

Response from the British Library to the Independent
Review of Intellectual Property and Growth.



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1. Summary of legislative recommendations:

We urge the Review Team to recommend the following legislative changes:

1. Work on and implement with immediate effect all Gowers Recommendations relating to research, education, teaching, mass digitisation and heritage. (Orphan works, preservation, distance learning and format neutral fair dealing to include sound, film and broadcast material.)
2. Amend UK copyright law to include a clause stating that contracts and licences should not override exceptions. This clause already exists in Irish, Portuguese and Belgian copyright law.
3. Introduce a limitation and exception for text and data mining to cover all forms of research to encourage medical, environmental and other public interest innovation.
4. Allow streamlined rights clearance mechanisms of all commercially produced works through independently regulated collecting societies for certain specific uses such as mass digitisation / digital library / cultural projects. A separate solution for unpublished works is also required.
5. Expand the defences in UK copyright law to include all exceptions and limitations from across the EU as provided for in Article 5 of the EU Information Society Directive relating to research, education, teaching, mass digitisation and heritage; furthermore, all exceptions should be made media independent
6. Amend clause 296ZE(6) of the CDPA to allow circumvention of Technical Protection Measures where the act is a permitted act. Such a clause already exists in Austrian Copyright law as well as Switzerland and Australia.

Summary of non-legislative recommendations:

1. Actively engage with the European Union on the issues of fair use, collective rights management, mass digitisation and the exhaustive list of limitations and exception in the Information Society Directive.
2. Develop a policy framework for measuring and bench-marking the development of intellectual property laws, and evaluate the requirement for a regulator to advice policy makers on the interplay of intellectual property law, technology and contract law.
3. Establish IPO endorsed guidelines for criticism and review to facilitate reuse of material for research purposes.

2. Environmental and Other Issues

The British Library, the national library of the United Kingdom, very much welcomes the opportunity to comment on the Independent Review of Intellectual Property and Growth.

As probably the largest research library in the European Union, the Library knows well the importance of copyright as a tool to manage and control the flow of copyright goods to create a well-educated society that underpins the UK knowledge economy. The Library has direct and a probably unique experience of the information ecology. It is not only a legal deposit library, purchaser of content¹, and licensee of publishers and collecting societies but also a publisher of databases, CDs and books, clearer of rights, licensor of IPR and exerciser of exceptions in law. We also support the creative industries through the Business and Intellectual Property Centre which is the largest resource of business information in the UK and also runs popular training courses on intellectual property for small businesses.²

Innovation, and what engenders it is a complex interaction of many factors. The British Library recognises the importance, and through its own activities seeks to support creativity and innovation at all points of the value chain. Creators need unhindered access to copyright works supported by efficient and stable markets, and limitations and exceptions in order to innovate. Education is key to supporting an efficient work-force and research / knowledge transfer is the bedrock of much technical and scientific advance. Business must also benefit from security on their return on investment as well as rely on appropriate legal and market infrastructures to promote business growth. Each part of the value chain is equally important.

We believe that the British government in the field of IPR continues to underestimate the economic importance of the technological step-change we have witnessed since the mid-nineties, and that economic success is now more than ever predicated on a more open, flexible and format neutral IPR regime. Many of the most important UK discoveries of the past 20-25 years have come from the university sector in this country and have been developed within, and engendered downstream immense public good by open forms of dissemination. For example, to name but a few: the design of the World Wide Web by academic Tim Berners-Lee, the human genome project carried out by researchers at Cambridge University, and more recently the development of Artemisia, the new Wellcome-funded “wonder drug” for treating malaria, developed by researchers from Oxford University. Of course many of the internet success stories of the past 15 years – Google, Facebook, Flickr, Twitter, Spotify – are also predicated on open business models which is why organisations such as the Computer Communications Industry Association assert the importance of limitations and exceptions for engendering growth within the technology sector.

Of course at the same time the core interests of creators and businesses who take product to market must be protected and balanced with the public interest in order to maximise societal well-being. It is of the uppermost importance that the IP system enables those who wish to make a financial return on their labour and investment, to be rewarded.

¹ In 2009/10 British Library's acquisition budget was £17.7 million.

² <http://www.bl.uk/bipc/devbusiness.html>

That is to say that creators must be rewarded for their work, but that they also need flexible access to knowledge in order to generate the work in the first place and innovate in turn.

We believe that by making a handful of core amendments as outlined in this document to UK copyright law, many of which we see already in other jurisdictions, we can ensure that the legitimate interests of rightsholder and creators are nurtured while facilitating new digital innovation and the growth of the UK economy.

Before answering the specific questions in the review we would like to raise a number of important issues that the review panel should consider in regards to the British Library's response:

2.1 The Importance of the European Union.

Since 2004 and the start of mass digitisation of books by Google in partnership with libraries in Europe and the US, the European Commission and European Parliament have had an active programme around a digital agenda. This agenda aims to establish a legal and procedural framework to facilitate more digital content being made available online for the benefit of the European knowledge economy. The EU has a duality of purpose in its focus on the greater availability of digital goods in that it wants to facilitate online business within the single market, as well as enriching the online experience of European citizens from a cultural perspective. To date this programme has sought to deal with the following issues:

- i) Under the i2010 work programme – orphan works, out of commerce works, and digital preservation.
- ii) The establishment and funding of a European portal “Europeana” for access to European content that is digitised by member states’ museums, archives, galleries, libraries, film institutes etc.
- iii) Under the Creative Content Online work programme – the lack of a single intellectual property rights market within the EU, and establishing the legal underpinning for collecting societies to facilitate a single market.
- iv) A Green Paper “Copyright in the Knowledge Economy” exploring how to encourage education and learning in the digital world.
- v) The Google Book Settlement by convening stakeholder events to gather views on the issue.
- vi) The establishment and highly significant report by the Comité des Sages in 2011 on how to encourage and fund the digitisation of more content from Europe’s cultural sector, and how to build new business.
- vii) An Internal Market DG work programme discussing a solution to facilitate through collective management the digitisation of out of commerce works. (Ongoing.)

We believe that the ongoing Digital Agenda outlined above, and a fit for purpose regulatory framework for facilitating the availability of more content online is of the uppermost importance for the UK government to engage in at a European level. We believe that the UK economy will, compared to those of all other member states, disproportionately benefit from the more efficient working of a single digital market

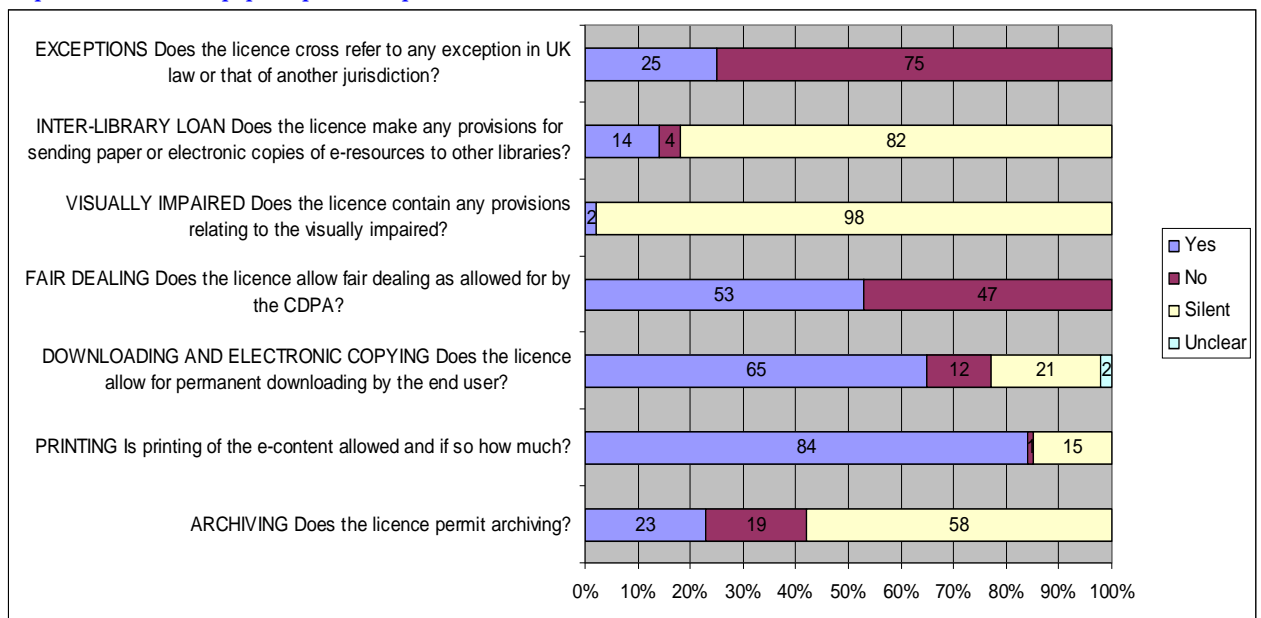
because of its relatively efficient collecting societies (e.g. the UK has two collecting societies for music compared to six in France) and the EU wide high demand for English language copyright goods.

Since 2004 the French and German governments have been extremely active in this area, and as a result we are seeing large strides being made in digitisation in these countries, public-private partnerships around this, and an appropriate legal framework to facilitate mass digitisation. For example it has been recently announced that the French National Library is intending to digitise 500,000 out of commerce works, based on an amendment to French law, allowing this category of material to be represented by collecting societies.³

2.2 Contract Law Overriding Copyright Law.

The overwhelming majority of paid for digital content in the UK, as in most other EU member states is not regulated by copyright law but by contract law. A contract entered into voluntarily by two parties of sound mind takes precedence over, and overrides copyright law. The types of agreement that exist between libraries and publishers are also not subject to Unfair Terms type legislation, which in the main is only pertinent to individuals/ consumers who purchase products and services.

Evidence in the form of a British Library study of 100 contracts offered to it for electronic publications benchmarking contracts against UK exceptions shows that well over 90% of all contracts undermine copyright law. A summary of the findings appear below. N.B. It is also worth stressing that silence in a contract is tantamount to a “no” so in the case below 98% of contracts did not allow copying for the visually impaired. (see <http://www.bl.uk/ip/pdf/ipmatrix.pdf>).



³ A Half a Million Out of Commerce Books to be Given Life to Thanks to Digitisation. <http://fr-ca.actualites.yahoo.com/un-demi-million-livres-%C3%A9puis%C3%A9s-vont-revivre-gr%C3%A2ce-20110201-091628-960.html>

This is of grave concern to researchers and libraries as currently universities spend well over £70 million p.a. on electronic resources⁴, and a study of the future of research material predicts that by 2020 80% of all commercially published educational material will be available electronically, 40% exclusively electronically.⁵

The lack of certainty around reuse of content also acts as a disincentive to purchasers, and acts as a self-limiting factor preventing a certain level of sales. For example certain digital databases have not been purchased by the British Library as their usage restrictions were too onerous and undermining of limitations and exceptions.

Other impacts include:

- a) A lack of clarity for purchasers regarding how to use a particular e-resource as well as increasing transactional overheads of individuals, usually not lawyers, having to interpret how a particular item can be used lawfully;
- b) A lack of clarity for users wishing to use electronic resources who usually will not have access to a confidential contract between a library and a publisher. This contrasts markedly with the relatively well understood principle of “fair dealing” and rule of thumb of one chapter or article from a publication.
- c) Increased confusion around the law and how it relates to accessing copyright works as a user’s “rights” to access, even for the same article or book chapter, will vary according to whether the object is in a paper form or in electronic form.

While fair dealing is generally accepted to equate to a book chapter or a journal article and therefore easy for users to comply with, contract by contract usage variations are extremely onerous, and due to their variation give little security to purchasers, and mean high management costs for purchasers of digital content such as universities.

Recommendation: Currently in UK law contracts that relate to sui generis databases cannot be undermined by contract law. A number of EU member states (Portugal, Ireland and Belgium) also forbid the over-riding of limitations and exceptions in copyright law by contract law in order to protect the public interest and guard against market failure. We would recommend as is the case in Ireland that the following wording is added to the CDPA:

COPYRIGHT AND RELATED RIGHTS ACT, NUMBER 28 of 2000 ⁶

S2(10) 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.

⁴A 2007 Society of College, National and University Library study estimated UK university spend on electronic items broke down as follows: £20M (e-serials) , £20M (e and print bundled content), £30M (other e-resources)

⁵ BL study commissioned with EPS on the future of publishing; 2005.

⁶ <http://www.irishstatutebook.ie/front.html>

2.3 Why Have Previous Reviews Failed?

The area of intellectual property is an extremely important area of public policy, particularly for a developed country like the UK that not only has a large domestic industry dependent on balanced IPR policy making, but also has much to gain from streamlined and balanced law making in the European Union because of the export potential of the English language.

The area of IPR, and in particular patents and copyright, is regrettably well-known for its highly politicised and lobbied nature – one of many examples of this being the epithet for the US Copyright Term Extension Act, namely the Mickey Mouse Protection Act. Combined with this is the fact that it is a highly complex area of law making, that increasingly interconnects with technological and contract law developments.

