying not only the works but also the economic asset value of the IPR, derivable from commercial copying and other exploitation, which the legislation is intended to protect. The inclusion of museums and galleries in the exception would recognise the essential connection between preserving copyright works and preserving the value of the copyright on behalf of rights-holders<sup>4</sup>.

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<sup>3</sup> See examples and evidence in Appendix II

<sup>4</sup> In a very small number of cases, the moral rights of the creator become a significant factor in preservation, for example where the creator considers the ephemeral nature of the work to be of its essence, and it is important to mention this here. However, it is important also to note that museums and galleries are sensitive and diligent in respect of moral rights in such

The copying allowed under the exception should include 'format shifting', as the same issues apply in respect of the preservation of all classes of works in all media and the scope of the exception should therefore be extended to apply in these respects, universally.

The realities of best practice in preservation and digital sustainability mean that a restriction on the number of copies made under this exception would unnecessarily impose difficulties in respect of, for example, secure systematic backup procedures. So long as the intention of the activity remains the same, and so long as the number of copies made available to the public remain the same, the number of copies made by prescribed bodies, in accordance with best practice in preservation and digital sustainability, is immaterial to the interests of the rights-holder but material to the effectiveness of the exception. What is material to the interests of the rights-holders is the number of copies available to the public. The exception should therefore be amended to allow the production of as many copies as are required for the purposes of preservation and replacement as long as this does not extend the number of copies available to the public.

The *intention* of the activity, i.e. '...for the purpose of preservation and replacement', is and must remain the primary and defining feature of this exception. In order to ensure its effectiveness, the exception should be amended:

- To include museums and galleries as prescribed bodies<sup>5</sup>;
- To include all classes of works;
- To include all media (i.e. to be media neutral);
- To include 'format shifting';
- To allow the production of as many copies as are required *for the purposes of preservation and replacement* as long as this does not extend the number of copies available to the public; and
- To make all elements of this extended scope retrospective.

### **Caricature, Parody or Pastiche Exception**

#### **Recommendation 12**

Museums and galleries have specific concerns in respect of parody, which is a well-established artistic practice whose contemporary forms include 'homages' and various types of collage in all media. Institutions operating under a remit to collect, display, conserve and provide public access to work which reflects contemporary practice are faced with complex challenges. Whereas, for example, it is possible to produce collages in physical media without infringing copyright, the use of digital media to produce collage work whose eventual existence will be in either a physical or a 'virtual' environment, acts of copying are involved. Similarly, the digitisation of works of parody presents significant challenges, where such work involves underlying copyright owned by potentially many rights-holders, known or unknown. The clearance of such underlying rights is in many cases a practical impossibility, and museums and galleries are left with the difficult choice of either declining to collect

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*cases and, in terms of quantity, as a portion of the copyright works in the nations collections, the number of works to which this consideration applies is negligible.*

<sup>5</sup> *A suggested definition of museums and galleries for this purpose is included in Appendix I.*

such items or providing for liabilities, which they lack the resources either to assess or to manage<sup>6</sup>.

Although a widely drawn 'parody' exception may pose difficulties and be open to abuse, particularly given the UK's rather weak legislation on moral rights, museums and galleries are trusted stewards of cultural heritage, operating in the public interest, and there are compelling reasons therefore to render such an exception specifically in respect of these institutions because:

- It would render clarity where there is currently a confusion of duties (between the public service mission and the duty of diligence in respect of liabilities to rights-holders);
- It would be inconsequential to the economic interests of the owners of 'underlying' rights;
- It would be positively consequential to the public purse, ensuring that resources are not unnecessarily diverted from core public service activities into marginal activities (but substantial costs) of risk-management.

Museums and galleries therefore request that UK IPO take this opportunity to draft an exception, which recognises the special status of these institutions as trusted stewards of cultural heritage and, in respect of their activities with works of parody in all media, removes the risk of 'secondary' infringement concerning underlying copyright.

## **General**

### **Performers Rights**

Performers rights need to be brought in line with the proposed amendments to the copyright exceptions, if the amendments are to achieve their intended objectives. It is possible that these objectives could otherwise be compromised, for example, in respect of the digitisation for preservation purposes of a film potentially containing hundreds of performances. In such a case, the amended copyright exception would not be sufficient on its own to allow copying of the film, since performers rights would need to be negotiated, in addition.

