Copyright and Research in the Humanities and Social Sciences

A BRITISH ACADEMY REVIEW

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The British Academy
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Foreword by Baroness Onora O'Neill President of the British Academy

As the U.K.'s national academy for the humanities and social sciences, the British Academy is well placed to consider how the current copyright system is affecting research in these disciplines, especially since Academy Fellows are both producers and users of original copyright work.

Because our Fellows have these dual roles, they are especially conscious of the need for balance which is inherent in copyright. Creative activity requires protection of the moral and economic rights of the creators of original material, on the one hand, and the opportunity to use and develop existing material in new and original forms, on the other hand. The maintenance of that balance is a difficult and delicate task, and the Academy believes that in recent years the balance has swung too far in the direction of protecting existing material at the expense of facilitating the development of original material.

This is one of a number of reports by the Academy focusing on current policy questions. An earlier Academy policy report, "*That full complement of riches: the contributions of the arts, humanities and social sciences to the nation's wealth*', demonstrated the vital contributions made by these disciplines to the UK's economic advantage, social development and cultural enrichment. The difficulties that researchers in these disciplines are experiencing, which are the result of the way in which the law is structured and implemented, has implications therefore for the UK's well-being. This report illustrates these problems and contains specific proposals for consideration by government and other bodies.

I am deeply grateful to Professor John Kay, who chaired the working group which oversaw the review, and also to the other members of the group and to the members of Academy staff who have contributed significantly to this report.

Preface by Professor John Kay, F.B.A., Chairman, Review Working Group

The British Academy, and its scientific counterpart the Royal Society, are guardians of the intellectual property of the nation. They are committed both to the defence of existing intellectual property and to the creation of new intellectual property.

In recent years, both bodies have become concerned that extensions of the scope of legal intellectual property protection may damage rather than enhance the defence and creation of intellectual property: see the Royal Society's report, *Keeping science open: the effects of intellectual property on the conduct of science,* and this present report from the British Academy. There is no paradox here. It should not be assumed that more extensive legal protection for intellectual property is always better, or that the public interest in intellectual property can be equated with the economic interests of existing rights holders. Such economic interests need to be balanced against the public interest in the wide dissemination of the new ideas and findings and creative activity. Learned societies are particularly aware that existing knowledge, often protected by intellectual property, provides the basis from which new material, in scholarship and the creative arts, is developed.

This review has been concerned with aspects of this latter issue: how existing copyright material is used by scholars to create new and original scholarly material which will subsequently attract its own copyright. Our concern has been that this process may be – is being – inhibited by excessively tenacious defence of rights in existing intellectual property. The evidence from our inquiry has produced important instances of this, especially in art and music.

Copyright law has always recognised the need to give opportunities for using established material in new work, in providing exemptions for private study and research and for criticism and review. In this report, we recommend how these exemptions can be made more effective in securing their intended purposes.

I am grateful to the members of the working party for their support and for the extraordinarily diverse range of inputs they have brought to our enquiry, and above all to our secretary, Vivienne Hurley, who has made possible the production of this report and made easy the proceedings of the group and the responsibilities of its chairman.

Introduction

Why the Review was established

1 All creative activity builds on the creative activity that has gone before. 'If I have seen further, it is because I have stood on the shoulders of giants'. This observation, attributed to Newton, describes the nature of all advance in knowledge and understanding. A regime which is unduly protective of the interest of existing rights holders may therefore inhibit, or even stifle, the development of original material.

2 The intellectual property regime is crucial for the development of, and access to, knowledge. Copyright seeks to protect the rights of authorship while securing the dissemination of knowledge. It protects the form of expression of ideas, but not the ideas, information or concepts expressed and applies to all original literary works (including computer programs and databases). However, recent developments in technology, legislation and practice have meant that the specific exemptions, which are provided by copyright to enable scholarly work to advance, are not in some cases achieving the intended purpose. The British Academy is concerned that these developments are hindering the progress of academic research in the humanities and social sciences, and it therefore set up a Review under the chairmanship of Professor John Kay, to examine the role of copyright exemptions in the promotion of scholarship.

The approach taken

3 The Review has been narrowly focused, not considering issues concerning the scope and purposes of copyright more generally, except to the extent necessary to meet the Review's objectives, nor with the use of copyright material in teaching. Its work has been carried out by a working group of eight members, appointed by the British Academy and drawn from a range of subjects in the humanities and social sciences, including those with known concerns about copyright. Under the chairmanship of Professor John Kay, the working group met on a regular basis between November 2005 and June 2006 to oversee the direction of the Review.

4 In addition to consulting key bodies concerned with the issues under consideration, the working group canvassed Academy Fellows for examples of restrictive interpretations of copyright which they thought deserved its attention. Fellows were also asked whether they had any experience of cases in which exemptions to copyright provided for scholarly purposes appeared too wide, or to have been interpreted too expansively, and where inappropriate use appeared to have been made of fair dealing or criticism and review exemptions. In the event, all comments by Fellows concerned the problems they had encountered in using the copyright material of others rather than abuse by others of their own copyright.

5 The Academy also commissioned the AHRC Centre for the Study of Intellectual and Technology Property Law at the University of Edinburgh to support the work of the Review. The Centre has also been instrumental in helping the group to draw up guidelines whose aim is to set out what can and cannot be done under current copyright law. The guidelines are available from http://www.britac.ac.uk/reports/copyright. A preliminary summary of their content is presented in Appendix B. The working group is very grateful for the support and guidance it received from the Director of the Centre, Professor MacQueen, and his colleagues, Ms Molly Torsen and Ms Dinusha Mendis.

The working group also took the lead in preparing the Academy's response to the call for evidence that was issued in February 2006 by the Gowers Review of Intellectual Property, which was established by the government to examine the UK's in intellectual property framework, and determine whether improvements can be made to it, especially in the

context of rapid technological change and globalisation. The Academy's submission to Gowers is available from http://www.britac.ac.uk/reports. The timetable of the Academy's Review means that this report has been published before the results of the Gowers Review are known. This report develops many of the arguments and recommendations presented to Gowers.