We would also note that there appears to be no agreed governmental policy structure for evaluating or bench-marking successful policy making in the area of intellectual property laws. Often copyright in particular is seen to be treated as simply a tool of industrial policy with little thought of its impact on the well-being of society in the form of consumers, education, culture or sometimes even innovators themselves. Of course economic issues are extremely important, but copyright is more than the industrial paradigm frequently presented in policy debates; it is an important tool in fostering education, research, and access to knowledge. It is also of course one of the primary tools whereby as a society we shape our own cultural memory.⁷ As one of the greatest research libraries in the world, and custodians of the nation's memory, the British Library believes that education, research, and access to our historical culture are also important issues that need to be placed at the centre of any IPR policy model.

Recommendation: Given the complexity of IPR issues, its many co-dependencies and the limited resources of politicians able to dedicate time to such a difficult area of law making (and technology) we would recommend that the Review explore the possibilities of extending the remit of an existing body to develop a structure for policy formation in this sector, and to subsequently advise politicians on how to form appropriate legal and other measures to optimise public and private benefit in the field of intellectual property. Any such body should ensure it works inclusively with creators, business, consumers, and representatives from the education and cultural sector, as well as centres of research excellence to ensure balanced and appropriate policy making.

2.4 Fair Use

The review was launched by David Cameron linking the fair use exception potentially to more innovation, particularly in the sphere of technological and online creativity. As the government is aware the UK currently works within the parameters of an exhaustive list of limitations and exceptions as a result of the way permitted acts were framed in the 2001 Information Society Directive. This means that we work within a legal system that cannot easily adapt to technological change opening up new possibilities such as mass digitisation, or new research techniques like text and data mining for the purposes of medical research.

⁷ We're in Danger of Losing Our Memories. <http://www.guardian.co.uk/technology/2009/jan/25/internet-heritage>

Certainly in the EU what it is evident is that the introduction of fair use may act to alleviate somewhat is the chilling effect upon innovation that arises from the strong disconnect that exists between technological innovation and the time it takes to introduce enabling legislation. For example, whereas the Internet was being widely used by the early 1990s it was not until 2001 that legislation making the “temporary acts of reproduction” that computer and internet technology are based upon, was introduced. Similarly the need for EU-wide legislation on orphan works has been discussed since 2004, and yet a directive is still in inter-services dialogue in 2011. Also because of the exhaustive list of limitations and exceptions that exist within the Information Society Directive the orphan works solution will not be able to be enjoyed by commercial organisations wishing to reuse orphan works but only be enjoyed by libraries, educational establishments, museums or archives in line with Article 5.2.c. This is less than ideal given that commercial players also have a requirement to use orphan works (e.g. the Google Book Settlement), and illustrates the serious shortcomings of an exhaustive list of exceptions that cannot be deviated from.

At a UK level technological enabling activities falling within the “three step test”⁸ and often seen in other countries, have been raised as part of a number of previous reviews but have still not been enacted. For example a digital preservation exception and a format neutral research copying exception were both recommended by Gowers in 2006. Similarly the case for new technology exceptions, such as one for text and data mining that have enormous potential in the area of medical science, and would give the UK a real creative edge, are likely to take many years to find themselves on the statute books.

One often raised and potentially valid concern of “importing” fair use into the UK is that it could give rise to much litigation to establish case law. To what extent this is true should form part of any governmental evaluation investigating for example whether this was in the case in countries like South Korea, Taiwan and Israel that have adopted fair use. UK case law pertaining to fair dealing shows that criteria applied by judges is very similar to that of fair use so such concepts already exist in UK jurisprudence – for example, is the quantity used excessive? What is the motive? Does it compete with the copyright owner’s exploitation? How “fair” is the use?⁹ Of course any introduction of fair use could be accompanied by advice on the parameters of fair use from the IPO, which would limit the likelihood of litigation as government endorsed parameters would already have been established.¹⁰

Given the mismatch between technology and the slow pace of the legislative agenda in the UK and the EU the benefits of a flexible test would appear to have its attractions. It is for this reason that the Computer Communications Industry Association states that in order “to stay on the edge of innovation and productivity, ...[the US] must keep fair use as one of the cornerstones for creativity, innovation, and, as ... an engine for growth for our country.” Similarly this is why Israel, South Korea and Taiwan have introduced fair use to foster online innovation and Japan is currently debating whether to introduce fair use.

⁸ http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html. Summary of current Berne Convention
http://www.wipo.int/treaties/en/ip/berne/summary_berne.html

⁹ Hubbard v Vosper, 1972; Beloff v Pressdram, 1973; Associated Newspapers Group v News Group Newspapers, 1986; NLA v Marks and Spencers, 2000; Ashdown v Telegraph Group 2001.

¹⁰ The Copyright Principles Project: Directions for Reform http://www.law.berkeley.edu/files/bclt_CPP.pdf

Recommendation:

1. The UK government should undertake further work at a UK and EU level to establish the value that a fair use exception may bring. This should be done in collaboration with other member states who are looking at the same issue, such as Ireland and the Netherlands.
2. Given the many barriers to innovation outlined in this paper, combined with the limitations placed upon the UK by the Information Society Directive it is of the uppermost importance that while fair use is evaluated copyright law is not simply left in limbo allowing it to become further divorced from user expectations and technological change. We therefore would urge the government to
 - i) Introduce the outstanding Gowers exceptions namely:
 - a) **Recommendation 9:** Allow private copying for research to cover all forms of content. This relates to the copying, not the distribution, of media.
 - b) **Recommendation 10a:** Amend section 42 of 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.
 - c) **Recommendation 10b:** Enable libraries to format shift archival copies by 2008 to ensure records do not become obsolete.
 - d) **Recommendation 13:** Propose a provision for orphan works to the European Commission, amending Directive 2001/29/EC. – with subsequent implementation in the UK.
 - ii) Introduce best practice exceptions from across the EU to allow technological innovation in the area of science, technology, education, teaching and research.

3. SPECIFIC QUESTIONS ASKED IN THE REVIEW

3.1 Is there evidence from other national frameworks to suggest how the UK (and EU) copyright systems could better support innovation?

See answer to the following question.

3.2 Are markets involving copyright more competitive in any other countries, while still providing satisfactory incentives to creators and investors?

Two studies by the Computer Communications and Industry Association using a WIPO econometric model for valuing intellectual property undertook to look at the value of limitations and exceptions in the EU and the USA. It is interesting to compare the two studies as it shows that the US (which has a more flexible limitations and exceptions

regime) has a larger percentage of its GDP ¹¹ (16.2%) coming from “fair use” industries – many of which are from the technology sector – compared to the EU (9.3%).¹²

While of course counter arguments can be placed, certainly the findings from these studies and the many strong statements in support of fair use from the Computer Communications Industry Association would indicate that a flexible exceptions regime stimulates growth, creativity and innovation, in particular in the field of technology.

We would crossrefer to the JISC submission for more detail on the results of the survey.

3.3 Is there evidence of how the UK copyright framework supports growth and innovation?

UK universities and colleges make a major contribution to the UK’s GDP. This demonstrates the importance of education and research to economic growth and social and commercial innovation in the UK as there is a close relationship between education levels and economic development.

In particular:

- Universities in the UK generated £59 billion for the UK economy in 2009, putting the higher education sector well ahead of the UK agricultural, advertising, pharmaceutical, music, games, book and film industries.¹³
- University knowledge exchange income (essentially patents), valued at £3 billion in 2008/09, increased by 6 per cent per year between 2003/04 and 2008/09. The university sector thus earns £3 billion annually from knowledge exchange activities.¹⁴
- UK researchers write 6.6%¹⁵ of all articles and therefore created \$1.55 billion (£1 billion) worth of value in copyright based revenue in 2009 for the Scientific, Technical and Medical Publishers.¹⁶

Given that the combined copyright and patent value of UK universities totals at least £4 billion per annum, larger than the IPR value of the music industry (£3.6 billion) ¹⁷, games industry (£1 billion)¹⁸ and film industry (£3.1 billion)¹⁹ we believe that it is particularly important that the barriers outlined to the flow of IPR in the education and research sectors are addressed as a matter of urgency. In essence the UK’s educational and learning environment could contribute more fully to the UK’s GDP if these obstacles were removed.

¹¹ <http://www.ccianet.org/CCIA/files/ccLibraryFiles/File/000000000085/FairUseStudy-Sep12.pdf>

¹² <http://www.ccianet.org/CCIA/files/ccLibraryFiles/File/0000000000398/FairUseEUstudy.pdf>

¹³ Ursula Kelly, Donald McLellan and Emeritus Professor Iain McNicoll of the University of Strathclyde, for Universities UK, “The Impact of Universities on the UK Economy”, 3 November 2009, accessed at <http://www.universitiesuk.ac.uk/Publications/Documents/EconomicImpact4Full.pdf>

¹⁴ National Endowment for Science Technology and the Arts (NESTA) and the Department for Business, Innovation & Skills (BIS), “Annual Innovation Report 2010”, January 2011, accessed at <http://www.nesta.org.uk/library/documents/AnnualInnovationv27.pdf>

¹⁵ Source: Activities, costs and funding flows in the scholarly communications system in the UK – Research Information Network.

¹⁶ <http://www.outsellinc.com/store/products/938>

¹⁷ http://business.timesonline.co.uk/tol/business/industry_sectors/media/article6721167.ece

¹⁸ <http://www.guardian.co.uk/technology/2009/may/18/computer-games-designers-tax-breaks>

¹⁹ <http://sy10.ukfilmcouncil.ry.com/20.2.asp>

3.4 Is there evidence of areas where the UK copyright framework does not deliver the optimal outcomes?

Yes.

i) Text and Data Mining.

Given the huge volumes of data and text that are now available in digital form, and that computers are able to copy and interrogate vast swathes of content we can no longer continue to rely on limitations and exceptions that essentially relate to manual “photo-copying”.

Text-mining, data mining or media mining is the extracting of “chunks” of data using computer programmes to discover hidden facts contained in databases. Using a combination of machine learning, statistical analysis, modelling techniques and database technology, data mining finds patterns and subtle relationships in data and infers rules that allow facts or hypotheses to be discovered or analysed. The technique can be used for all disciplines but perhaps offers the greatest potential in the field of medical research where it can radically increase the speed of innovation and discovery as the examples in the attached Schedule A demonstrate.

There are a number of ways to text and data mine but the most common way is first of all to identify the text or data to be mined. This is then normalised (copied and format shifted) into one standard data structure that allows computer programmes to analyse the data using text mining tools. Algorithms are programmed to look for relationships between certain facts – for example the relationship in 3000 articles from numerous different publishers and authors between a certain enzyme and a particular cancer. In this example, once the data that relates to these two facts in the articles is extracted, a derived dataset is then interrogated further and a link, fact or hypotheses can then be evaluated. Clearly this process involves using copyright works as well as database rights, and is not routinely permitted in contracts offered to universities. Having to negotiate text and data mining clauses with numerous publishers and coming to compatible terms and conditions is likely to be an extremely long and complex process if not impossible. For further detail on the uncertainties and restrictions placed by contracts on text mining activities we would refer you to the submission from the National Centre for Text Mining on this point. We would also refer you in terms of the importance of the process to submissions made by AstraZeneca and GlaxoSmithKline.

Given that this new process offers enormous potential to speed up scientific discovery, and that facts (which are not copyrightable in themselves) are extracted, the argument to make text and data mining a new exception would appear to be an extremely strong one. In researching this response it has become clear that important, potentially life-saving innovation is being stymied. As stated to the Library by Dr Cameron Neylon from the Science and Technology Facilities Council “People won’t/can’t talk about the details because they are unsure of the legality of what they’ve done. In turn this means the [data and text mining] tools aren’t developed because people are unsure whether they will be allowed to use them.”

Evidence: Please see Schedule A for more information in regards to evidence of the efficacy and importance of text and data mining. Highlights of the schedule show the value of text and data mining in the field of financial savings in the area of information management (\$3 million by Dow Chemicals), biomedical advances in understanding the role of certain genes relating to osteoporosis, hypotheses for new uses for the Thalidomide drug etc.

Recommendation: Given that this technique offers huge potential for speeding up medical and other forms of innovation, and that no limitation or exception to our knowledge exists in any other country we believe the introduction of such a permitted act in UK law offers the prospect of a significant competitive advantage for the UK or a UK based research and pharmaceutical sector.

We would also add that, as outlined above, it is important that the introduction of a new limitation and exception of this nature would have to be accompanied by legislation that ensured that any such exception was not subsequently undermined by contract law.

ii) Format Neutral Fair Dealing

Exceptions and limitations in copyright law do not currently extend to all types of work equally. In order that this does not act as a barrier to new forms of learning it is important for copyright law exceptions to be logically applicable to all types of copyright works.

Fair dealing provisions in Chapter III of the Copyright, Designs and Patents Act currently cover literary, dramatic, artistic as well as musical works; however they fail to cover the neighbouring rights that subsist within the sound recording itself, or in film or broadcast. This means not only is the law preventing short excerpts from, for example, musical recordings or television programmes being made for personal use, its absence clearly also undermines the express grant of musical or literary works in the law within the context of fair dealing in the first place.

