

**GOWERS REVIEW OF INTELLECTUAL PROPERTY  
COVER SHEET FOR RESPONSES**

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Please indicate below which issues are covered by your response. Not all issues will be relevant to all respondents – please feel free to skip questions that are not relevant to you.

<b>General Questions covered:</b>	
How IP is awarded	Yes
How IP is used	
How IP is licensed and exchanged	Yes
How IP is challenged and enforced	Yes

<b>Specific Issues covered:</b>	
Current term of protection on sound recordings and performers' rights	
Copyright exceptions – fair use and fair dealing	Yes
Copyright – digital rights management	Yes
Copyright – orphan works	Yes
Copyright – licensing of public performances	
Patents – utility patents	
Pharmaceutical Supplementary Protection Certificates (SPCs)	
Trade Marks – international issues	
Designs – registered designs and unregistered design rights	
Legal sanctions on IP infringement	
Parallel Imports / International Exhaustion	
Coherence between competition policy and IP policy	

Have you raised any other issues in your response? No

<b>Details of accompanying documents</b>
None

Please TICK BOX if you DO NOT want your response posted on the Gowers Review website.

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**Evidence submitted to the Gowers Review of Intellectual Property by  
the National Council on Archives**

The NCA welcomes this valuable opportunity to give our views to the Gowers Review of Intellectual Property. After an introduction explaining our main interests in the Review, our evidence follows the structure supplied.

The National Council on Archives (NCA) was established in 1988 to bring together the major bodies and organisations, including service providers, users, depositors and policy makers, across the UK concerned with archives and their use. It aims to develop consensus on matters of mutual concern and provide an authoritative common voice for the archival community.

**NCA'S MAIN INTERESTS**

Before answering the general and specific questions posed by the Review, it seems appropriate to ask what is the public policy purpose of an Intellectual Property regime, since Intellectual Property is not an end pure in itself. It is the view of the NCA that the protection of Intellectual Property jointly serves the purposes of:

- Stimulation and reward of creativity and innovation
- Fair access to and use of the products of that creativity and innovation.

These principles are paramount, and equally applicable to all Intellectual Property, regardless of media. Technology, however advanced and however quickly it advances, is still the servant of society. As such, the debate on Intellectual Property should not be driven purely by technological considerations. However, we realize that the effectiveness of the methods and the nature of the legislative instruments may well be affected by the nature and increasing rate of technological change.

Archives and record offices may accept deposit of original material (to preserve it for the nation and in the public interest) without being the rights holder, which may be retained by the depositor. This custodianship situation was difficult enough when it mainly concerned paper records and publications, but has become much more complicated now that archives have to deal with many different media, such as:

- electronic records, either born-digital or digitised from paper sources to increase access or for preservation purposes
- sound archives in a variety of media
- film and moving and still image archives, also in a variety of media.

In order to secure an effective and world-class knowledge economy and knowledge society open to all individuals, small and medium businesses as well as large corporations, it is vital that the existing exceptions to Intellectual Property and copyright law afforded to places of learning and deposit, such as archives, record offices, university and public libraries, should be preserved within any new Intellectual Property regime recommended by the Review. Ideally, they should be extended to clarify the position of preservation and access to material on deposit in all media, and for all sectors of society, including those with specific access needs (*see* Copyright exceptions *below*).

This Review raises questions of moral and public value with humanity's most valuable asset: knowledge, and how creators receive just reward whilst also preserving the benefits to the wider society and the UK economy from access to their creations. Libraries, archives and other places of deposit of these creations are often rights holders as well as custodians and facilitators of access to content belonging to others and are therefore inherently balanced and even-handed in their considerations of these questions. They are also institutions that transcend generations of researchers and are ideally placed to consider the long term impact of any change in IP legislation.