The questions addressed

7 The working group focused its attention on the questions shown below.

1. Are researchers in the humanities and social sciences experiencing serious or insurmountable problems caused directly by copyright law?
2. If so, what is the nature of these problems and are they confined to particular subject disciplines?
3. Are there problems because the legal exemptions are insufficient?
4. Or, is it because the scope of the provisions is being narrowly interpreted, and there is uncertainty about the law?
5. If so, can more be done to clarify the various exceptions?
6. Will developments in information technology present difficulties in the future?

Background

A brief history of copyright law in the UK

8 The history of copyright in the UK is usually traced back to privileges granted by the monarch in the early modern period before 1700, giving printers (but not authors as such) exclusive rights to print and distribute books. The author gained the exclusive 'right and liberty' of printing books through the Statute of Anne 1709; a right and liberty usually exercised, however, by granting a licence to the actual printer. The Statute of Anne confined the right to a 14-year term, renewable once. Questions about whether the author was entitled to a perpetual right to copyright under the common law, or whether the statute had restricted its duration, were answered by the courts in favour of the latter view. Henceforth copyright was clearly a right dependent only on statute, lasting for only a limited period of time.

9 During the nineteenth century, however, copyright was extended as to subject matter, bringing in art, drama and music as well as literature, and the term of the right grew in length. The law also developed an international character when the Berne Convention for the Protection of Literary and Artistic Works 1886 provided a minimum framework of principles to be observed around the world. A key feature of this Convention was the setting up of a balance between protecting the intellectual work of creators whilst also providing the public the freedom to access and build on such works. This underpins concepts of fair dealing with a copyright work not requiring the right-holder's licence or constituting infringement if done without authorisation. A further result of the Convention is that copyright can now be enjoyed world-wide. But it is important to stress that national copyright laws remain significantly different from each other in many respects, and that one can only have in any country the rights which that country has chosen to establish. The present analysis is therefore limited to law in the UK, and activities in this country.

10 The late nineteenth and twentieth centuries saw further expansion of copyright to cover new ways of producing and disseminating creative works: photographs, films, sound recordings, broadcasts, computer programs and databases are all protected by copyright. Most recently, the Internet and the expanding use of digitally based media have thrown up new issues with

which copyright – sometimes in amended form - has had to deal. The length of the copyright term has continued to be extended. The UK's membership of the European Union has also required participation in a continuing project for the harmonisation of copyright across the Union, achieved here by continuing amendment of the present governing statute, the Copyright, Designs and Patents Act 1988 (CDPA 1988). Although this has brought the various national laws of the member states closer together, they remain distinct in a number of important aspects: we have not yet reached a Europe-wide copyright law.

Copyright exemptions

11 Existing UK law provides that scholars may use copyright material for fair dealing purposes of criticism or review and for non-commercial research, and does not require the consent of the rights holder for such use. No fair dealing with a literary, dramatic, musical or artistic work will constitute infringement of the copyright in the work if it is carried out for one of the permitted purposes. The permitted statutory purposes for all literary, dramatic, musical and artistic works are:

- research for a non-commercial purpose accompanied by a sufficient acknowledgement, unless such acknowledgement is impossible for reasons of practicality or otherwise;
- private study;
- criticism or review, whether of the work whose copyright is said to be infringed or of some other work or of a performance of a work, which is accompanied by a sufficient acknowledgement;
- reporting current events.

Fair Dealing

12 Fair dealing is an exception to copyright or database right infringement that allows use of copyright material in certain cases. The dealing with the copyright work must be fair, but the Act contains no elaboration of what is or is not fair. In comparison, the list of factors to be taken into account under fair use provisions of the US Copyright Act, include such matters as whether the use is of a commercial nature or for non-profit educational purposes, the amount and substantiality of the portion used in relation to the whole work, and the effect of the use upon the market or value of the copyright work. Some of these (e.g. commercial use) are built into the structure of the specific exceptions in the UK, and others have emerged in the case law.

Duration

13 Before the CDPA 1988, literary works[1] in existence but unpublished as of 1 August 1989 enjoyed perpetual copyright; this will now expire on 31 December 2059. Otherwise the copyright lasts for the lifetime of the author plus 70 years. If the work is of unknown authorship, copyright expires 70 years after the work was made or, if published during that period, for 70 years from publication. With regards to sound recordings and broadcasting, the term of the copyright is currently 50 years. Film, sound recordings and broadcasting have no provision for fair dealing for the purposes of non-commercial research or private study.

1 "The term literary work means any work, other than a dramatic or musical work, which is written, spoken or sung, and includes tables or compilations, computer programs and databases" British Copyright Council.

The definitions of the term 'research' and 'non-commercial'

14 The meaning of the word 'research' appears never to have been judicially considered in the UK. Prior to the 2003 amendments it was linked to 'private study', but the two have now been severed, so must each have a separate rather than a cumulative meaning. The distinction between commercial and non-commercial research is also not clear.

The uses of copyright material in scholarship

15 The uses fall into four broad categories.

The first is the normal progression of scholarly enquiry – the process of standing on the shoulders of giants. New ideas are based on existing ideas, and the creator of new ideas must, within the canons of the academic tradition, describe the relationship between his ideas and those of prior scholars. Such use appears to be protected by the distinction, central to English law, between ideas (which are not protected by copyright) and the expression of ideas (which is protected). But while this distinction seems relatively clear in the natural sciences, in certain disciplines within the humanities and social sciences, particularly art and music, the idea and the expression of the idea are inextricable.

The second area is where the new work is, by its very nature, derivative of some original work or works. The classic example is parody or pastiche, but examples of concern to the scholarly community would include the compilation of indices and concordances or the analysis of copyright data.

The third area is the normal scholarly function of criticism and review, which is the subject of specific legal exemption. In the past book publishers established principles in this area, although the guidelines they put forward have now been withdrawn. But other publishers were not parties to these agreements, and the requirements of, say, art history, where criticism frequently necessitates reproduction of the entirety of the original work, are different from those of literary criticism.

The fourth area is IP in databases. It is increasingly the case that printed source material, especially if out of copyright, is being gathered together in large commercial databases, to which access is only possible on payment of substantial subscription or other charges. These databases enjoy copyright and/or the recently introduced "database right".