Considering new media, the internet is a multi-works environment bringing together, in many instances on one website or web page, primary and secondary works covered by the CDPA (e.g. www.bbc.co.uk contains text, film, sound recordings, images etc). Even if separating out the primary works for copying were practical, in the context of 'fair dealing' nothing is to be gained by the rights holder by excluding these works from permitted acts. We believe an important step towards creating a healthy copyright environment to be the creation of a mature copyright regime that protects the rights of the creators of content but irons out some of the less rational exceptions.

Currently you have a situation whereby researchers have to apply for a research grant and travel around the country in order to research audiovisual material due to the lack of a strong research exception for audiovisual content. (See Schedule B for evidence.) In many other EU countries such as Spain and Denmark, a library or archive would be able

“It is an anomaly that whilst I can make photocopies of excerpts from many books about Sayyid Darwish ...copyright law doesn't allow me to ... copy or “rip” any audio or audiovisual recordings.”
Reem Kelani
Singer and
Educator

to supply a copy of a film or sound recording under specific conditions to an individual for their private study or non-commercial research purposes as their limitations and exceptions are more media neutral.

It is also important that the intermediary role of libraries and archives, in acting as educators and facilitators for copyright in general and fair dealing in particular, is protected into the digital age. Library privilege exceptions covering the permitted activities of libraries without express permission from the copyright holder must be extended to cover artistic, film, sound and broadcast material. This would be to the benefit of the rights holders, who may be concerned about how onward use of the material can best be controlled, and for the benefit of the user who otherwise would not have access to the material for research and private study purposes.

Recommendation: The Intellectual Property Office should fine-tune its existing draft Statutory Instrument to ensure that fair dealing is format neutral, and can be facilitated by libraries. This exception should be implemented as a matter of priority.

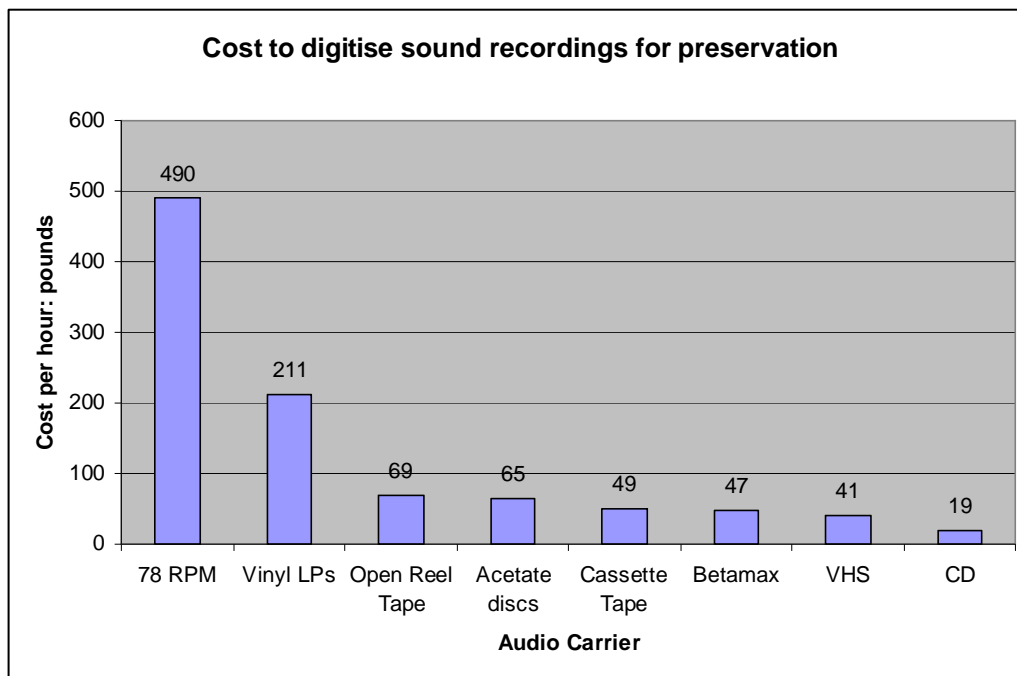
iii) Digital Preservation Exceptions

Copyright law around exceptions for preservation purposes is currently based on the analogue model where only single copies are permitted to be made. Digital preservation requires the creation of multiple copies through the practice of 'normalising' content for ingest onto a server, format shifting to address future obsolescence, the use of emulators to render digital works where the software is obsolete and the creation of backup copies on mirror servers.

It is also vitally important that for preservation purposes the right to circumvent a technical protection measure and contractual terms is enshrined in UK law, as this is a complex brake upon the ability to preserve material digitally. For further case studies and evidence on the requirement for preservation exceptions see Schedule C.

In addition to this, preservation exceptions only cover literary, dramatic, musical, typographic and artistic works. This has always been interpreted as meaning that sound and film cannot be copied for preservation purposes, and therefore the British Library Sound Archive, one of the largest sound archives in the world, is unable to preserve the nation's audio heritage for the duration of sound recording copyright. Not only does this risk not being able to format shift a work as the material has decayed beyond repair, it also increases costs significantly for the preserving institution as techniques and media required to format shift material become increasingly rare and expensive as time passes.

Evidence: For example as the graph below sets out the cost to format shift from a CD is £19 per hour and rises to £490 per hour for older formats.



As some music media such as LPs and 78s are notoriously fragile and others such as cellulose nitrate discs degrade from the day of creation, current legislation is impeding our ability to preserve audio material. Hardware formats also become obsolete, meaning that copying of the original recording is required to ensure access to members of the public. For instance, Nelson Mandela's 'Rivonia' trial speech was recorded in 1964 on dictabelt, which has fallen from use and the hardware is no longer available.

Digital preservation is a new and untested science and the EU funds research in this area in order to maximise its chance of success in preserving the European patrimony. While in the digital environment libraries and in particular journal publishers work together both recognising the importance of digital preservation²⁰ we would also note that it is not in the business interests of most commercial entities to preserve their back list and copyright works no longer returning revenue. In fact even amongst scientific publishers, the most digitally preservation conscious type of publisher between 8 – 34% of publishers had no preservation policy at all and between 8-10% were unaware as to whether they had a preservation policy or not.²¹ The British Library can also bear witness to this phenomenon as large publishers routinely approach the Library to digitise their own collections, as they themselves have not kept or preserved their own publications.

Given the importance of such an exception to allow preservation of our own cultural and scientific legacies we believe it to be of the uppermost importance for the government to ensure UK preservation exceptions are not out of kilter with those of other European countries. (See Schedule C.) Without the ability to effectively preserve important content, one part of the innovation chain may be broken – as without the ability to preserve material for future generations downstream innovation becomes impossible.

²⁰ http://www.stm-assoc.org/2011_01_19_Avoiding_a_Dark_Age_for_Data_Smit_VanDerHoeven_David.pdf

²¹ Ibid.

Recommendation: The Intellectual Property Office should fine-tune its existing draft Statutory Instrument to ensure that multiple shiftings of format, and circumvention of technical protection measures for all types of copyright works for the purposes of education, research and learning are implemented as a matter of priority.

iv) Criticism and Review / Clearing Rights for Publication

In 2010 the British Library published series of essays entitled “Driving UK Research. Is Copyright a help or a hindrance? A perspective from the research community.” (See attachment to submission.) One of the common themes from the paper was the lack of willingness of UK publishers to assert fair dealing in the form of criticism and review.

Professor Lionel Bently explains (see Schedule D) how he has been required to seek permission for the minimal reuse of copyright protected works – often from publishers with no rights clearance mechanisms in place – whereas in the US he believes fair use would have been asserted in such a publication.

We are also aware from other academics in the arts and social science field who through the impossibility of asserting criticism and review or clearing rights for educational purposes are having to amend, curb and even withdraw their own academic publications and teaching, which in turn impacts upon further teaching and learning. We would cross refer you also to the JISC case study of an author’s experience of writing a scholarly monograph, as well as a recent article in the Times Higher Education²²

Recommendation: The approach by publishers is clearly not ideal and is stifling the writing and publishing of textbooks and monographs. Given that the excellent joint paper²³ produced by the British Academy and Publishers Association has had little effect we would recommend:

- a) the Government includes this as an issue in any further exploration of the utility of fair use; and
- b) to embark upon creating IPO endorsed guidelines for criticism and review.

“As both a beneficiary of copyright, and someone who wishes to use copyright protected material ... I would be prepared to sacrifice the “benefits” if I could be relieved of the burdens. ... The truth is that with some relatively limited reforms of copyright, the system could continue to provide the benefits (and incentives) without imposing the burdens on education, free expression and intellectual progress.”

Professor Lionel Bently,
Professor of Intellectual
Property, University of
Cambridge

3.5 Is there evidence to suggest that the current framework impacts the production and delivery of goods and services which consumers want?

See answer to the following question.

²² <http://www.timeshighereducation.co.uk/story.asp?storyCode=407659§ioncode=26>

²³ Joint Guidelines on copyright and Academic Research – Guidelines for researchers and publishers in the Humanities and Social Sciences

3.6 What evidence is there that the necessity / complexity / cost of obtaining from existing rights holders constrains economic growth?

Yes – the online provision of copyright works is being hampered by the lack of appropriate rights clearance mechanisms.

i) Term of Copyright. Another issue is the length of retrospective copyright in the European Union which is for text based works life plus 70 years.

The oldest known in-copyright work in the British Library's collection is by a Scottish essayist published in 1865 that will enter the public domain in 2012.²⁴ This contrasts with the US where books published before 1923 are in the public domain. This large difference in the term of copyright between the US and the EU – in this case 58 years – has resulted in a significant “knowledge gap” of an estimated 500,000 books visible in the US as part of the Google Books project but that are blocked from view to individuals in the EU. The British Library can see no justifiable reason why material of this age, the majority of which is returning no money at all to publishers or authors, should be essentially off limits to European citizens.

A British Library study looking at 19th Century in-copyright books excluded from a 2005 - 2006 British Library / Microsoft public domain mass digitisation project of 85,000 books found the following evidence (Source of sales data: NielsenBookData²⁵).

Total Number of titles excluded from digitisation as in-copyright = 865

Number of titles theoretically available for purchase = 173²⁶

Number of titles available in print on demand format = 140

Number in stock = 1

Number available in unspecified form = 12

Number of titles available for sale in the US = 147

Number of titles available in UK = 93

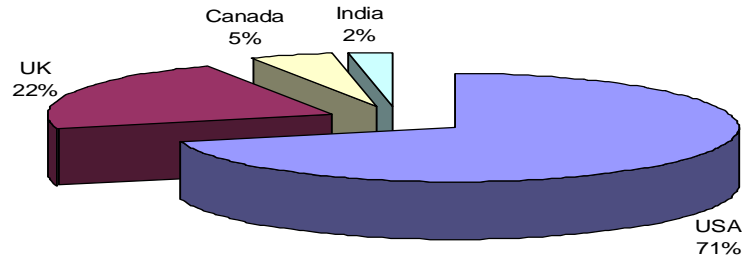
Analysing breakdown of business location of 41 print on demand publishers we see the US is a leader in print-on-demand:

²⁴ Dame Sarah Mair, 1846-1941 'On Making a Noise in the World' and other items published in 'The Attempt' (1865)

²⁵ The data provided by Nielsen is limited to the 5 most recent editions related to each title. Further analysis of titles with multiple editions has shown that the availability and the publishers involved are broadly the same as the records included in the study.

²⁶ The 173 titles available for purchase breaks down into the following categories: Cancelled = 1 (1%); Not Yet Available = 5 (3%); Out of Print = 14 (8%); Print on Demand = 140 (81%); In Stock = 1 (1%); Available (form unspecified) = 12 (7%)

Location of POD Publishers



While a number of factors as with any business will come into play, it would appear to be no coincidence in this case that the vast majority of sometimes very small print on demand publishers, are for reasons relating to copyright term, based in the US and not the EU. This was backed up by a small number of interviews with the companies involved. One of the largest Print-On-Demand publishers Bibliolife when being interviewed stated:

“No one could have imagined even half a century ago how digital technologies would increase our ability to preserve and distribute historical materials. Whether in print-on-demand or digitally -- packaging historical books for interested consumers is a challenging and rewarding business. An important part of making that happen is being able to utilize public domain laws as they were intended - to encourage the re-publication of works that have long been out of print.

For the well known “classic” books (Moby Dick, Pride and Prejudice, etc) the date of death of the authors and status of the books are well known. But for the millions of more obscure works - it is not practical to manage the costs of this research. And so books (including hidden gems) sit unavailable to the public. Having a firm date to delineate Public Domain works in the US (pre-1923) makes it easier to ensure as many of these gems as possible are brought to light.”

Despite this it is interesting to note that whereas 58% more titles were available in the US over the UK, that still as many as 93 titles were still available for sale in the UK. Given that it is unlikely that material of over 110 years (the project cut-off was 1900), unless from a well-known estate, was rights cleared it is perhaps not incorrect to assume that the availability was either the result of a business risk to sell overseas in-copyright material without permission (i.e. take the risk of a legal claim arising in the knowledge that the cost of pursuing litigation across borders is extremely high), or simply stemmed from a lack of knowledge regarding duration of term in the UK and the EU.