### **Technological Protection Measures**

The Museums Copyright Group is concerned about the effect of Technological Protection Measures, in preventing the exercise of rights under the 'permitted acts', and in preventing the entry of works into the public domain, on expiry of the term of copyright. However, it is critical that any change to the legislation in respect of these issues must recognise the essential distinctions to be made between Technological Protection Measures ('TPM's'), i.e. technological measures that are designed to restrict access to particular digital assets to the terms of a specific contract, and other Digital Rights Management ('DRM') technologies and practices.

During the Gowers consultations, much reference has been made to the social contract underlying the awarding of monopoly in the copyright legislation. TPMs have evolved out of necessity, to address the breakdown of certain aspects of this social contract in the evolving culture around the use and re-use of IPR assets. Although TPMs are legitimate measures, there are real concerns that they, in turn, undermine

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<sup>6</sup> See examples and evidence in Appendix II

the principles of copyright by exerting too much control, on behalf of the rights-holder, and subvert the principles of fair use and the public domain. In addition, there are further concerns, particularly among museums and galleries, archives and libraries, about the impact of TPMs on digital sustainability and preservation issues.

There is therefore need for legislative control over the extent of TPMs. This legislative control should be:

- For the purpose of protecting the exercise of rights under the 'permitted acts';
- For the purpose of providing for the entry of works into the public domain, matching the provision for the expiry of the term of copyright; and
- In order to provide for digital sustainability and preservation.

The legislation must recognise the special position of museums and galleries as well as libraries and archives, as trusted repositories of content.

In addition, the **Museums Copyright Group** endorses the British Library's proposal to become trusted 'keyholders' for the broadest range of TPM technologies, as a form of legal deposit, with the licence to 'unlock' content for a range of specified public service and 'fair use' purposes.

There is, simultaneously, need to develop the legislation specifically to address other DRM technologies and practices. The proper crediting of creative work is an important moral right for creators, enshrined in current legislation, but rarely enforced. For diligent end-users and publishers, establishing the provenance of rights is increasingly important but also increasingly difficult. The attachment of rights metadata and the full crediting of creative work are very easy in the digital domain, and are absolutely essential strategic elements in preventing the proliferation of the problem of 'orphan works'. Good DRM methodologies and infrastructures are therefore essential to the health of the digital creative economy. Detailed consideration of this specific issue and amendment to the legislation is urgently required, to address it, as part of a comprehensive strategy for orphan works.

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## Appendix I

### Suggested definition of 'museum'<sup>7</sup>

"Public Museum" means:

1. Any of the national museums in England, Wales, Scotland and Northern Ireland;
2. The Historic Buildings and Monuments Commission for England, Cadw: Welsh Historic Monuments Executive Agency and Historic Scotland;
3. Any museum or gallery of a school within the meaning of section 174 of the Copyright, Design and Patents Act 1988 and any museum or gallery of a description of educational establishment specified under that section in the Copyright (educational Establishments) (No.2) Order 1989;
4. Any museum or gallery administered as part of a government department, including a Northern Ireland department, or any museum or gallery conducted for or administered by an agency which is administered by a Minister of the Crown;
5. Any museum or gallery administered by:
  - a. in England and Wales, a local authority within the meaning of the Local Government Act 1972, the Common Council of the City of London or the Council of the Isles of Scilly;
  - b. in Scotland, a local authority within the meaning of the Local Government (Scotland) Act 1973;
  - c. in northern Ireland, a district council established under the Local Government Act (Northern Ireland) 1972;
6. Any other museum having registered status under the Museums Registration Scheme administered by the Museums Libraries and Archives Council;
7. any other museum or gallery conducted for the purpose of promoting the public's enjoyment, and advancing their knowledge, of any special domain or domains represented by the collection of the museum or gallery, or administered by any establishment or organisation which is conducted wholly or mainly for such a purpose, and which is not conducted solely on a commercial basis.

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<sup>7</sup> Draft definition courtesy of Farrer & Co, 66 Lincoln's Inn Fields, London WC2A 3LH

## **Appendix II**

### **EVIDENCE AND EXAMPLES**

#### **Amendment of library privilege exceptions to extend permitted acts for the purposes of preservation.**

##### **Recommendations 10a and 10b**

- A multi-monitor video portrait of Duncan Goodhew by Marty St James and Anne Wilson in the National Portrait Gallery's collection (NPG 6815). Created in 1990, this early multi-media work comprised 11 'Umatic' video tapes, played simultaneously and shown on 11 monitors.