Past and current studies that have a bearing on the Review

16 Recent developments in information technology, which have reduced the cost of copying as well as distribution, together with the growing complexity of IP legislation, have helped to raise the profile of IP. There has recently been considerable public debate in the UK and overseas about the value of the intellectual property regime, and there were a number of enquiries in train at the time of drafting this report.

17 The debate has focused on whether the UK has got the balance right between owning and having ideas if the knowledge economy is to thrive. The issue has polarised opinion. On the one hand, there is growing recognition of the economic benefits of owning ideas and the ways in which IP can be harnessed to generate revenues, and there is a particular concern that the creative industries may need more protection for IP. "This government wants to ensure that we consolidate the UK's comparative advantage as a place for patent-intensive and creative industries … .In the new global economy, innovation has a central role to play in economic success, and we need to make certain that we have a system of intellectual

property rights that is fit for the 21st century."[2] On the other hand, it is argued that recent changes in the law's scope and breadth have "resulted in an intellectual property regime which is radically out of line with modern technological, economic and social trends. This threatens the chain of creativity and innovation on which we and future generations depend."[3]

The Gowers Review

18 The Gowers Review[4] is part of a series of government activities in this area. In recognition of the tensions that have arisen in the existing IP regime as a result of globalisation and technological change, the Chancellor of the Exchequer set up the Review in December 2005, to examine the UK's intellectual property framework. The Review, chaired by Mr Andrew Gowers, will report to the Chancellor, the Secretary of State for Trade and Industry (DTI) and the Secretary of State for Culture, Media and Sport (DCMS) in Autumn 2006. It is focusing on: regime administration and complexity; infringement and fair use in the digital environment; copyright term for sound recordings. The Review will look at both the instruments (patents, copyright, designs) that are provided by government to protect creative endeavour, and also at the operations: how IP is awarded, how it is licensed in the market, and how it is enforced. It will examine whether improvements could be made and, as appropriate, make targeted and practical policy recommendations.

Other enquiries

19 These include:

(a) In October 2005, the Royal Society of Arts (RSA) launched the Adelphi Charter on Creativity, Innovation and Intellectual Property. The Charter set out new principles for copyrights and patents, which aimed to ensure that everyone had access to ideas and knowledge, and that intellectual property laws did not become too restrictive.

(b) *Keeping science open: the effects of intellectual property policy on the conduct of science,* Royal Society, 2003[5]. The report considered whether scientific research was being hindered by the interpretation and use of IP policies, and made a number of recommendations for improvement. It drew attention *inter alia* to the Society's concerns that scientific research was being impeded by copyright and database right laws, and that scientists were not able to gain access to databases on reasonable terms. At the time, the EU Directive on the legal protection of databases (implemented in the UK in 1998) provided one of the highest levels of protection for databases anywhere in the world, including the USA.

(c) In the second half of 2005, the European Commission undertook a review of the Database Directive. The review sought to "to assess whether the policy goals of Directive 96/9/EC on the legal protection of databases (the Directive) had been achieved and, in particular, whether the creation of a special *sui generis* right had had adverse effects on competition." The Directive had been introduced to stimulate the production of databases in Europe. The review showed that the EU production of databases had fallen to pre-Directive levels and that the gap between the European and

2 Lord Sainsbury, Innovating for Success: The intellectual property review and economic competitiveness, July 2006

3 Adelphi Charter on Creativity, Innovation and Intellectual Property. Further information about the Adelphi Charter can be found from http://www.adelphicharter.org/

4 More information about the Gowers Review can be found from http://www.hm-treasury.gov.uk/independent_reviews/gowers_review_intellectual_property/gowersreview_index.cfm

5 http://www.royalsoc.ac.uk/document.asp?tip=1&id=1374

US rate of production had widened: "the ratio of European/US database production, which was nearly 1:2 in 1996, has become 1:3 in 2004." The report presents a number of options, including the possibilities of repealing the whole Directive or withdrawing the *sui generis* right. A further consultation is currently underway, seeking comments on the various options under consideration.

(d) All Party Parliamentary Internet Group (APIG) undertook a public inquiry on Digital Rights Management (DRM), with the aim of establishing how consumers, artists and the distribution companies should be protected in a continually evolving market place. DRMs are designed to track and oversee the use of works, and enable the content to be controlled. The APIG's report[6], published in June 2006, recommended *inter alia* that the DTI should reconstitute its moribund IP Advisory Committee, in order to address the complex issues surrounding DRM.

(e) The Institute of Public Policy Research (IPPR)[7] is undertaking a major study on the topic of "Intellectual Property and the Public Sphere", which aims to: facilitate dialogue between a wide range of stakeholders in the debate; highlight the economic, technological and democratic impacts of intellectual property regulation; illuminate the political choices and policy trade-offs to be made in developing a policy framework for future intellectual property regulation. The report will be published in Summer 2007.

The problems we identified in the humanities and social sciences

Summary

20 Key points include:

- Copyright law generally provides exemptions for fair dealing for private study and non-commercial research, and for purposes of criticism and review. These exemptions should normally be sufficient for academic and scholarly use.
- The problems lie in narrow interpretation, both by rights holders and by publishers of new works which refer to existing copyright material. These problems are acute in some subjects, particularly music, and history and film studies.
- Copyright holders have become more sensitive in defence of their rights, as a result of the development of new media, and are more aggressive in seeking to maximise revenue from the rights, even if the legal basis of their claims is weak.
- Risk averse publishers, who are often themselves rights holders, demand that unnecessary permissions be obtained, and such permissions are often refused or granted on unreasonable terms
- There is an absence of case law, because the financial stakes involved in each individual case are small relative to the costs of litigation.
- Publishers and authors are very uncertain as to the true position and misapprehensions are widespread.
- There are well-founded concerns that new database rights and the development of digital rights management systems (DRMs) may enable rights holders to circumvent the effects of the copyright exemptions designed to facilitate research and scholarship.