This small project perhaps highlights how copyright law as it is currently structured within the UK is out of kilter with the potential offered by new reproduction technologies and distribution methods that are now available to small and medium sized businesses in the publishing industry. Whereas even two decades ago the cost of re-typesetting, printing, warehousing and distribution were out of reach for many small potential publishers, the “print on demand” technology revolution has significantly reduced barriers to new market entrants. Essentially it has meant that anyone who has access to a computer, certain software programmes and an online distribution channel can establish themselves as a publisher.

Recommendation: Given the limitations imposed by the Term Directive on the UK in regards to the duration of term we would propose that a practical solution to the issue presented above is to explore modernising the systems of UK collective management of rights, particularly for out of commerce works. Given the importance of the English language in the global entertainment and academic markets we believe that finding a solution to digitising historic copyright works would have a disproportionately beneficial effect on the UK creative sector by freeing up access to historical works for online and offline technologically driven new uses such as print on demand, or e-books.

For more details on a proposed solution please see the next section.

2. Rights Clearance for mass digitisation – the role of Collecting Societies. As identified by the “i2010” and “Digital Agenda” work programmes, much societal and economic benefit could be derived from digitising and putting online the collections of national libraries, as well as large archives and museums.

Not only is there a strong demand for access from consumers for such material²⁷, (Europeana receiving over 13 million hits an hour at its launch), there is also strong evidence from technology SMEs and large telecommunication companies such as Orange, presented to the Comité des Sages October 2010 hearing²⁸, as to their demand for more digital content to be made available online for technology companies to build new and innovative products and services around.

Currently the main barrier to the mass digitisation of material not born digital is the fragmentation of rights for pre-digital material.

The British Library is currently working with the Publishers Association, Nielsen, CLA, ALCS and equivalents across the EU on the ARROW project whose aim is to facilitate the rights status of out of commerce books and orphan works being easily known.

A joint British Library / ARROW rights clearance study soon to be published shows the immense time and effort required to clear 140 publications, spread through a date range of 1870-2010, searching for each publisher, author, and where identifiable from the

“Europe can become a leader in the distribution of digital content, and as part of this change, our digital heritage is an important component.”

Orange’s Vision – The Migration of Digital Content to Open Markets.
Comité des Sages
Hearing October 2010.

²⁷ <http://www.europeanvoice.com/Article/63159.aspx> “The site, which houses thousands of items from books to paintings from Europe’s cultural history, received up to 13 million hits per hour – three times the maximum level expected by the European Commission ...”.

²⁸ Please see the submissions from technology SMEs and Telcos at the 28 October 2010 Comité des Sages hearing. http://ec.europa.eu/information_society/activities/digital_libraries/publichearings/index_en.htm

library records, artists. While the study is still being completed the statistics available to date (which requires further validation), suggest that 40% of the potentially in-copyright works in the study were found to be potential orphan works:

Total time spent on diligent search and rights clearance: 546 hours

Number of books found to be out of copyright = 38

Number of books found to be in copyright = 80

Number of books with an unknown copyright status = 22

Number of books requiring potential clearance = 102

Number of books where a rights holder could not be identified (orphan works) = 41

Rights holders approached = 75

Permission to digitise granted = 14

Permission denied = 9

No response forthcoming²⁹ = 52

Pre 1990 contracts of course did not foresee digitisation and online use, and therefore the “communication to the public” right contractually will in most instances sit not with intermediaries such as publishers, but with the authors and artists themselves. Clearly therefore if any public or private entity is to embark upon the mass digitisation of even a small fraction of the estimated 2.5 million 20th Century in-copyright UK books and serials it will be unable to do this on an author by author, or artist by artist basis.

From the perspective of an organisation wishing to digitise material from across the 20th century this is complicated by not only the complexity of rights that may exist in a single digital item, but also the fact that as copyright law has changed across the 20th century the rules regarding ownership have changed. We calculate that the following different number of rights can exist in an individual copyright work when looking across the 20th century (For more details see Schedule E).

Published Books - 6

Sound recordings - 11

Film - 14

At the same time an analysis of UK collecting societies shows that their own ability to facilitate more electronic content being available online is also fragmented. The chart below which is based on the British Library’s own interactions with collecting societies as a licensee as well as using publicly available information shows a patchwork quilt of strengths and weaknesses when looking at an individual collecting society’s ability to facilitate digitised material being communicated to the public for mass digitisation purposes in the context of a digital library programme. The picture is of course made more complicated given that large parts of collections that exist in the university and cultural sector are from other countries (beyond the EU) and to what extent this material is represented by collecting societies is unclear especially if never distributed or sold here.

²⁹ No response forthcoming was due to a number of reasons such as no reply, invalid contact details, lack of clarity around rights ownership, publisher believing work public domain etc.

Collective Management of Rights of Historical Material – Communication to the Public for digital library purposes

Category	Collecting Society	Online mandate for whole works for digital library purposes	Repertoire	Further Information
Books / Journals	CLA /PLS	No	Opt-in only.	No mandate to represent reproduction and subsequent communication to the public of an entire work.
Newspapers	NLA	No	Opt-in only.	No mandate to represent reproduction and communication to the public of an entire work.
Music	PRS for Music	Yes*	Literary and Musical Works. Opt-in only.	*Minimum per track download and per stream fees available for commercially produced tracks but an “iTunes” model (payment per track download / stream) and therefore not applicable to the education / digital library context. Will issue a licence for unpublished music sound recordings under certain circumstances.
	PPL	Streaming only	Commercially released sound recordings. Opt-in only.	No mandate to represent sound recordings for full track downloads – must be individually negotiated with the record labels.
Film / Broadcast	Sporadic collective management of rights.**	No	N/A	** Communication to the public of whole historical works by cultural bodies would fall outside the scope of licensing schemes established under S.35 of the CDPA.
Fine Art	DACS	Yes	Opt-in only.	Communication to the public of the entire work allowed.
Unpublished Works	No clear remit exists.	N/A	N/A	N/A

The issue facing policy makers wishing to facilitate online product and service offerings of 20th century material is therefore what to do about the intense fragmentation of rights that exists for the last century's copyright works, and the lack of effective and efficient clearance mechanisms. This conundrum is often referred to as the "Black Hole of the 20th Century."

Without a collective management approach to mass digitisation, or the issuing of compulsory licences for certain specific uses, it is impossible to envisage how the mass digitisation of UK cultural goods can become a reality given the immensely high transaction costs of rights clearance on an author by author, creator by creator basis.

In order to facilitate the mass clearance of rights, not only for printed matter but in the area of sound recordings, film, as well as the large amounts of unpublished material that sit in libraries, archives and museums (the latter two areas effectively having no tradition of collective management of rights) some form of effective and streamlined collective management of rights is required. This is currently being discussed in France, Germany as well as by the European Commission. Such mechanisms already exist within the European Union in the form of Nordic Extended Collective Licensing schemes.

As mentioned above how to do this with "out of commerce" works has been the subject of Internal Market DG stakeholder dialogue since November 2010 including publishers, national libraries, authors, technology companies etc. What currently is being discussed in France is a legal underpinning of collecting societies to represent the 500,000 estimated out of commerce works that are held by large French libraries. In essence the EU stakeholder dialogue is discussing:

1. A statutory underpinning for a collecting society to allow them to extend their repertoire and represent all out of commerce works;
2. An opt out by authors, publishers and creators (NB across the EU pre-digital rights are likely to sit with the author) ;
3. Establishing a historical cut-off point before which this category of work can be represented collectively;
4. A presumption that the original publisher should make the works available electronically but if this does not happen a third party can;
5. The establishment of a well regulated legal environment.

It is worth stressing from our own experience, and in discussions with other cultural sector bodies that attempting to clear rights en masse for the purposes of communication to the public is very complex. The rights to allow mass digitisation of whole items must

French Mass Digitisation Proposal for 500,000 Books

Given the fragmentation of 20th century rights the French Ministry of Culture, the French National Library the Syndicat national de l'édition and the Société des gens de lettres have signed an MOU ahead of legislative changes aimed at:

1. Establishing the legal right for state regulated RROs to represent all 20th century out of commerce works.
2. Allowing authors to opt out.
3. If not opted out, allowing the original publisher first option to make the book available in electronic format.
4. If this right is not acted upon within 18 months, offer the right to third parties to exploit online.

be cleared with each and every rights holder which is impossible in this context. Given the numerous contributions as well as layers of IPRs that can exist within a single copyright work, combined with the vast quantity of works and potential rights holders, we believe that the only solution for the mass clearance of rights in the sphere of 20th Century commercial copyright works is through either compulsory licensing or streamlined collective rights management whereby collecting societies can represent an expanded repertoire of rights holders for certain specific uses such as the creation of a digital library or online educational portal.

The French model proposed above would appear to be fair – balance equitably the public and private interest and promote mass digitisation of content in the context of out of commerce works.

We also believe given the strength of British broadcasters and our own publishing, music and cultural sectors that finding a solution to the mass availability of digital content across borders is of a particularly prime economic and social importance for this country.

Given the predominance of the English language we believe that the UK government should engage actively with Europe on these issues because as a country we would benefit disproportionately from facilitating more cross border access to UK cultural goods.

Recommendation:

In this context we would therefore propose to government that in order to facilitate more material being made available online for the benefit of consumers, researchers and technology companies that, they should:

1. In an EU cross-border context, create a legal underpinning for UK collecting societies;
2. Ensure they can represent all categories of commercially produced works for which they have a sufficiently applicable or representative mandate;
3. For certain specific uses (such as mass digitisation, education, broadcast etc);
4. Ensure independent oversight to ensure minimum standards of practice and a balance of public and private interest. (i.e. ensure that licences are fair and that artists are fairly remunerated.)

On point 4 above, as demonstrated by the failure of the Orphan Works and Extended Collective licensing proposals in the 2010 Digital Economy Bill due to opposition from photographers, we believe independent and well-regulated oversight of collecting societies is extremely important. This is in order to safeguard against dominant market player behaviour as their monopoly is increased with a statutory underpinning to allow them to represent artists and creators, for certain specific uses, for which they have not actually received a direct mandate from the parties that they will represent. This will be important to ensure that licences offered are fair, and that the creators which they represent feel that their moral and economic interests are being sufficiently and equitably represented.

iii) Orphan Works

The issue of orphan works (works where the original rights holders cannot be traced) is an area which would also benefit from review in the light of the recent Comité des Sages paper, as well as the work under the previous government to create a legislative solution for orphan works. The Library believes that enlightened change to the law would facilitate not only important commercial opportunities for publishers, broadcasters, artists and so on, but also the reproduction of such works in research and academic fields. We believe that there would be a tangible economic and public good benefit if a provision were established to streamline the process of seeking rights clearance to deal with the use of orphan works as at present many works are, arguably, unnecessarily 'locked up'.

When cultural institutions are looking to digitise and make orphan works available under the current copyright framework, they must undertake time-intensive rights clearance activities and still not receive legal certainty over use of material. For public sector bodies this is particularly problematic not only for reputational reasons as any bad publicity around use of a work could hamper its ability to collect further material, but also because of the difficulties for public bodies to take out indemnity insurance under existing Treasury rules.

In addition to the recent British Library / ARROW study outlined above many other studies exist that show the time taken and difficulties involved. During 2005-2007 the British Library undertook a project to digitise over 4,000 hours of sound recordings and make them available online for researchers. One part of the project involved the digitisation of 220 oral history recordings of jazz musicians and promoters made in the late 1980s. The majority of the recordings were made by the British Library at the time, and as many permissions as possible were applied for and received by the Library from the interviewees, as well as some of the interviewers / sound recordists who were not Library employees. Between May 2005 and February 2006 all identifiable outstanding permissions, totalling 200, were applied for in order to put these recordings on the web for music researchers and the public alike. Of this 200, 107 permissions were cleared, 27 received no response despite chasing, and 53 could not be traced. Thirteen of the rights holders were discovered to be deceased during the process. This represents 26.5% of the total requiring permission as orphan works which, given the well-controlled environment³⁰ one can conjecture is considerably lower than the norm for large projects such as this. It also leaves a further 20% where the permission is left in limbo when no response is received, or the apparent lack of an estate to approach to seek permission. While this project essentially had only two performers – the interviewer and the interviewee – and was therefore quite simple where a work has multiple contributors, and only one cannot be traced then despite the effort to clear all the other rights then a work cannot be used at all.

There have been a number of other studies into orphan works such as that of the Carnegie Mellon University Libraries in the US between 1999 and 2001 who found that between 23% and 31% of works in their studies were orphaned. Given that the duration

³⁰ The programme started with a high level of documentation, the majority of the sound recording rights were owned by the British Library, most recordings were made less than fifteen years ago, and none of the works were donated by third parties.

of historical copyright is significantly longer in the UK / EU it is not unexpected that initial indications from the ARROW study are that at 40 % the rate of “orphanage” in the UK / EU is higher than the US.

In addition to the issue of orphan works on a mass scale, the British Library also receives a constant flow of requests to use individual orphan works for private study and non-commercial research purposes. Given the generally accepted views on the quantitative limits of fair dealing this presents a problem for libraries and other heritage institutions as to whether such supply is lawful or not. Please see case study at Schedule F.

