

UK-IPO: Taking forward the Gowers Review of Intellectual Property: Second Stage Consultation on Copyright Exemptions

Response by the Wellcome Trust

March 2010

Introduction

1. The Wellcome Trust is a global charity dedicated to achieving extraordinary improvements in human and animal health. We support the brightest minds in biomedical research and the medical humanities. Our breadth of support includes public engagement, education and the application of research to improve health. We are independent of both political and commercial interests.
2. The Wellcome Library, part of the Wellcome Trust, is one of the world's major resources for the study of the history of medicine. It holds around 2.5 million items, including 600,000 books and journals, an extensive range of manuscripts, and more than 100,000 paintings, prints and drawings.
3. We are pleased to have this opportunity to comment on the changes to the copyright exceptions proposed by the UK Intellectual Property Office (UK-IPO). Our response focuses on the relevant questions in Annex B of the consultation document which concern the recommendations for research and private study (Gowers' Recommendation 9) and libraries and archives (Gowers' Recommendations 10A and 10B). Our key points are as follows:
 - We welcome the Government's move to extend copyright exceptions to the additional works of film, sound recordings and broadcasts as a positive step towards achieving a copyright system fit for the modern digital age. It has previously been inconsistent and counterintuitive that these materials have been treated differently within existing copyright legislation.
 - **Research and Private Study:** we view with concern the proposed restriction of the extended exception to those who are members of an 'accredited' educational establishment *and* when copying is for the purposes of private study or for research being undertaken at that establishment. We urge the Government to make the extended exception for private study and research (s.29) unrestricted and unqualified to match the current provisions for fair dealing in literary, dramatic, musical and artistic works.
 - **Libraries and Archives:** we welcome the proposed expansion of the exception to allow libraries, museums and galleries to make multiple preservation copies of films, sound recordings and artistic works, and to enable the transfer of works to different formats. We would, however, encourage the UK-IPO to confirm that the exception in s.42 also applies to making copies of preservation copies.

Research and Private Study: Recommendation 8

Question 1(a)

4. We welcome the extension of the exception for research and private study to cover all forms of content. As elaborated in our response to the first stage of the consultation, scientists, researchers, and people engaged in private study increasingly make use of film, sound recordings or broadcast material and it has been restrictive and counterintuitive that they do not fall under the current 'fair dealing' provisions. Copyright law should be format-independent and should not discriminate between different modes of communicating information.
5. We do not believe or anticipate that there any impractical consequences which would prevent Section 29(3) from applying equally to the additional works as to the works originally covered by this exception. To date, it has been illogical that an individual who uses a music clip for research would be infringing copyright in the sound recording but not in the underlying musical copyright. It is difficult to see why owners of copyright in sound recordings should be afforded greater protection in this case. Furthermore, we have a sophisticated judicial system which is capable of clarifying any unintended and impractical consequences that may arise from such an extension. We would urge caution in attempting to legislate for impractical consequences, as we would consider this type of interpretation to fall within the traditional role of the judiciary.

Question 2(a) and 2(b)

6. We consider that any legitimately copied extracts which are subsequently dealt with would not fall under the provisions of s.29 and would be considered to be an infringing copy. While we agree with the principle of s.29(1F), we do not consider it necessary to specifically set this out in statute as it is within the remit of the courts to decide in accordance with their rules of interpretation and construction.