Illustrative examples

21 Quantitative evidence on the problems that have occurred and their impacts is not easy to come by, so the working group has had to rely on illustrative examples. The results of its surveys and consultations have shown that difficulties outlined below are relevant to a wide range of disciplines in the humanities and social sciences. Digitisation and the development

6 http://www.apig.org.uk/current-activities/apig-inquiry-into-digital-rights-management/DRMreport.pdf

7 Further information is available from http://www/ippr.org

of digital rights management systems are both likely to present further difficulties in the future. Our consultations showed that other sectors of the academic research community share several of the concerns we raise, so we are confident that the problems outlined below are widespread within the academic research community. In the course of these exercises, the following areas of concern and examples of subject-specific problems were most frequently drawn to our attention: image reproduction; musical extracts and sound recordings; the moral and economic interests of rights holders; unpublished and orphan works; databases; and DRMs.

What is research?

22 UK law has always provided for exemption from copyright for fair dealing in the course of research. There is, however, no statutory definition of research, or clarity on what differentiates the use of otherwise copyright material in research from its use in private study, or in criticism, or in review. Research involves the production of new ideas, whereas private study might represent only the consideration of existing ones. But this is a fine line indeed, and not one that it would seem appropriate for a publisher, or a court, to draw.

23 In some areas of scholarship, such as literary studies, the traditional view has been that 'research' is distinct from the publication of research. A distinction has also often been made between academic publication and commercial publication, although more often with regard to the level of charges than to the availability of exemption from copyright. But research without the publication of the results is barely if at all distinguishable from private study, and there is little or no public benefit in the production of new ideas unless they are made publicly available. At the same time the traditional distinction between academic and commercial publication has broken down with the commercialisation of scholarly journals and academic publishing. A distinction between a coffee table book, which typically is not the product of research, and a monograph which is, does however remain, if sometimes blurred.

24 The implications of the position that research was permissible, but the publication of research was not, would seem to be that scholars might use copyright material – new data, for example – in published criticism and review (replicating and commenting on the previous studies), or for purposes of private study: but that the copyright holder would have the right to charge for – and, perhaps more important, to veto - the publication of further analysis of the original data. It is evident that this would be a serious barrier to scholarship, and in some subjects – such as art history and musicology – an overwhelming one.

25 The 2003 regulations, which introduced a distinction between commercial and non-commercial research, and a requirement for 'sufficient acknowledgement' would seem to have clarified the matter. Research which might be 'commercial' or 'non-commercial' research is clearly an activity distinct from private study, and the sufficient acknowledgement obligation equally clearly envisages that 'non-commercial' research involves publication.

26 The position is, however, further complicated by any other provision of the same regulations which states that

> 'Copying by a person other than the researcher or student himself is not fair dealing if ... the person doing the copying knows or has reason to believe that it will result in copies of substantially the same material being provided to more than one person at substantially the same time and for substantially the same purpose.'

27 While this provision was intended to regulate classroom use of copyright material, it has been suggested (by Burrell and Coleman[8]) that 'its effect is to prevent entirely any reliance on the research exception to justify the inclusion of a substantial part of an earlier work in a published research paper'. This unintended consequence is a possible interpretation of this provision, although not an interpretation we find persuasive.

28 In the absence of clarity in either statute or case law, we focus on what we believe the position should be. We consider that the research exemption must extend to the publication of research. The exemption would be largely nugatory and the consequences seriously inimical to scholarship if it did not do so. We also consider that the distinction between non-commercial and commercial research should relate to the purpose of the research, rather than the purpose of the publication of the research. Non-commercial research is research whose objective is to put new ideas into the public domain for the public benefit – and will therefore normally be financed from public or charitable funds. Commercial research is directed to the purposes of a particular client or clients, and will therefore normally be funded by the client or clients benefiting from the research. Commercial research aims to cover the costs of the research, as well as the costs of the publication of the research, from the process of selling the research results. It would follow – and only on this definition would it follow – that scholarly work undertaken in universities or other publicly funded research institutions would generally be classified as non-commercial. Such non-commercial research would not be rendered commercial by the commercial objective of the publisher of an academic journal or monograph.

29 We believe that the present uncertain position requires clarification. If case law does not develop along the lines we describe above, or if rights holders insist on substantially different interpretations of the law, then we believe that statutory clarification will be necessary to protect scholarship and the public interest in research. Such clarification would be welcome in any event.

Image Reproduction

30 The greatest number of responses to our call for evidence concerned image reproduction, which is clearly a significant issue not only for researchers of fine art/history of art, but also in subjects such as archaeology, ancient history and medieval studies. Research in art history depends upon the reproduction of visual images, often in large numbers. Art historians wishing to reproduce published images face problems, because the criticism and revision provision is interpreted as covering reproduction of a small proportion of the copyright work: this does not normally meet the needs for criticism or review for these subjects, which will often require reproduction of the work in its entirety. For this reason these scholars almost invariably need to reproduce large numbers of images in their publications. The traditional problem in doing so has been that the exemptions provided by the copyright legislation for criticism and review have been held by copyright owners not to apply. This is aggressively policed by powerful copyright agencies which often refuse on principle to waive fees even if there may be no valid legal basis for the claim of a fee.

31 This problem is aggravated because British law is believed to confer copyright on a photograph or image of an original work even if the copyright in the original work has long expired. Museums and galleries are therefore enabled to claim copyright fees for non-copyright works in their possession. This has become more severe as museums and galleries all over the world, driven by the need to find additional sources of income, have demanded fees to use their photographs even in scholarly non-commercial publications.

8 R Burrell and A Coleman, *Copyright Exceptions: The Digital Impact,* Cambridge University Press (2005).

32 Publishers often insist in a mechanical fashion on permissions being obtained to use copyright material even if use of the material is probably covered by an exemption, or even on permissions being obtained for material which is probably outside the scope of copyright. The rights owner, or alleged rights owner, may in turn demand a substantial fee. The requirement to clear such permissions from owners is now a substantial overhead for any author; even if free permission is given, there is a considerable amount of paperwork involved. A book with, say, 200 images can cost between £20,000 and £40,000 in reproduction rights. One author of a recent catalogue raisonné of an artist's work told us that it cost more than £40,000 in rights and reproductions. In academic publishing – books and journals – the author is normally responsible for meeting these costs.