A clause to allow the use of orphan works was included in the Digital Economy Bill (Clause 42, then subsequently Clause 43). This clause received cross party support and support from all the national museums, galleries, libraries, university and educational groupings as well as Consumer Focus and the BBC.

From the perspective of the museums, galleries, archives and libraries who are increasingly expected by the public as well as the European Union to digitise their collections, the flexibility offered by the proposed orphan works provision was immensely important. Any mass digitisation of in-copyright commercially produced material will probably involve a licence from an appropriate rights holder, but the majority of works that sit in the museum and archives of the UK were not produced for commercial purposes but are unique unpublished records, documents, sound recordings and videos.³¹ We do not believe that it is appropriate for ethical and reputational reasons to commercialise this type of material through collecting societies. Indeed the sector believes that this would compromise their ability to continue to collect this material if seen to be commercialising such historical records of our past, and certainly complicate relations with copyright owners who surface post digitisation.

The wording in the Bill would also have allowed for cultural bodies to process, subject to governmental independent oversight, the demonstrable demand by users of cultural sector bodies to use individual orphan works. See Schedule F.

Recommendation: Reintroduce as a matter of priority the Orphan Works proposal contained within the Digital Economy Bill, after fine-tuning with appropriate stake holders.

3.7 Are there cases where SMEs face barriers in accessing IP services or with the IP system to help them to protect and exploit their IP?

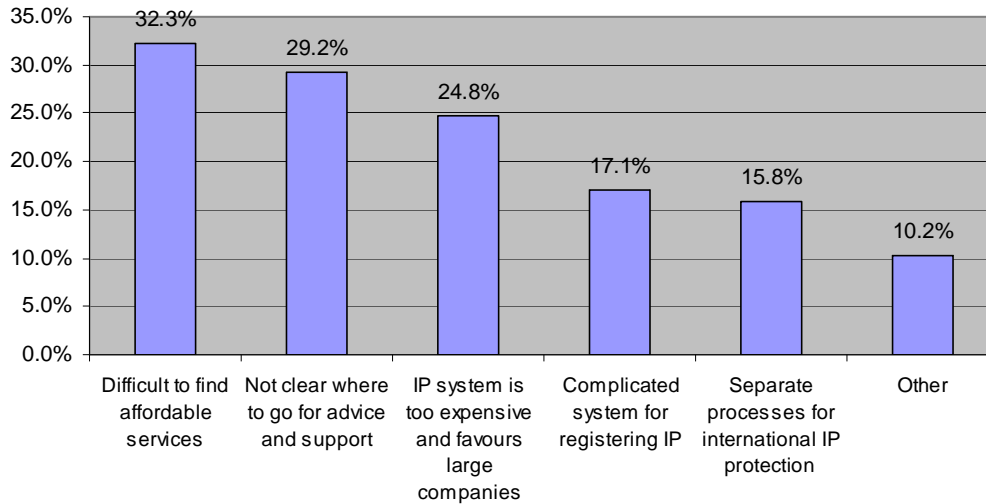
Entrepreneurs' views on the IP process

In February 2011 the British Library ran an online survey to ask users of its Business & IP Centre their opinions of the IP process, innovation and their plans to grow. We gained 322 responses from SMEs who had previously used the Centre. Within this group, 38% were either planning to start, or in the process of setting up a business and 49% of respondents were already running their own business.

³¹ <http://www.jisc.ac.uk/media/documents/publications/infromthecoldv1.pdf> JISC: In from the Cold – An assessment of the scope of Orphan Works and its impact on the delivery of services to the public.

The survey showed that the biggest barriers that SMEs face in protecting and exploiting their IP are around finding affordable services, knowing where to go for advice and support, and the feeling that the IP system favours large companies.

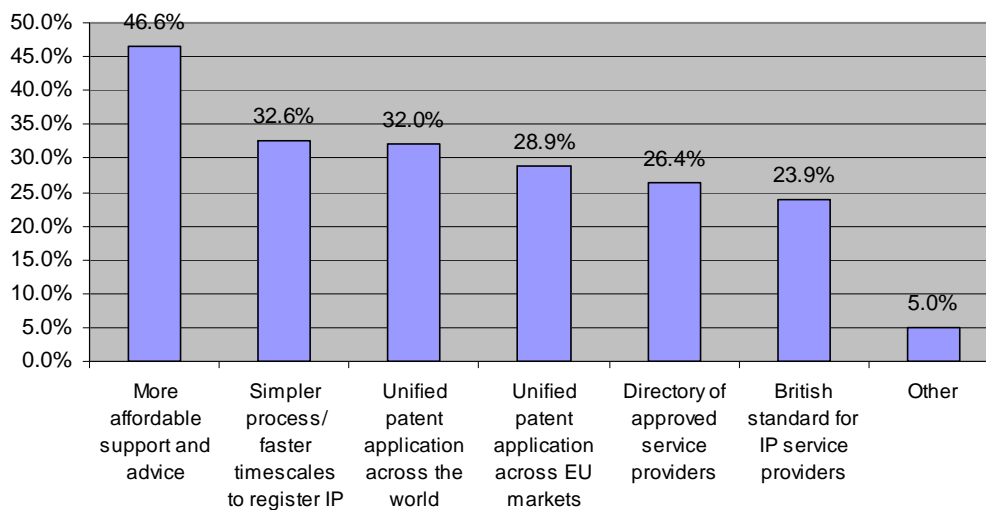
Issues in accessing IP support and services



Base = 322

Respondents were also asked what improvements or new services they would like to see in the future. They were most interested in having more affordable support and advice, a faster and simpler process to register IP and a unified patent application across the world, or at least across EU markets.

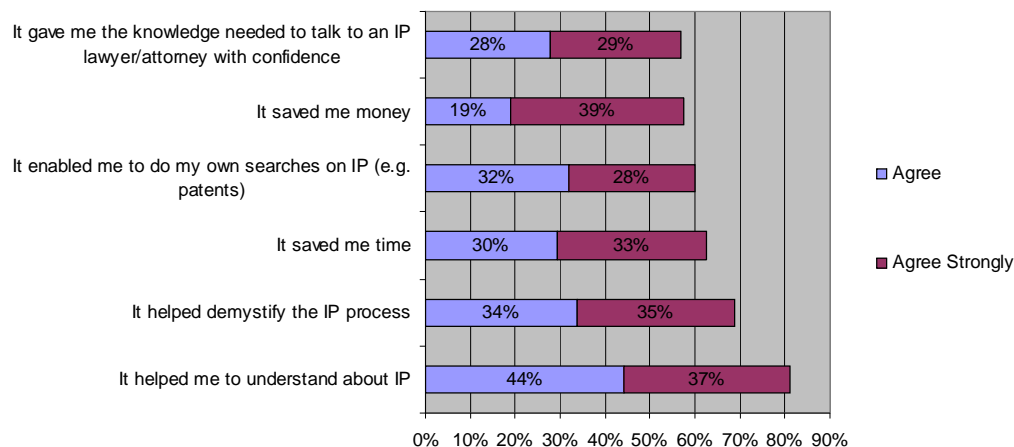
Improvements or new services



Base = 322

How the British Library Business & IP Centre has helped entrepreneurs with their IP

The online survey showed that over a third of respondents had used the British Library's IP-related services. The chart below shows the Centre and its services have made a real difference in helping people to understand about IP, shown them how to do their own searches on IP and has saved them time and money.



What can be done to overcome barriers?

The British Library Business & IP Centre supports innovators and entrepreneurs from that first spark of inspiration to successfully launching and developing a new business. Improving upon such services across the country and online would be a major step in supporting innovation in the UK. e.g. the British Library has developed a number of IP learning tools that could be useful for an online learning environment. As the Business & IP Centre survey shows, start-ups and SMEs rated affordable support and advice services to be the most needed change to the current SME landscape. The Centre does this by providing free access to its unrivalled business and intellectual property (IP) collections, workshops, networking events and 1:1 advice sessions. Since March 2006, the Business & IP Centre has welcomed over 250,000 people through its doors.

We are unique in that – as the national library of the UK along with the Intellectual Property Office – we hold the largest collection of published business and intellectual property information in the UK (if not the world). We make available thousands of market research reports, which gives small businesses access to the same resources as those within a major multinational company. We make the link between IP and business information so that we can support users through the whole innovation cycle – from idea to market.

Conclusion

Summary of legislative recommendations:

We urge the Review Team to recommend the following legislative changes:

1. Work on and implement with immediate effect all Gowers Recommendations relating to research, education, teaching, mass digitisation and heritage. (Orphan works, preservation, distance learning and format neutral fair dealing to include sound, film and broadcast material.)
2. Amend UK copyright law to include a clause stating that contracts and licences should not override exceptions. This clause already exists in Irish, Portuguese and Belgian copyright law.
3. Introduce a limitation and exception for text and data mining to cover all forms of research to encourage medical, environmental and other public interest innovation.
4. Allow streamlined rights clearance mechanisms of all commercially produced works through independently regulated collecting societies for certain specific uses such as mass digitisation / digital library / cultural projects. A separate solution for unpublished works is also required.
5. Expand the defences in UK copyright law to include all exceptions and limitations from across the EU as provided for in Article 5 of the EU Information Society Directive relating to research, education, teaching, mass digitisation and heritage; furthermore, all exceptions should be made media independent
6. Amend clause 296ZE(6) of the CDPA to allow circumvention of Technical Protection Measures where the act is a permitted act. Such a clause already exists in Austrian Copyright law as well as Switzerland and Australia.

Summary of non-legislative recommendations:

1. Actively engage with the European Union on the issues of fair use, collective rights management, mass digitisation and the exhaustive list of limitations and exception in the Information Society Directive.
2. Develop a policy framework for measuring and bench-marking the development of intellectual property laws, and evaluate the requirement for a regulator to advice policy makers on the interplay of intellectual property law, technology and contract law.
3. Establish IPO endorsed guidelines for criticism and review to facilitate reuse of material for research purposes.

Submission by The British Library, 96 Euston Road, London, NW1 2DB.

Contact: ben.white@bl.uk

Schedule A

Case Studies on Uses of Text Mining

1. Supporting the education evidence portal via text mining – Increasing Efficiencies

Case A: A project was undertaken in collaboration with James Thomas of the Institute of Education's Evidence for Policy and Practice Information and Co-ordinating Centre (EPPI), to add text mining functionality to the UK Education Evidence Portal (eep) which is used by several government departments as well as researchers. A major activity there is systematic reviewing of the type you yourself are undertaking. The conclusions were reported in Philosophical Transactions of the Royal Society A:

“Text mining services have been used to enhance search and discovery options for the UK eep. Combinations of metadata enhancement, improved browsing and navigation, alongside alternative views of resources, have all strengthened the overall proposition of the portal. Particular features include the automatic classification of lengthy documents and reports (as opposed to only abstracts) according to a custom-built, domain-specific taxonomy, automatic grouping of documents into clusters that are generated on demand according to the contents of the retrieved documents, and automatic identification of key terms within documents, which facilitates quick scanning of documents, as well as allowing closely related documents to be identified. Collectively, these features provide the ability to search for relevant information in a more timely and efficient manner than was previously possible. The enhanced features of the portal provide the potential to revolutionize education practice that, owing to time limitations, sometimes does not take account of research evidence at all.”

Ananiadou, S., Thompson, P., Thomas, J., Mu, T., Oliver, S., Rickinson, M., Sasaki, Y., Weissenbacher, D. and McNaught, J. (2010) Supporting the education evidence portal via text mining. *Phil. Trans. R. Soc. A*, 368(1925): 3829-3844.

Case B: Leveraging text mining to improve human curation

“Background: The Comparative Toxicogenomics Database (CTD) is a publicly available resource that promotes understanding about the etiology of environmental diseases. It provides manually curated chemical-gene/protein interactions and chemical- and gene-disease relationships from the peer-reviewed, published literature. The goals of the research reported here were to establish a baseline analysis of current CTD curation, develop a text-mining prototype from readily available open source components, and evaluate its potential value in augmenting curation efficiency and increasing data coverage.

Results: Prototype text-mining applications were developed and evaluated using a CTD data set consisting of manually curated molecular interactions and relationships from 1,600 documents. Preliminary results indicated that the prototype found 80% of the gene, chemical, and disease terms appearing in curated interactions. These terms were used to re-rank documents for curation, resulting in increases in mean average precision (63% for the baseline vs. 73% for a rule-based re-ranking), and in the correlation coefficient of rank

vs. number of curatable interactions per document (baseline 0.14 vs. 0.38 for the rule-based re-ranking).

Conclusion: This text-mining project is unique in its integration of existing tools into a single workflow with direct application to CTD. We performed a baseline assessment of the inter-curator consistency and coverage in CTD, which allowed us to measure the potential of these integrated tools to improve prioritization of journal articles for manual curation. Our study presents a feasible and cost-effective approach for developing a text mining solution to enhance manual curation throughput and efficiency.”