***The National Council on Archives would like to endorse the submissions by The National Archives, The Research Information Network and The British Library. In preparing our submission, we have endeavoured not to restate points made better by our colleagues in these organisations, but to complement them with observations from our wider remit representing both professionals and users.***

## **GENERAL QUESTIONS**

### **How Intellectual Property is awarded**

Throughout the preparations for our response to this Review, the level of misinformation, misunderstanding and confusion surrounding the existing IP legislative framework, even among information provision professionals, publishers, academics, researchers, librarians and archivists has become very clear to the NCA. Along with the British Library and other members of the NCA, we would be very keen to see a balanced (i.e. not exclusively rights holders focussed) programme of education and awareness surrounding the copyright provision and frameworks throughout the UK. Should the Review recommend such a programme, the NCA would be very willing to assist in designing and implementing such a programme, and we are sure that there would be many other national agencies, such as The National Archives, who would be prepared to assist.

The NCA is particularly concerned with the position of archive professionals and users, including many world-class academics, who use the unpublished works held in archives. These resources are the raw materials for many working in the humanities but also in an increasingly wide range of interests. For example, Dr Dennis Wheeler from Sunderland University is engaged in mapping pre-industrial revolution weather patterns from ships logs providing essential data helping to map global warming. However, the copyright position and term for such materials is very difficult to determine. Bringing some consistency to this situation would be very welcome and significantly reduce the burden on information professionals. The NCA would recommend the adoption of the standard term (life plus 70 years or creation plus 70 years where the work is anonymous) as suggested by the Research Information Network in their submission to this Review.

## **How Intellectual Property is licensed and exchanged**

*[This answer is also applicable to the query on copyright of orphan works under Specific Issues.]*

The NCA hears the experiences of users of archives who are individual or independent researchers in negotiating use of Intellectual Property and copyright materials. The following example is typical:

A local historian published a book with photographs all of which he had permission to use except for one, for which he was unable to find the copyright owner, although he spent considerable effort in his search. Deciding to go ahead without permission he had the book printed with the usual calls for the owner. Immediately the copyright owner demanded £20,000 for using his photograph without permission. The local historian had to pay a much smaller payment but had to pay.

This type of action runs diametrically against the spirit of Intellectual Property protection, neither giving fair and reasonable return to the copyright owner nor promoting research and creativity. We suggest that some of the onus for identifying copyright owners should be allocated to those who claim to have such rights. Some guidance on what constituted sufficient or cost-efficient efforts to trace rights holders would be very helpful. We also suggest that a penalty is added within the legislation regarding abuse of IP ownership, perhaps with guidance regarding the appropriate levels of payments for use of IP with unidentified owners. In this regard, we recommend the Review refers to The Library of Congress Report on Orphan Works (*see <http://www.copyright.gov/orphan/orphan-report-full.pdf>*).

Particularly with the migration of journals, periodicals and other time-based or regular publications to a digital format delivery, many archives, libraries (both public, specific-interest and research) and museums have faced increased costs and complexity to access these materials on behalf of their users. Yet, it is often exactly in these publications and periodicals that the products of research and intellectual property are disseminated, leading to citations, peer review and further research and innovation. The NCA acknowledges that publishers sometimes do reduce the cost of licensing such materials significantly for such places of deposit. Should the Review make any recommendations in this area, it would be extremely helpful to reiterate the point that publishers are reducing access to private buyers by pricing libraries and other places of deposit from providing access to their products to potential markets. Many people sample these publications in libraries, where they can access them easily and at low or no cost without opening themselves to the “hard sell” before deciding to purchase the products themselves for home use.

Along with The British Library and other organisations, the NCA believes that it is important to clarify exactly what constitutes an item in a permanent collection and, indeed, exactly what constitutes a permanent collection. This becomes particularly important with on-line resources, for which institutions can pay large sums of money, running to hundreds of thousands of pounds for a subscription to an individual product, which previously would have been delivered to the institution physically, and which would have stayed in the collection and accessible to the reader as long as this paper version remained conserved. In the digital age, not only is the product not physically held by the institution, it is also supplied under licence where the work is effectively “rented” to the institution, and the work is withdrawn from access once the licence

expires, leaving the institution to ask its parent body for further funds, which in these times of careful money management is often not available. Clarification of the exception in a place of deposit would significantly reduce the cost to the public purse in supplying these resources for public consumption and supply additional savings in the form of the many hours of information professional time in seeking funding to renew licences, and in negotiating the bureaucratic labyrinth in renewing the licences correctly.