> "I currently have a book that is in press with Yale University Press, which has 250 images. My arguments depend on visual evidence. Depending on how many colour illustrations are included, the estimate for photographic costs (which I must meet) is in the range of £15,000 for works in the public domain, for an academic book with a print run of 1800."

> "There are over 100 black and white half-tone illustrations in the book, which was published by x Press in 2003. The cost of permissions was in the region of £4,000 of which the Press paid virtually nothing. Of course I applied to several foundations and University funds, but without success. Now the book has been reasonably successful, so that a paperback edition is in question. But the permissions to reuse for a paperback would be even more costly, so that I am in the painful position of being unable to offer the book to a wider readership."

33 It is clearly difficult for scholars to find the funds to meet these costs. The problem can be quite acute for certain subjects. For example, a snapshot of the awards made to art historians in the most recent round of the Academy's own small grants scheme show that 50 per cent of the monies awarded went towards meeting these fees (permissions and the costs of supplying the photographs). While there can be no objection to fees which reflect the actual costs of supplying the material, quote charges exceed, and frequently far exceed, this amount. Costs and policies appear to be very variable across the sector. Some institutions ask, not for a fee, but for a copy of the publication in which the image would be reproduced; while this seems reasonable on the face of it, authors and publishers are for different reasons sometimes reluctant to do it (especially with more expensive publications).

> "What does the author do if he has to shell out multiple copies of a book which costs £60 and is highly illustrated (most authors only get six free copies)?"

34 In the long term, digitisation should lead to reductions in the costs incurred by museums and galleries. We consider that the use by public galleries of their monopoly position in access to the national heritage to extract fees for scholarly use of their collections in excess of the actual costs incurred contradicts their fundamental public purposes.

35 The building of large databases is putting some publishers in a dominant market position, thanks to their high charges to others for access and/or permission to use material on a database. This appears to be particularly the case as regards reproductions of visual art. Whether the works themselves are still within copyright or not, there may be copyright in photographs of them. This may combine with the absence of any ability to acquire separate photographs of the works. As a result it may be very difficult to find a publisher for scholarly works of art history or criticism.

Musical Extracts

36 There are a number of common problems encountered by musicologists working in all areas, but they are illustrated at their most extreme in the study of popular music, where copyright holders generally have little commitment to or understanding of scholarship and where significant commercial interests are involved. This in turn makes scholarly publishers reluctant to rely on the fair dealing exemption. Rights holders in these areas often appear to be unfamiliar with the exemptions to copyright which exist for criticism and review and for private study and research. We know of authors who have been told by publishers that fair dealing exceptions apply to newspapers and magazines but not to books or articles, and of copyright holders who maintain that quotation under fair dealing is admissible only on payment of a fee. Publishers routinely insist on clearance for the reproduction of short extracts (e.g. four bars of music or one line of lyrics) which in our view fall clearly within the scope of the existing legal exemptions.

37 We are aware of cases where copyright holders have failed to reply to requests for clearance, but threatened litigation once the book was published; *Settling the Pop Score* by Stan Hawkins (Ashgate, 2002) had to be withdrawn from shelves and reissued for this reason. Sheila Whiteley's *Too Much Too Young: Popular Music, Age, and Identity* (Routledge, 2003) was also withdrawn and only reissued following extensive rewriting and omission resulting from withholding of permission by copyright holders. We know of cases where copyright holders have demanded the right to see and approve the complete book text as a condition of giving permission, and where permission was refused by a deceased musician's family on the grounds that the book implied that—as is almost universally known—the artist in question took drugs; such cases amount to an effective censorship of scholarly publication. There is in consequence of all this a tendency for musicologists to omit all quotations from publications on popular music, even though this is acknowledged to reduce the value of their analyses, or not to work on popular music at all. More information about the problems encountered in this field of scholarship can be found on the web site of The Mass Media Music Scholars' Press, inc, at http://www.mmmsp.com/mmmsp/background.html.

> "The biggest problem facing popular music research is the uncertainty. One can never tell how either music publishers or book publishers are going to respond to the use of quotation…the problem is not copyright law as such but its interpretation."

> Philip Tagg's doctoral thesis 'Kojak: 50 Seconds of Television Music' (PhD dissertations, Göteborg, 1979), includes in its introduction details every letter and phonecall he made to the publishers of the theme music and their lack of response. In the end he got hold of the score of the 'Kojak theme' music and also managed to get permission to reproduce it (in four-part arrangement only), but as he puts it "A minor fortune in telephone calls and postage costs and over thirty pages of correspondence should not be necessary conditions for the loan of eight pages of a photocopy of a pencilled manuscript".

Sound recordings

38 While popular music is again a particularly problematic area, owing to the commercial interests involved, the difficulties faced by musicologists and other scholars working with sound recordings are quite general. This is because, unlike US fair dealing, the current UK fair dealing exemptions apply to sound recordings for purposes of criticism and review, but not for purposes of private study or non-commercial research. The study of music as sound, rather than in the form of a written score, is an increasingly important area of musicology, and such research cannot be undertaken without copying (techniques of computational analysis, for instance, require the copying of a recording to hard disc). While there may be

defences to the claim that this activity breaches copyright involving analogy with other areas of copyright law, they have not been tested in the courts, and the result is that a major area of academic research is proceeding on a legal basis which is at best unclear. The effect of these problems is to skew musicological research away from the form in which listeners engage with music, and to inhibit research into popular and other musical genres in which the sound recording constitutes the primary text.

39 These problems will be greatly increased if the term of copyright for sound recordings is extended unless the fair dealing exemptions are extended, clarified, and can be utilized with greater confidence. It should be noted that, even with such extension and clarification, US experience shows that longer copyright terms for sound recordings result in an increased proportion of the recorded legacy becoming inaccessible[9]. It should also be recognised that sound recordings of the majority of old material are not available from the rights holders.