Thomas C Wieggers, Allan Peter Davis, K Bretonnel Cohen, Lynette Hirschman and Carolyn J Mattingly Text mining and manual curation of chemical-gene-disease networks for the Comparative Toxicogenomics Database (CTD). BMC Bioinformatics 2009, 10:326doi:10.1186/1471-2105-10-326

2) Tapping the power of text mining – \$3,000,000 Savings

Case A: “In 2001, Dow Chemicals merged with Union Carbide Corporation (UCC), requiring a massive integration of over 35,000 of UCC’s reports into Dow’s document management system. Dow chose ClearForest^{32[1]}, a leading developer of text-driven business solutions, to help integrate the document collection. Using technology they had developed, ClearForest indexed the documents and identified chemical substances, products, companies, and people. This allowed Dow to add more than 80 years’ worth of UCC’s research to their information management system and approximately 100,000 new chemical substances to their registry. When the project was complete, it was estimated that Dow spent almost \$3 million less than what they would have if they had used their own existing methods for indexing documents. Dow also reduced the time spent sorting documents by 50% and reduced data errors by 10-15%.”

Fan, W., Wallace, L., Rich, S., Zhang, Z. (2006) Tapping the power of text mining. Communications of the ACM 4(9): 76-82.

See also:

http://www.computerworld.com/s/article/85113/ClearForest_Scaling_Dow_s_Paper_Mountain

Case B: Text mining improves Hong Kong Government’s ability to anticipate and address public complaints. A ‘customer story’ from SAS, a major text mining provider. www.sas.com/success/pdf/hongkongeu.pdf

3) Accelerating biomedical discovery- Discovering a New Link between Genes and Craniofacial Development / Osteoporosis, new uses for Thalidomide Drug and discovering a new interaction of proteins

Case A: Cranial Facial Development

^{32[1]} ClearForest was subsequently acquired by Thomson Reuters

This work tackled the problem of dealing with large amounts of experimental data (high throughput data), by combining text mining over the scientific literature, reasoning from ontologies, and networks constructed from experimental data, resulting in: “creation of hypotheses regarding the roles of four genes never previously characterized as involved in craniofacial development; each of these hypotheses was validated by further experimental work.”

These hypotheses were experimentally validated by in situ hybridization and may have clinical consequences related to cleft lip and palate.

Leach SM, Tipney H, Feng W, Baumgartner WA Jr., Kasliwal P, et al. 2009 Biomedical Discovery Acceleration, with Applications to Craniofacial Development. PloS Computational Biology 5(3): e1000215. doi:10.1371/journal.pcbi.1000215

Case B: “The text mining approach results in increased speed and selectivity (as for instance many different aliases of a gene are searched at once)”

Maté Ongenaert and Luc Dehaspe. Integrating automated literature searches and text mining in biomarker discovery BMC Bioinformatics 2010, 11(Suppl 5):O5 doi:10.1186/1471-2105-11-S5-O5

Case C: “We created a text mining tool that analyzes the PubMed literature database and integrates the available genomic information to provide a detailed mapping of the genes and their interrelationships within a particular network such as osteoporosis. The results obtained from our text mining program show that existing genomic data within the PubMed database can effectively be used to predict potentially novel target genes for osteoporosis research that have not previously been reported in the literature.”

Varun K. Gajendran, Jia-Ren Lin, David P. Fyhrie, An application of bioinformatics and text mining to the discovery of novel genes related to bone biology, Bone, Volume 40, Issue 5, May 2007, Pages 1378-1388, ISSN 8756-3282, DOI: 10.1016/j.bone.2006.12.067. (<http://www.sciencedirect.com/science/article/B6T4Y-4MVS1-1/2/df681f901acd33d5f3eecedb36fe441e>)

Case D: Text mining suggests new uses for thalidomide.

Marc Weeber and colleagues used automated text mining tools to infer that the drug thalidomide could treat several diseases it had not been associated with before. Thalidomide was taken off the market 40 years ago, but is still the subject of research because it seems to benefit leprosy patients via their immune systems. Weeber and Grietje Molema, an immunologist, used text mining tools to search the literature for papers on thalidomide and then pick out those containing concepts related to immunology. One concept, concerning thalidomide’s ability to inhibit Interleukin-12 (IL-12), a chemical involved in the launch of an immune response, struck Molema as particularly interesting. A second automated search for diseases that improve when the action of IL-12 is blocked revealed several not previously inked with thalidomide, including chronic hepatitis, myasthenia gravis and a type of gastritis. ‘Type in thalidomide and you get 2–3000 hits. Type in disease and you get 40,000 hits. With automated text mining tools we only had to read 100–200 abstracts and 20 or 30 full papers. We’ve created hypotheses for others to follow up,’ says Weeber.

Weeber et al. Journal of the American Medical Informatics Association. 2003 10 252–259

Case E: Prediction of an undocumented interaction between proteins: calpain 3, whose mutation causes muscular dystrophy, and parvalbumin B, a skeletal muscle protein. Text mining analysis revealed these frequently co-occurred in the literature with other key terms. Experiments subsequently validated interaction of these two proteins.

H. H. van Haagen et al. PloS One 4, e7894; 2009).

Schedule B

A Case Study of an Audiovisual Researcher

For a study of Alex North's film score to *A Streetcar Named Desire* (1951), I wanted to explore the composer's scoring practices in other films of the same period. I found that the BFI archive holds copies of three films that I wished to view, all of which are currently out of print both in the UK and in the US. Of course, to study a film I have to view it more than once, and each film would reasonably take a day to play through a couple of times (the viewing service is available 10.30-5.30 Monday to Friday). Each film is about 2 hours long and involves a reel by reel viewing in a BFI viewing room. This is a great service. The one drawback is that I cannot have a keyboard in the room so it's difficult to make the most of the experience.

Getting to London from Edinburgh takes 4 ½ hours each way by train or by plane if you include getting to and from the airport, so I would have had to stay in London for 3 nights, plus the cost of travel, plus the cost of viewing (12.50 plus VAT per hour of film) to see these films. For a three day trip the cost of such a trip would be £500-600, even making the usual economies. I have to factor these costs in when applying to research councils for grants to study such material.

It would be much easier, and potentially cheaper, if I could easily and legally ask the BFI to make a DVD/videotape copy of these films for research purposes. It would also enable me to watch the films more than twice if necessary. It would ensure I did not damage a film copy by watching and re-watching specific sections over and over. An exception in law would actually be more practical in that it would enable me to study these works on a playback set-up that privileges film music and sound.

On this particular occasion, to minimise costs, I arranged one screening at the BFI prior to a conference I was attending in London.

I located an old video copy of one of the other films in the library at Manchester University; I was able to travel there and back in a day and watch the film through twice at a cost of a little over £100. Again, however, I was not able to ask for a copy – this tape was a commercial copy (with relatively poor sound quality), and again, there are no keyboards in the viewing suite. I was not able to locate another copy of the third film, alas. Though I did manage to source a copy on eBay in the US. Unfortunately, once again, the tape had poor sound quality, and I'm not entirely convinced that it was an entirely legal copy – it is difficult to judge such things over the net, and vendors are sometimes not entirely honest.

If I had been able to ask the BFI to make copies of these films for me legally, I am sure that this could have been done at a cost less than the cost of my trips, and I would not have searched out a copy on eBay, which was likely of less good quality.

Related to the same project, a differently edited version of *A Streetcar Named Desire* was released by the production company between 1951 and 1993. After this, cuts were reinstated and the original release was re-released as the "Director's cut". It is no longer possible to buy copies of the film as it was released between 1951 and 1993. For

comparison, context, and to enable me to consider the impact that the editing (including the editing of the music) had on the film I thus rely on a decrepit videotape copy that was recorded under the ERA-licence over 15 years ago, and which has been well-used by students judging from the now poor quality of the image and the sound. Again, if I were able to request a copy of this earlier release from the BFI, I would likely be able to work with a much better copy.

Dr Annette Davison
School of Arts, Culture & Environment
University of Edinburgh

Schedule C

Digital Archiving and TPMs

As well as “primary” objects (i.e. the legal deposit items, acquisitions etc.) archiving requires that libraries are also interested in ancillary copyrighted items that are necessary to use the primary objects themselves.

Atlas Schoemaker:

This publication contains digitized images of the 18th century historical-topological atlas assembled by Andries Schoemaker, and a Windows front-end to search and view those images. The front-end requires a software component for manipulating images that shipped with some versions of Windows; Windows 95 OSR 2 (1996), Windows NT 4 (1996), Windows 98 (1998), Windows 2000 (2000), and Windows Me (2000). The software component was licensed by Microsoft from Wang, Microsoft has stopped including it with Windows. Consequently, no currently shipped version of Windows can run the software.

Microsoft can no longer distribute certain legacy operating systems (e.g. Windows NT 4, Windows 98, Windows 2000) due to the terms of their 2001 legal settlement with Sun concerning Microsoft’s Java Virtual Machine. The versions of Windows that ship with the necessary image component required to view the atlas are (coincidentally) the versions of Windows that Microsoft is not permitted to ship any more.

In order to use the atlas software, we are therefore required to use a version of Windows that is not available to buy any longer, in fact that its developer has no way of selling to us. The Library can, for the time being, probably locate second-hand copies of the software and use these, but these items must be preserved alongside the atlas itself.

To ensure access to the Atlas in the future we must be able to provide long-term access to the software necessary to run it, and therefore media shifting of both Windows software as well as the CD itself will be required.

Amiga Software

There is some number of Amiga magazines with cover discs in the legal deposit collection. The cover disks require specific software to run but the software was often embedded into the computer and does not exist on any readily duplicable media, only as microchips (firmware). Due to bankruptcies and subsequent sales of IP rights, it is difficult to ascertain who now owns the rights to this firmware. Although there is a company now selling computers under the Amiga brand, it would appear that they do not sell the firmware required to run this old obsolete software.

The only source of the firmware is “salvage” – purchasing old machines from eBay and or other similar outlets. This is only a temporary solution. The hardware is old and unreliable, and not a viable long-term access strategy. An approach that does have better prospects is emulation.

There are effective open-source software emulators available that allow running Amiga software on modern PCs. The problem with this approach is that these software emulators cannot use the ROM microchips – they instead read the firmware from a file.

There are ways to extract the software from the ROM microchips, but they require expertise and equipment currently not found within the library.

(DRM) Windows XP:

Windows XP is currently fairly widely available. In common with a lot of software, Windows XP requires a licence key to be entered to work. Unlike most software, it also requires what Microsoft call “Activation” if it is to be used for more than a few days. To “activate”, Windows XP contacts servers hosted by Microsoft to verify that the licence key is legitimate, and to couple the licence key to the software that it is being used with.

This has a number of repercussions for archiving. If hardware is decommissioned and replaced, and the software installed to a new machine, the activation is liable to fail, unless the new machine has identical hardware to the old one. There is currently a manual telephone process to activate in these situations so this is not an immediate concern. The bigger concern is what will happen when Microsoft ceases to offer the internet-based activation servers and manual process; at this point Windows XP will become substantially unusable, as the software will not run anymore. A few other software products have gained similar features; for example, the latest version of Adobe Photoshop has similar activation methods.

If Microsoft does not provide a workaround for activation which is unlikely, some alternative solution will have to be found to allow continued use of the software. One option would be to change the software so that the DRM features were no longer functional; the other would be to use a special licence key that automatically bypasses the activation checks. Obtaining such a licence key is conditional on Microsoft providing one. The only other alternative is to use a “key generator” to illegally generate a key that the software thinks is legitimate and does not need activation by Microsoft or other software providers.

Format Shifting (Journals)

Electronically published journals are currently deposited voluntarily, as a prelude to eventual legal deposit legislation. The journals are deposited as a mix of XML, PDF, and images. Different publishers use XML in different (and incompatible) ways, which makes the task of providing access to the journals much harder, the structures used to describe and cross-reference articles, for example, vary from publisher to publisher, which makes searching for articles more difficult. There is a de facto standard XML format for journal articles called “NLM”. To provide better services for accessing e-journals, it is proposed to migrate e-journal publications to use this NLM XML format as soon as the journals are deposited with the library; normalizing the different incompatible, inconsistent formats into one uniform one. This also makes the preservation task more tractable; instead of dozens of formats that must be managed, only a single format needs to be dealt with.

As well as this up-front normalization, other format shifts could be desirable. Although the XML is convenient for computerized processing, it is much less useful for human readers. A system for accessing and reading e-journal articles would need to convert the articles to a different format—such as plain text or a web page—for human access. In this way, several different copies of an article may exist concurrently; the original XML, the normalized NLM XML, and a web page. Not only must format shifting be allowed; it must not restrict the number of format shifts that can be done, nor the number of shifted copies that can exist concurrently. It is important to note that even though digital versions are still commercially available these are not relevant for preservation purposes.

Looking into the future, there may be a need for further format shifts. The journal articles include a PDF representation of each article. There are many different versions of the PDF specification, and the e-journal submissions are not restricted to any one version. Current PDF software can accurately display any PDF version, but in the future we could see support for the oldest PDF versions being phased out. Although one strategy to cope with this is to preserve the software and the environment needed to run it, another strategy would be to convert the old PDF files into a newer version of PDF that was still supported. Even further in the future, these PDFs could themselves be converted to some future file format.

In this way, there is a need both to permit both “sequential” format shifts (where a format shifted file is itself format shifted), and “parallel” format shifts (where a single file is shifted into several other formats concurrently). These two approaches may also be combined.