In 2006-7, an intern Curator, tasked with checking the condition of the tapes, found that they had badly oxidised and therefore urgently needed format-shifting from analogue to digital media in order even to be shown and thence preserved for future generations. At issue were not only the tapes but also the players (which were obsolete).

Before the format shift could be carried out, prior written consent was needed from both artists, who had retained rights (copyright was shared between the two artists and the NPG, so naturally all parties' consent was needed before copies were made). One of the artists proved difficult to trace but was eventually tracked down after considerable expenditure of time and effort by a very determined Curator. Once permission had been given in principle, a formal agreement was drafted in consultation, involving at least two departments and the Chief Curator. Although the outcome was entirely happy (the artists were fully supportive; copyright was assigned fully to NPG; loose ends of informal correspondence were resolved into formal documentation; the work's stability was guaranteed for the time being), the time and effort involved in obtaining this outcome was considerable.

Digital preservation is an urgent issue: the Curator's advice was that digital originals need to be upgraded/format-shifted "at least every ten years" to help safeguard the future existence of such artwork.

- The Royal Air Force Museum have needed to 'format shift' audio visual material in order to make it accessible including 200 78 rpm records (mostly BBC recordings) ; film in obsolete gauges (notably 9.5 mm); and moving and still images on nitrate stock which have to be transferred to safety stock before they spontaneously combust.
- The National Coal Mining Museum for England have a large collection of film and video which they are unable to show or copy, because they have been unable to establish who owns the copyright. Most of the material came from a company which went into receivership and has been taken over by various companies since. The Curator would like to copy the film and video because there are no facilities to care for it adequately and it is deteriorating in the stores. At least if they were able to make a digital copy of the works, the material would be preserved and could be used for research purposes until the copyright holder could be established.



- The National Media Museum have noted that many photographic processes have a limited lifespan, which means they really should be copied before they are lost due to chemical changes in the make-up of the object. There are many examples of this problem in historic photograph collections, two of the most obvious being Polaroid photographs from the 1980s and early colour photographs on celluloid from the 1940s. Ideally as a museum, it would be good to know that they could copy these images to preserve them for future generations without risking a breach of copyright under the current copyright legislation.
- The Royal Pavilion and Museums, Brighton & Hove have a collection of photographic material which was transferred from the library service where it was deposited from a local company when it closed. They are investigating the copyright holder and in the meantime the material is unable to be accessed by the public and is deteriorating rapidly. The process can be decelerated if the material is frozen, but this is an expensive option. It's likely to be several years before the Museum can develop cold storage, but for other, smaller regional museums, this is unlikely to be a practical option. A far more efficient means of preserving the images would be to 'format-shift' them into digital media, but they do not currently have any legal right to do this. The irony is that an archive could have the legal right to copy the material for this purpose, while another heritage institution cannot. Although many museums are actually better equipped to administer photographic collections than archives, the copyright legislation does not provide for this. It is unacceptable that the survival of heritage in the national collections is dependent on this nominal aspect of the status of the institutions in which they are held.

### **Caricature, Parody or Pastiche Exception Recommendation 12**

- Tate have noted that while an organisation will take all reasonable steps to obtain the necessary copyright permissions and will seek protection in the form of indemnities from the artist, it is not possible in every circumstance to be absolutely sure that all secondary copyrights have been dealt with. One work offered as a gift to Tate comprised of a five screen video projection featuring long, slowed down excerpts from commercial American produced films. Despite attempts by the artist to clear the films for use in their work, the rights-holders had failed to respond, and so the artist had not cleared any permissions. This is a recurrent problem for Tate and they are continually assessing the risk of purchasing or acquiring works such as this.
- The question of liability for secondary infringement is real for museums and galleries. Tate, for example, were threatened with legal action after the acquisition and display of a work, which was made from the recording of numerous small puppet show performances. Tate were approached by an organisation representing the performers who objected to their work being filmed and portrayed in the way the artist had elected to do, and also objected to the fact that Tate had exhibited the resulting piece in the gallery with no reference to the performers. Much consideration and correspondence was required over many before the issue was eventually settled without the need for external legal intervention and a suitable credit was agreed.