The moral and economic interests of rights holders

40 The findings of our various consultations showed that there was a lack of clarity about the nature and scope of the moral and economic aspects of copyright, and the two are frequently confused. The moral rights of the author relate to respect for his or her creative activity while the economic rights of the rights holder relate to the economic interests in commercial exploitation. While both kinds of right are important, it should not be taken for granted that the scope of the moral rights of the author should be identical with the economic interests of the rights holder, and distinct issues are involved with the exercise of each right. Copyright must not become censorship: this is inconsistent with requirements of free speech and the stimulation of creative activity and with the broader public purposes that copyright is designed to advance.

Unpublished works

41 These issues are particularly relevant to copyright in material such as unpublished letters and other personal material held on gift or deposit in publicly accessible national or local repositories. Some scholars are encountering problems when seeking to reproduce unpublished letters of deceased public figures, because their heirs are refusing copyright permission to quote material that they have seen or are imposing excessive charges on its use. As a result, many works are unnecessarily unavailable to academic researchers, and (in the words of the British Library) "complex rules are locking away creative potential and offering little economic or social value to society. Unpublished works represent a body of works with numerous difficult to understand durations, that through complexity and long durations of copyright in certain instances make the works difficult to use."[10]

42 Those holding such private material may simply refuse access to it. This is not a copyright issue. But where documents are publicly available, copyright claims may be made. Copyright law permits the researcher to refer to the content of a copyright letter without using its actual expression but this is not satisfactory as a legal position, creating dispute about what is expression and what idea, or for purposes of scholarship, where the exact wording of a phrase may be crucial to the interpretation of an idea. As to access itself, the author of the material may well have a legitimate interest in preserving his or her privacy during his or her lifetime, but the preservation of such interest for long periods after death can seriously interfere with historical scholarship.

9 A study for the Library of Congress has shown that the majority of the US recorded heritage is unavailable. See 'Survey of reissues of US sound recordings', by Tim Brooks and published by the Council of Library and Information Resources and the Library of Congress in August 2005 (http://www.clir.org/PUBS/reports/ pub133/contents.html)

10 The British Library's submission to the Gowers Review, April 2006

Orphan works

43 Orphan works are works either by authors whose date of death is unknown, and/or of which the rights holders cannot be traced. Scholars are frequently left in difficulty about the steps needed to comply with copyright requirements. In practice these problems are often addressed by demonstrating that 'reasonable efforts' have been made to trace the heirs of a deceased author. In UK law, however, there is statutory protection for such efforts only in relation to anonymous and pseudonymous works, and not with regard to works where it is simply the case either that the present holder of the copyright cannot be traced or the date of the author's death is uncertain. In January 2006, the US Copyright Office published the results of its study of the problems related to orphan works (see http://www.copyright.gov/orphan). The report made a number of recommendations, including the 'reasonably diligent search requirement' for the copyright owner and the 'limitation of the remedies that would be available if the user proves that he conducted a reasonably diligent search'. The British Academy's Guidelines on copyright and academic research in the humanities and social sciences (available from http://www.britac.ac.uk/reports/copyright) provide guidance as to what might count as 'reasonable efforts' in relation to anonymous and pseudonymous works, and some practical steps for other cases. It is clear, however, that the present law is incomplete in its coverage and lacking in practical utility for scholars and other researchers.

Databases

44 Developments in information technology have greatly changed the context within which IP exists, and are putting great pressure on the existing system of rights. It is increasingly the case that printed source material, especially if out of copyright, is being gathered together in large commercial databases, to which access is only possible, despite the absence of content copyright, on payment of substantial subscription or other charges. These databases enjoy copyright in their selection and arrangement and/or the recently introduced *sui generis* "database right" preventing unauthorised extraction and re-utilisation, which provide the basis for the charges imposed. Increasingly those unable to afford the charges may find themselves cut off from basic research material[11].

45 A database has copyright in the selection and arrangement of its contents, provided that that selection and arrangement manifests and 'intellectual creation' of the maker. A database failing to meet the 'intellectual creation' standard may nonetheless have the *sui generis* right, provided that the maker has made a 'substantial investment' in the 'obtaining, verification or presentation of the contents' of the database. The recent ruling by the European Court of Justice that 'creating' the data in the first place was not 'obtaining' for these purposes has meant that a number of databases fall outside the *sui generis* right, because of the difficulties of satisfactorily meeting the definition of 'obtaining', and rely instead on copyright for protection. With database rights there is another uncertainty – how much can one take before offending the right, as constant little borrowing will be an infringement.

46 We are concerned that the Database Directive is at once vague and wide-ranging and fails to contain the exemptions for private study and research and for criticism and review, both in respect of database copyright and the *sui generis* database right. These exemptions are

11 "The Working Party noted with interest, however, the Google Print Library project, which if achieved will produce a vast database of much out-of-copyright writing as freely available to Internet users as any other of the Google services, plus a system for searching within the text of in-copyright works (see http://books.google.com). It is also understood that a similar project in relation to out-of-copyright books is under way between Microsoft and the British Library (see http://www.bl.uk/news/2005/pressrelease20051104.html), although the MSN Book Search facility did not appear yet to be operative at the beginning of September 2006."

essential to the balance of rights and interests inherent in copyright and associated legislation. As an increasing proportion of material takes a digital form, the scope of even the current exemptions may be seriously undermined.

Digital rights management systems (DRMs)

47 Given the importance of databases to academic research and the growing amount of work that is being published electronically, it is important that academic researchers are able to access this material, whether through fair dealing exceptions, or on reasonable terms. However, the development of specialist technologies (DRMs) is threatening to inhibit access for the purposes of academic research even where fair dealing exceptions are applicable or, indeed, the basic material is out of copyright. DRMs are making access available only in return for payment and are locking away valuable material, because they can over-ride both fair dealing exceptions and the term of copyright. "The technologies are extending beyond the law they are supposed to uphold."[12]

48 The results of our various consultations showed that there are growing concerns that issues related to DRMs will become much more significant for researchers in the humanities and social sciences in future decades as increasing amounts of material are likely to become available only in digital form. A number of US libraries have already digitised their collections, and it has been estimated that between 80 to 90 per cent of all journals published in the UK are available electronically. The British Library's submission to the Gowers Review also illustrates the potential difficulties that are already occurring:

> "DRMs are given total protection under EU Directive, with no exceptions for legal circumvention in the interests of disabled access, long-term preservation or where the DRM prevents fair-dealing use. DRMs do not have to expire, and can effectively prevent the work reverting to the public domain at the expiry of the copyright period. As the Library prepares for legal deposit of digital items we are discovering that DRMs can pose a real, technical threat to our ability to conserve and give access to the nation's creative output in perpetuity."