DRM (Fay Godwin Collection)

The current versions of Windows (XP, Vista) and Photoshop (CS3) all contain a DRM system called Product Activation – the latter is required to view the images that form part of the Fay Godwin photographic collection recently acquired by the British Library. In addition to the standard licence key, programmes such as photoshop examine system hardware to construct a kind of hardware “fingerprint” – they send the fingerprint and the licence key to remote Microsoft/Adobe-operated internet servers. If the servers are unavailable, or if the servers say that the licence key has been used with a different set of hardware, then the software will refuse to run.

When these programmes are no longer supported action will be required to circumvent the DRM checking. The technical options, which would be breaking copyright law as anti-circumvention measures currently stand, are:

- i) Modify Windows or Photoshop so the fingerprint / licence key is no longer required.
- ii) Generate a fake licence key ourselves or use one available on the web.

DRM (DVDs)

There are many objects protected by a DRM in the Library’s collections. Perhaps the most obvious being video DVDs. The DVD specification includes two DRM measures—encryption using the CSS algorithm, and region coding –and there are a number of third-

party extensions such as Macromedia's RipGuard that some DVDs also contain. In order to preserve such material and archive it is a requirement and unavoidable to circumvent the DRM by running a programme on the hardware that will allow you to format shift and export the contents of the DVD into a non-proprietary environment.

DRM (Hardware)

As part of the Legal Deposit collection the Library acquires gaming software on magazine cover-mounts, and while a small part of the total collection, the issues associated with gaming DVDs illustrates well some of the issues around DRMs and hardware. Given the relative ease of hacking into a DRM and transferring gaming software onto a DVD-R the Xbox hardware has been configured so as not to read DVD-R discs meaning the back up of such material on disc is not a logical preservation solution. The best solution is therefore to modify the hardware which is an illegal act under UK law.

International Comparative Preservation Exceptions Table

	Are there restrictions on the type of in-copyright work that can be copied by Libraries for heritage and archive purposes?	Are there restrictions in statute on the numbers of copies that can be made by Libraries?	In the digital environment are there restrictions on format-shifting an original work for preservation?
Denmark	None	None	None
France	Not covered in French law.	Not covered in French law.	Not covered in French law.
Germany	None	None	None
Japan	None	None	None
Spain	None	None	None
UK	Sound, film and broadcast excluded.	One Copy Only	Permanent or semi permanent format shifting not permitted in Copyright Law.
US	None	Three Copies Only.	None

Schedule D – Criticism and Review

Essay from: Driving UK Research. Is Copyright a help or a hindrance? A perspective from the research community.

Legal academic Professor Lionel Bently uses three examples from his own teaching experience to highlight the difficulties with the current copyright regime. He calls for an extension to fair dealing provisions under UK copyright law to bring them into line with the fair use doctrine in the US.

As a legal academic, I am a 'beneficiary' of copyright protection. The articles I produce, the books I write, the reading lists I compile, the course materials I develop, even the examinations I set, are all protected by copyright and, since 1989, by 'moral' rights of attribution and integrity. My university – Cambridge – allows me to retain copyright in much of this material (though other academics are not so fortunate), only claiming ownership of the material I create in my administrative roles.

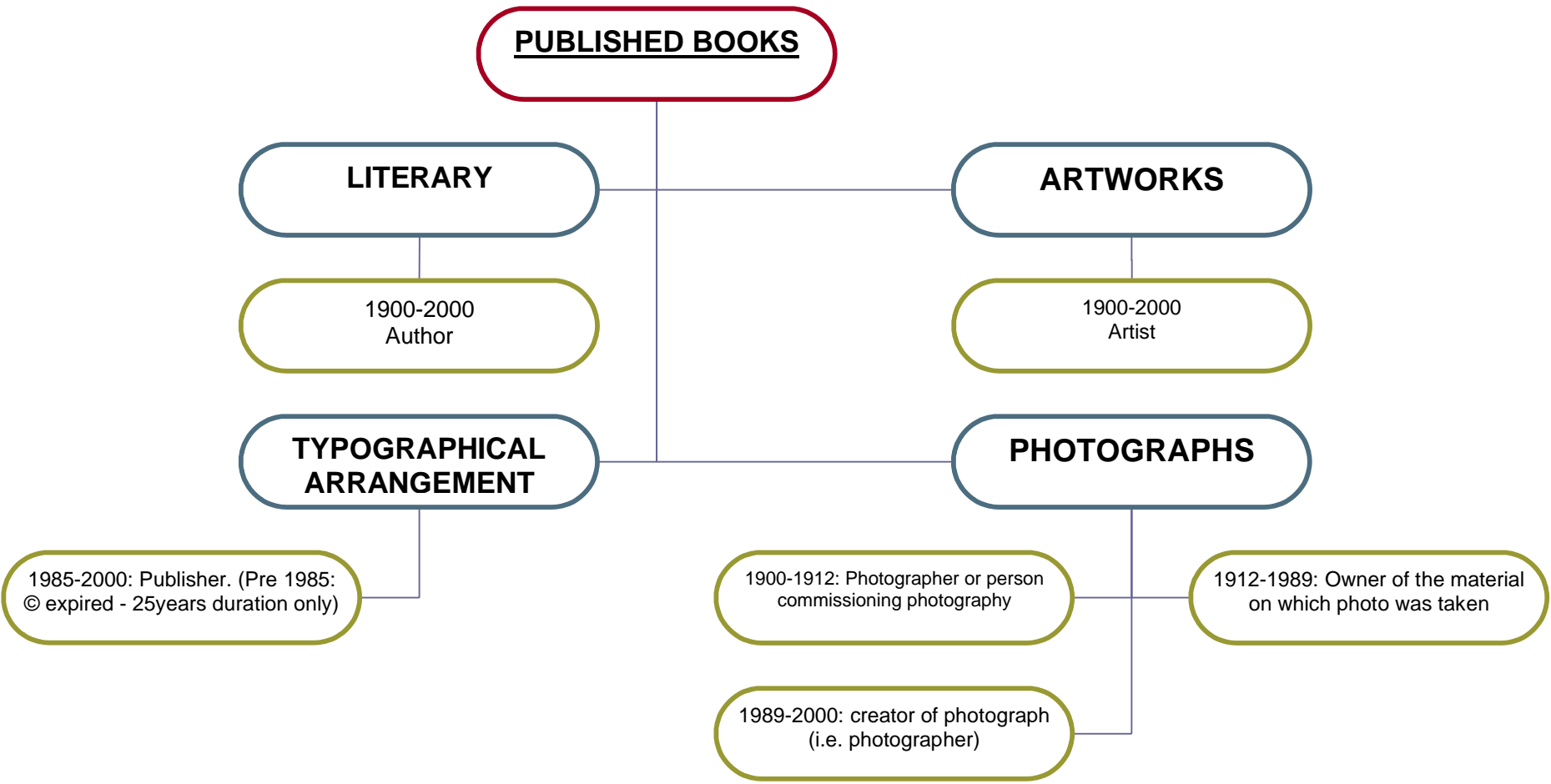
While I am able to benefit from the copyright system, and indeed do so financially, I mostly experience copyright as a burden both to my teaching and my writing. I have picked out three examples. While teaching a Master's level course entitled Legal regulation of the Music Industry, we wanted to examine cases on claims of copyright infringing and co-authorship in detail by giving students access to the relevant parts of the musical sound recordings themselves. Columbia University in New York has a wonderful website giving public access to the parts of recordings alleged, or found, to be infringement in cases that went to court. No permissions were required to create this database, Columbia relying on the 'fair use' defence. The creation of a similar site would simply not be possible under British copyright law: the 'fair dealing' defences in UK law would not cover these sorts of educational uses – indeed the "fair dealing for research" defence is not even available for sound recordings. But, as if to highlight the absurdity, while I could play the recorded songs to the students under s.341 of the CDPA, I would have to carry with me a bag containing each of the CDs because I could not legally copy for teaching purposes the recordings in order to create a compilation CD of 'copyright authorship cases' or 'copyright infringement cases'.

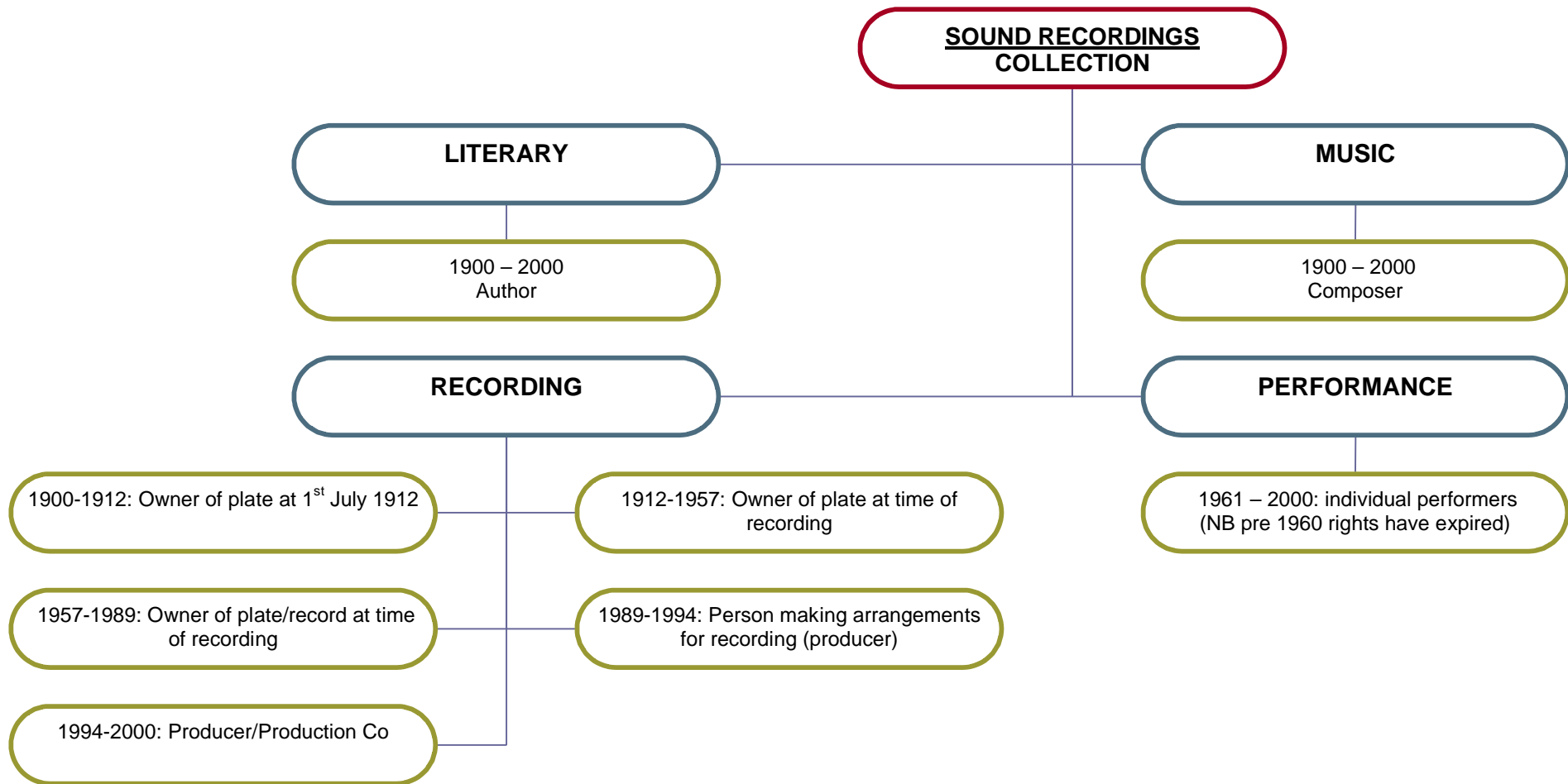
The second example of a situation where copyright law unduly restricts teaching activities concerns the use of 'presentation software' such as PowerPoint. The copying of an image to make a presentation is an infringement, as there is no statutory exemption. In fact the presentation, as a public display of an infringing copy, if done knowingly and 'in the course of business'² is a criminal act. I also write a textbook on intellectual property law which is illustrated with images of trade marks, designs and artistic works. Although it is certainly plausible to claim that many of these items are covered by a 'fair dealing' exception, the publisher insists that I and my co-author have the consent of the copyright owner. But identifying and locating the copyright owner is not at all straightforward. Sometimes the photographs have been taken by lawyers involved in the litigation, sometimes by an employee of the company that claims design rights or trade mark rights in the subject matter represented. Because the effort and skill involved is minimal, many will not even appreciate that the photographs are legally protected. Few of the copyright holders, if any, will have established mechanisms to grant licences. In