The issue of digital publishing and preservation of digitally published works is also of great concern to the NCA. Due to high printing and publishing costs, many small organisations are now publishing reports only on their websites. We would welcome clarification of the position of organisations printing these publications for future use, or making digital copies for preservation purposes within their collections, as indeed would many of our colleagues. The NCA recommend that these instances are included under a fair use/fair dealing provision (*see below*).

The legal deposit and archiving of internet materials is a much larger issue. The NCA refers the Review to the submission made by The British Library.

### **How IP is challenged and enforced**

The NCA recognises that there will always be a need for a framework of litigation for IP infringement. However, the majority of libraries, archives and other places of deposit have only low-level and low-value copyright transactions. It would be extremely helpful if the Review could consider ways of establishing lower-cost licensing and copyright tribunal arrangements (perhaps similar to small claims hearings), which are proportionate to the business needs of places of deposit, and to publishers and rights holders when dealing with places of deposit with limited means.

In prevention of the need for appropriate arenas for litigation, we would like to reiterate our suggestions that some of the responsibility for identifying copyright owners should be allocated to copyright owners to make themselves available and identifiable, that some guidance on what constituted sufficient efforts to trace rights holders, and that a penalty is added within the legislation regarding abuse of IP ownership with regard to copyright.

## **SPECIFIC ISSUES**

### **Copyright exceptions – fair use/fair dealing**

It is absolutely vital that the current exception accorded to libraries, archives and other public access points to knowledge are at least maintained. Ideally, they should be extended for the following purposes:

- to clarify the position of librarians, archivists and curators who copy materials for preservation purposes, e.g. from VHS video formats which are degrading to digital holding formats
- to clarify, and make consistent, the legislative framework to cover all relevant categories of works, including artistic works in all formats, sound recordings of all categories of material, databases and audio-visual formats and film
- to clarify the position of librarians, archivists and curators who change the formatting of materials with the specific purpose of overcoming barriers to people

accessing them, e.g. changing digital materials to make them accessible to readers with vision impairment or dyslexia. It is especially important to make the recommendations from this Review consistent with the Disability Discrimination Acts and associated legislation, especially in wording the recommendations so that they cover all disabilities and impairments. There are various mechanisms currently available – please see RNIB, RNID and especially *Share The Vision*'s submission of evidence to this Review

- to clarify the position of librarians, archivists and curators holding orphan works. The addition of such an exception would enable access to these works, and may also assist with finding rights holders, which would in turn benefit those rights holders
- to clarify the position of librarians, archivists and curators to ensure that sensible interpretation of current statutory exceptions apply to the full range of digital materials, in both format and delivery mechanisms, e.g. e-delivery of library privileges are permissible.

The NCA believes that there should be a “fair use” exception granted to places of deposit to help librarians, archivists and curators encourage public use of publicly held materials. Innovative delivery of such schemes is already encouraged and supported by Government through initiatives such as The People’s Network and the Open Archive. It would make sense to strengthen these provisions within any reformed IP framework. Compensation for content owners should be structured consistent with existing library compensation for authors.

The NCA believes that Statutory Exceptions, however framed, should take precedence over contract law wherever there is a conflict between the two in order to clarify the legislative framework for all concerned.

### **Copyright – digital rights management**

For archives and libraries which keep digital materials, Digital Rights Management (DRMs) and Technical Protection Measure (TPMs) have become a very serious problem, preventing legitimate copying of materials e.g. for preservation or to help organisations fulfil their obligations under the Disability Discrimination Acts (*see* Copyright exceptions – fair use/fair dealing *above*). It is the view of the NCA that consideration should be given to the establishment of an independent regulatory body for DRMs, to develop codes of practice for DRM developers and adopters, and to arbitrate in cases of dispute, and to facilitate preservation for Statutory Exceptions. A best case scenario would be that this independent body could facilitate discussions so that disputes very rarely occur. The NCA would like to refer the Review to the excellent detailed analysis of these technical problems presented by The British Library as part of their submission of evidence.

### **Copyright – orphan works**

*See* How Intellectual Property is licensed and exchanged *above*.