49 The effect of DRMs may be to make ineffective the existing exemptions under copyright, which are carefully constructed to maintain a balance between the economic interests of rights holders and the public interest in the development of scholarship and the creation of new original material.

Conclusions and Recommendations

Conclusions

50 Whilst copyright law provides specific exemptions to enable creative and scholarly work to advance, our findings show that these exemptions are in some cases not achieving their objectives, because the scope of the provisions are increasingly narrowly interpreted. Historically, the main issues related to printed material. Scholarly publishers, along with scholars themselves, had a common interest in securing both the protection of existing original material and the dissemination of new material. There was therefore a distinction between commercial use, mainly directed at the economic exploitation of original material, and scholarly use, mainly directed to the academic exploitation and development of original material, and permissions were (if required) readily granted for the latter use. This

12 Sue Charman, Executive Director of the Open Rights Group which campaigns on digital rights issues.

distinction has now broken down because copyright holders are actively looking to maximise the revenues from copyright material, and are demanding high fees for its use; and publishers are insisting that unnecessary permissions nevertheless be obtained, since they are becoming increasingly risk averse and are not prepared to stand up to unreasonable demands from copyright holders. Even if the legal basis for these claims is weak, uncertainties about the outcome, and the risks of substantial damages and costs, inhibit a robust negotiating response. There is in consequence an absence of case law. Scholarship in many disciplines within the humanities and social sciences is thereby being impeded.

51 The cost to the higher education sector as a whole is significant as is indicated by the estimate drawn up by the Society of College, National and University Libraries (SCONUL) in its submission to Gowers: "The indirect costs in higher education (through delays and difficulties in clearing rights) are very hard to estimate. [SCONUL has] attempted an estimate of the static costs in higher education and have arrived at a minimum figure of the order of £30 M/year." These costs are, however, purely administrative costs. The real issue is impediment to scholarship and the creation of new original works, and the costs here are not calculable.

52 In drawing up our recommendations, we have been guided by two basic principles. The first is that we regard non-commercial research as research whose principal objective is public benefit rather than private profit, i.e. where the primary purpose is to put new knowledge or synthesis in the public domain rather than to recover the costs of the underlying research (as distinct from the costs of publication of the research) from users. The second is that fair dealing, in relation to copyright exemptions, is activity which does not prejudice the normal commercial exploitation of the economic interests of the rights holders, in line with the provisions of the Berne Convention. This means that private study and non-commercial research, and criticism and review, are not in themselves anticipated sources of revenue for the rights holder, but that use for these purposes should not significantly interfere with the anticipated sources of revenue for the rights holder – generally, fees for the sale or reproduction of the original work. The question relevant for scholars would therefore frequently be whether the scholarly use competes with the primary use. Criteria such as the proportion of the copyright work reproduced might be a practical guide to this issue, but would never be definitive, and other considerations, such as the intended audience and the price at which the scholarly work was available would also be relevant.

Recommendations

53 These findings lead us to the ten recommendations which are shown below. To help address the current uncertainties and confusions about the scope of copyright exemptions, the working group has produced a new set of guidelines based on the general principles outlined in this report, which, while they do not represent a statement of the law, will aim to clarify the current situation and it is hoped will have considerable moral force in the event of dispute. The guidelines are available from http://www.britac.ac.uk/reports/copyright. A preliminary summary of their content is presented in Appendix B.

Recommendation 1

Copyright policy and authors themselves must recognise that the interests of academic authors do not always coincide with those of the publishers who undertake to exploit their works. Authors of initial works may well wish to allow extensive quotation from them in subsequent work, whereas their publishers may see their own advantage to lie in charging high prices for permission to incorporate earlier material into subsequent analyses and criticisms. Authors should not accept the decision of their producer without question on

these issues, and should retain some power to require their own preference to be respected. Equally the authors of the derivative works should have reasonable opportunities to make reference to the first work.

Recommendation 2

Copyright must therefore provide reasonably broad and practically effective exemptions for research and private study and for criticism or review. Both these types of activity are particularly beneficial to the public interest in the lively development of new cultural material, which is a root objective of copyright protection.

Recommendation 3

The exception for research and private study under the 1988 Copyright Act has recently been narrowed in compliance with the EU Information Society Directive. By way of counterbalance, the new text should be given full effect, particularly in relation to the following:

(i) under its wording, "research" is to be treated as distinct from "private study". "Research" for these purposes should not only encompass the initial stages of an academic project when material is being collected but also subsequent stages which involve the analysis and publication of the results.

(ii) "Research" in this context should be regarded as "non-commercial" in any circumstances where the taking of copyright material is fair and the presentation of the results will be without charge to the recipients or will be at a charge which can only be expected to cover the reasonable costs of production and distribution, including the reasonable profits of a commercial publisher.

(iii) research which is financed by a research council or charitable foundation is presumptively non-commercial.

(iv) charges which are not covered by the exemptions, because the research to which they relate is commercial, should be reasonable and competition authorities and the copyright tribunal should be able to restrain abuse.

Recommendation 4

The exemption for non-commercial research and private study should apply equally to sound recordings, films and broadcasts. There are no reasons for differentiation on this point between these media and other published work.

Recommendation 5

The exception for criticism and review should apply with reasonable breadth, as has been laid down in recent UK court decisions. There should be no assumption that, just because this exception limits a right of property, it should be read narrowly. As with research and private study, the British Academy should publish its own guidelines on how to assess whether a taking for criticism or review is fair. A preliminary summary of the content of these guidelines is presented in Appendix B.