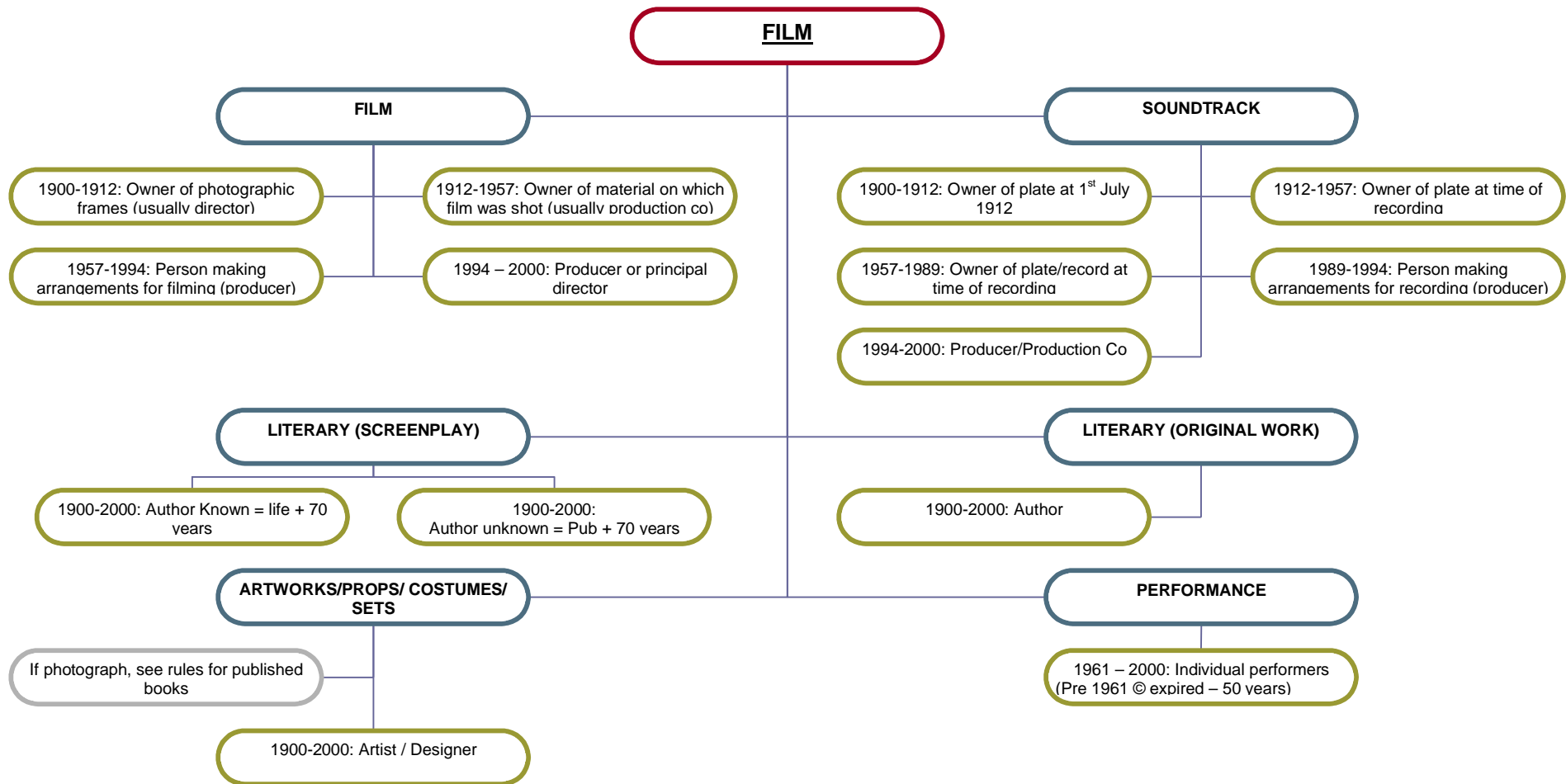
other countries, such as the United States, such uses would be allowed, freeing the academics to write even longer law review articles. But in Britain, obtaining such permissions is just one more burden.

As both a beneficiary of copyright, and someone who wishes to use copyright protected material, one might legitimately ask whether I would be prepared to sacrifice the 'benefits' if I could be relieved of the burdens. While my answer would be a resounding 'yes', the truth is that with some relatively limited reforms of copyright, the system could continue to provide the benefits (and incentives) without imposing the burdens on education, free expression, and intellectual progress. 1 Section 34, CPDA: Performing, playing or showing work in course of activities of educational establishment: (1) The performance of a literary, dramatic or musical work before an audience consisting of teachers and pupils at an educational establishment and other persons directly connected with the activities of the establishment – (a) by a teacher or pupil in the course of the activities of the establishment, or (b) at the establishment by any person for the purposes of instruction, is not a public performance for the purposes of infringement of copyright. (2) The playing or showing of a sound recording, film, broadcast or cable programme before such an audience at an educational establishment for the purposes of instruction is not a playing or showing of the work in public for the purposes of infringement of copyright. (3) A person is not for this purpose directly connected with the activities of the educational establishment simply because he is the parent of a pupil at the establishment. 2 CDPA, s.107(1)(d). "Business" includes "a trade or profession": s. 178.

Schedule E – 20th Century Rights Summary







Schedule F – Orphan Works Case Study

Professor Maggie Gale at Manchester University recently contacted the British Library to request copies of plays held within the Library's Lord Chamberlain's collection. This collection is unique and incredibly valuable to researchers as all plays to be performed in Britain between 1737 and 1968 had to be submitted to the Lord Chamberlain's office.

Professor Gale's research involves investigating the relationship between performance and legislation and how notions of citizenship and nationhood were re-constructed between 1900 and the early 1930s. As a virtually complete repository of all plays performed in Britain during this time it is impossible for Professor Gale to find copies of some of these plays anywhere else and five of them in particular were of significant importance to her research. However due to the copyright status of the works needed, many of which were written by jobbing playwrights writing under pseudonyms and are therefore anonymous or orphan works, it is probably not permitted in law for the Library to supply whole copies of these remotely even to an individual.

In order to gain the permissions required under copyright law to be supplied a whole copy of the work Professor Gale undertook an extensive due diligent search which included reference to the online WATCH database of writers, artists and creators hosted by the University of Texas, the UK Society of Authors, specialist websites on World War One, British Periodicals Online as well as in depth enquires through search engines such as Google. For these five titles Professor Gale spent an entire day searching for the rights holders but none of them could be traced. Some of the bodies representing creators who were contacted advised that due to the non-mainstream nature of the material, the copying and remote supply would entail a very low risk of copyright infringement claims.

If a copy of the plays were not made in contravention of copyright law the cost for Professor Gale to undertake this research in situ at the British Library in London is a £70 train fare, £300 on accommodation and £75 expenses per visit on the basis that each trip would require three days work. In order to complete her current studies on these plays Professor Gale estimates that 10 such trips would be necessary at £445 each, costing a prohibitively expensive £4,500 - money which is not readily available in academia in the current economic climate.

In many other EU member states such supply would fall under the research copying exception.

Researchers Views on Copyright

Results of a British Library Questionnaire: Copyright and the Digital Age

Schedule A

Results of a British Library Questionnaire: Copyright and the Digital Age

1. 'Fair Dealing' allows someone for his or her own non-commercial private research to copy a part of a creative work. For example, copying a whole book for private non-commercial research would probably not be Fair Dealing, but copying a chapter would be.

Currently Fair Dealing only covers literary, dramatic, artistic, and musical works. Would you support the extension of Fair Dealing to cover sound recordings, film, and broadcast?

Yes, I would support	260	81.30%
No, I would not support	26	8.10%
Don't know	34	10.60%
No reply	-	-

2. In the age of the internet, for non-commercial research purposes you should be able to copy parts of a literary work, like an online article from the BBC website, and parts of a news broadcast, film or sound recording.

Strongly agree	197	61.60%
Tend to agree	101	31.60%
Neither agree nor disagree	5	1.60%
Strongly disagree	13	4.10%
Don't know	3	0.90%
No reply	1	0.30%

3. There should be different laws for Fair Dealing depending on whether the material is in paper form or electronic form. For example if a library has a copy of a book on its shelf, and the same copy electronically, different laws should apply to their access.

Strongly agree	11	3.40%
Tend to agree	40	12.50%
Neither agree nor disagree	32	10.00%
Strongly disagree	217	67.80%
Don't know	18	5.60%
No reply	2	0.60%

4. Researchers attached to an educational establishment should be the only group able to enjoy limitations and exceptions like fair dealing.

Strongly agree	8	2.50%
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Tend to agree	16	5.00%
Neither agree nor disagree	40	12.50%
Strongly disagree	244	76.30%
Don't know	10	3.10%
No reply	2	0.60%

5. Alternatively, anyone conducting non-commercial research in the digital age should be able to enjoy limitations and exceptions like Fair Dealing.

Strongly agree	181	56.60%
Tend to agree	96	30.00%
Neither agree nor disagree	20	6.30%
Strongly disagree	11	3.40%
Don't know	7	2.20%
No reply	5	1.60%

6. Researchers should be able to have a copy of a research article sent to his or her personal e-mail address rather than having to be present in the library, university or school.

Strongly agree	164	51.20%
Tend to agree	101	31.60%
Neither agree nor disagree	27	8.40%
Strongly disagree	21	6.60%
Don't know	5	1.60%
No reply	2	0.60%

7. In order to safeguard the interests of the copyright holder a library should monitor the material a researcher uses. (Even if the material is e-mailed, downloaded and accessed through the researchers personal PC)

Strongly agree	59	18.40%
Tend to agree	105	32.80%
Neither agree nor disagree	46	14.40%
Strongly disagree	92	28.70%
Don't know	15	4.70%
No reply	3	0.90%

(See www.bl.uk/ip for the full survey – 320 respondents in total).

Miscellaneous Comments from Respondents:

“Limitations and exceptions are vital to research and the facilitation of research.”

“I’m concerned that digital should not be seen as different – it’s not regarded as different for media exceptions such as reporting current events; why should it be different for any other exception?”

“I would support the extension of fair dealing because these mediums (sound, film and broadcast) are an increasingly important part of culture and society and therefore increasingly relevant to non-commercial research.”

“Recordings, film, and broadcast materials, are all extremely important in much of today’s research. You cannot adequately research music, films etc. without having copies to work on.”

“If fair dealing is allowed for books then it is a natural progression for it to be applied to sound recordings, film and broadcast.”

“In creative or research content there is no essential difference between any of these media.”

“As boundaries between media blur the need to consider and make reference to other media increases in research.”

“I think copyright law should be consistently applied to all media.”

“If you can copy part of a book for research purposes it would seem logical that an extract of a sound recording or film could be treated equivalently.”

“Much information is now conveyed via media other than traditional print (podcasts of speeches come to mind) and one should be able to use them.”

“I support the extension because I do not see why different creative products should be treated differently in terms of fair dealing.”

“Increasingly researchers will need to access sources other than those traditionally used.”

“Fair Dealing should cover anything that is created and published/produced for public consumption by an individual.”

“So many people work part-time on degrees and often rarely attend their educational establishment that personal e-mail is such a useful way of obtaining articles.”

“In studying the work of an actor, director, film company etc. as I have done in the past, access to rare and otherwise inaccessible materials is paramount. A film text is exactly the same as the text of a novel or play. It demands careful study and analysis. To fully appreciate and analyse sections of the text one should be able to watch and rewatch

materials, and obtaining copies of sound, film or broadcast is the only way to ensure accuracy with this.”

“I might use archive material in researching historical documentaries or to research social or cultural history. I might also listen to sound material for biographical research.”

“I might use a clip from a radio program, or similar, as part of my thesis or a presentation. I’m working on Henry James – there might be a dramatisation of his work which I could use.”

“I am writing my dissertation on pantomime and recorded examples of pantos or documentaries would be useful.”

“Clips from plays or adaptations of books, etc. would help to improve my understanding of the reception of the work in question when, for example, writing an essay.”

“I am currently writing about CIA activity in support of the US Cuban Trade Embargo since 1960, in particular CIA’s admitted programme of sabotage of Leyland buses to Cuba. In 1964 an East German freighter carrying 42 Leyland buses sank on the River Thames following a collision with a Japanese vessel. It is believed that the CIA had arranged for a deliberate collision. The report of the Trinity House Pilot for the Japanese vessel has gone missing. An ITV news programme later indicated that it could not have been CIA inspired nor that the pilot was blameworthy. I have used a transcript of this particular item to support my researches but the film clip would be very useful given that I now have data to question if not disprove the ITV news clip’s contentions.”

“One of my ongoing research projects is on the use of technology in lifelong learning ... limited things are written but there is considerable amount of video interviews by specialists on the issue.”

“I have a research interest in the BBC’s handling of folk music in its broadcasts from the early twentieth century, and it would therefore be of great benefit if these archives were more easily available.”

“If I’m researching a singer or actress and want copies of their work to evaluate – how am I meant to do this?”

“My research area is theatre and intermediality. Where theatre references or draws on other media, I would like to be able to draw together fragments and parts of other performances, recordings etc to work on analysis.”

“I am preparing a PhD and teaching visual culture and regularly make PowerPoint presentations that could be enriched by moving image.”

“To support written work in the study of, for instance, early recordings; it would be terrific to be able to download digital copies of otherwise unobtainable recordings.”

“It can be very useful to consult sound archives when researching a biography. It is an unreasonable burden to require that the researcher travel to the library each time

something needs to be checked – and it increases the cost of running the library, and the carbon footprint of the final biography!”