Recommendation 6

Where material has previously been published or made available to the public (even on a fee-paying basis), fair dealing for purposes of research and of criticism or review should apply to that material, even where the author or other rightholder seeks to prevent any quotation of it, either in general or in a particular case. Any protection of such material from publication should arise only from obligations of confidence between particular persons, and then only where it is made plain in advance that the material is not to be made public.

Recommendation 7

Where a so-called "orphan work" has no author or publisher who can be identified by reasonable search, others should be free to produce *derivative* works from that work. This will greatly aid the presentation of historical research, in its incorporation both of primary and of secondary material that is otherwise still in copyright. As to what should constitute a reasonable search for the owner of copyright, the British Academy should furnish guidelines that will aim to keep a check on expenditure that can be disproportionately wasteful or lead to unjustified abandonment of projects.

Recommendation 8

Rights holders should not generally be able to circumvent the objectives of the exemptions to the copyright act by contract or through the use of technology. The current UK law which seeks to allow access that will enable its use for research or for criticism or review through a DRM system too readily favours the upholding of the access terms prescribed by the operator of that system. The result can only be side-stepped by complaint to a Minister and consequent action to modify the system. This serious impediment to the freedom of researchers to discover material and make appropriate use of it, needs to be reviewed wherever in consequence undue constraints on scholarship and the development of new creative material arise.

Recommendation 9

Databases are a resource of immense importance to scholarship, not least in the practical benefits that can flow from working on database information. The *sui generis* right accorded to the financial organiser of a database by virtue of the EU Directive of 1996 on the legal protection of databases has been limited in scope by important decisions of the European Court of Justice. The Academy approves strongly of the tendency of these decisions, though it recognises that in various respects the scope of the law remains unclear. The Directive in its final version failed to impose any limitations on the right even where the database accumulated data from single-access sources or where the cost of amassing the data create what is virtually a "natural" monopoly. Both public authorities and academic communities should monitor carefully the assertion of database rights and the charges made for access to database contents in order to ensure that this right does not become a growing impediment to scholarship.

Recommendation 10

The Academy's concerns over the effects of copyright, particularly in a digital age, are twofold. A first danger is that academic work is being impeded because scholars are excluded from using copyright material in cases where the balance is clearly in favour of allowing them to do so and even where a court would probably find they enjoyed the right to do so. The second danger is that the opportunities for copyright holders to engage in monopoly pricing or blanket restriction have increased through the new media of delivery. This will be so where particular holders, including collecting societies, are in a position to prevent access to material or are able to enjoin any use of it in reproduction or public communication. The UK government should consider extending the power of the Copyright Tribunal to require the grant of licences, and to impose reasonable terms in them, where licences are required for academic publication and presentation. These powers should extend to requiring access to digitised copyright material and databases in appropriate circumstances. There may also be questions of abuse of dominant position or restrictive practices, notably in relation to the practices of copyright collecting societies. The competition authorities should be alert to consider the impact of such practices on the conduct and utilisation of academic research.

Appendix A: Terms of reference and membership of the working group

The terms of reference

- to examine concerns that copyright is becoming increasingly problematic for researchers in the humanities and social sciences and is impeding essential scholarly activities
- to review current law and practice relating to the scholarly use of copyright material and legally protected databases
- to challenge, where appropriate, existing practice and identify areas where changes are called for
- to seek legal clarification as appropriate
- to publish the resulting guidance on the Academy's web site
- to draw the attention of both publishers and authors to this material

Membership

The review's work is being carried out by a working group of eight members, appointed by the British Academy. The members of the working group represent a range of subjects in the humanities and social sciences, including those with known concerns about copyright.

Chairman

Professor J A Kay, FBA, Economist, Visiting Professor, London School of Economics, Fellow, St John's College, Oxford.

The other members of the Working Group

Professor R J Bennett, FBA, Professor of Geography, University of Cambridge and Chairman of the Academy's Research Committee
Professor D N Cannadine, FBA, Professor of British History, Institute of Historical Research
Professor N J Cook, FBA, Professorial Research Fellow in Music, Royal Holloway
Professor W R Cornish, FBA, Emeritus Professor of Law, University of Cambridge
Professor H MacQueen, FBA, Director, AHRC Centre for Intellectual Property and Technology Law
Professor M Murphy, FBA, Professor of Demography, London School of Economics
Professor J H Stallworthy, FBA, Senior Research Fellow, University of Oxford

Secretariat

Mr P W H Brown (Secretary of the British Academy)
Ms V Hurley (Secretary of the Review Working Group)

Appendix B: A summary of the content of the Guidelines on copyright and academic research

The guidelines set out to give academic researchers information both general and particular on the application of copyright in the context of their work. The first part looks at the position in general (giving illustrative examples), while the second part examines the way the law works in some common situations where difficulty has been encountered in the experience of Fellows of the British Academy. While the treatment sees the researcher as primarily a ***user*** of copyright material, it also keeps in mind that the researcher is a ***producer*** who may originate copyright work. Where the law is open-ended or unclear, the guidelines seek to provide a reasonable and balanced interpretation of its effects, hoping to influence outcomes in a number of potentially problematic situations. The full text of the guidelines is available from http://www.britac.ac.uk/reports/copyright

The Academy would be very interested to hear of any other copyright-related situations that have not been covered by the guidelines, and where general guidance of this kind might be thought useful. Please send any thoughts and comments to Ms V Hurley at v.hurley@britac.ac.uk

The Guidelines cover:

PART I: COPYRIGHT IN GENERAL

1. A brief history of copyright law in the UK
2. Subject matter
3. Originality
4. Term
5. First ownership
6. Transfer of copyright to subsequent owners
7. Transfer after the death of the right-holder
8. The 'orphan work'
9. Licences
10. Crown and Parliamentary copyright
11. Exclusive rights: economic rights
12. Exclusive rights: moral rights
13. Infringement
14. Fair dealing
15. Public interest
16. Fair dealing v. charging
17. Technological protection measures and digital rights management systems

PART II: COPYRIGHT IN SOME COMMON SITUATIONS

18. Image reproduction
19. Film clips and 'captured stills'
20. Musical extracts
21. Sound recordings
22. Broadcasts
23. Databases
24. Editorial work
25. Unpublished correspondence and private papers: literary estates