Question 3

7. We do not agree with the approach taken in the draft legislation which proposes that 'fair dealing' in the additional works would be permitted only for individuals who are members of an 'accredited' educational establishment *and* when copying is for the purposes of private study or for research being undertaken at that establishment. These constraints on the circumstances of 'fair dealing' severely limit the supposed easing of restrictions and would not help those engaged in bona fide private study or research who are not connected to an 'accredited' educational establishment. Whether an activity is eligible for the research and private study exception should depend on the character and intent of the activity, rather than where it takes place or the affiliations of the researcher.
8. Limiting eligibility to researchers and students registered with an academic institution could exclude important research taking place in other contexts. For example, medical researchers may have affiliations with independent research institutions or the NHS, rather than academic institutions. In addition, depending on how widely 'educational establishment' is defined under the proposed restriction, researchers employed at independent institutes such as the Wellcome Trust Sanger Institute – a world-leading genomic research centre predominantly funded by the Wellcome Trust – could also be excluded from benefiting from the extended exception.
9. More generally, private study which is not carried out in an institutional setting would also fall outside the scope of the copyright exceptions. Private study is by its very nature for the sole benefit of the individual and therefore should not be tied to an institution – as recognised in the Government's expressed encouragement of lifelong learning. We are concerned that the proposal would further restrict researchers, particularly those in the arts and humanities, who may not necessarily be affiliated with an educational establishment – potentially increasing the barrier for interdisciplinary collaboration. It is also not clear how these restrictions would inter-

relate with the education exceptions, or what burden the proposed system would place on librarians, who will have to explain and navigate the proposed legislation for users.

10. While we fully support the principle that the exceptions for private study and research should not be used for entertainment purposes, it is still unclear why sound recordings, films and broadcast content should be treated any differently from literary, musical and artistic works. It is arguable that dealing with content for entertainment purposes would not come within the scope of the private study and research exception in s.29 and therefore would be deemed to be an infringing act regardless. We consider that limiting the scope of s.29 to non-commercial purposes in accordance with the provisions of the Information Society Directive could provide a satisfactory solution.
11. If the intention of the proposed approach is to discourage copyright infringement, it should be noted that artificial limitations in a statutory instrument will not deter infringement. Furthermore, it is within the courts jurisdiction to define concepts such as 'private study' and 'research' and it should not be the remit of statutory instruments to provide such definitions.

Libraries and Archives (Recommendation 10A and 10B)

Question 10

12. We agree that it is sensible not to place numerical limitations on the number of copies that may be made for preservation purposes. The very nature of the Libraries and Archives exception strictly limits copying to preservation and archiving purposes – which in itself ensures a high threshold for libraries, archives, museums and galleries to justify making numerous copies. Furthermore, the proposed flexible approach to numerical copies taken in s.42 allows the exception to apply where future technological developments may require two or more copies to be held. It is sometimes difficult to predict what may occur in years to come: making the proposed drafting of the provision technologically neutral should allow the exception to remain relevant where future developments occur.
13. We would, however, encourage the UK-IPO to confirm that the exception in s.42 also applies to making copies of preservation copies. This is particularly important in its application to digital works, where digital copies may be preservation copies in themselves and not the original versions. As mentioned above, it is important that these provisions are technologically neutral and libraries and archives are not prevented from preserving material which is being threatened by obsolete technology.

Question 11

14. We encourage the UK-IPO to use different names for each of the institutions, but for the purposes of s.42 the prescribed terms and conditions should be the same for all libraries, archives, museums and galleries. Institutions increasingly adopt a number of functions and share premises - for example, the Natural History Museum is both a library and museum. Difficulties may arise in categorising such hybrid institutions and for this reason we do not consider it prudent to treat libraries, archives, museums and galleries as mutually exclusive for the purposes of s.42.
15. Furthermore, we would discourage the UK-IPO from adopting a definition of library which is attached to the location of the library. Particularly with sound recordings and films, a permanent collection is often held digitally and located on third party servers. If the definition of library is tied to its location, then a large proportion of its electronic collection would potentially fall outside the scope of s.42 – undermining the proposed expansion of s.42 to sound recordings and films.

Question 12

16. The term 'permanent collection' is not currently defined – an approach we feel is the most flexible and appropriate. However, if the UK-IPO feel it is desirable to adopt a test for a permanent collection, we think that such a test should be based on the nature of the organisation and what it considers to be part of its collection rather than the nature of the collection, which may change over time.

Question 13

17. We consider that any preservation copies which are subsequently dealt with would not fall under the provisions of s.42 and would be considered to be an infringing copy. We do not consider it necessary to specifically set this out in the statute as it is within the remit of the courts to decide in accordance with their rules of interpretation and construction.

Question 14

18. It is not necessary to distinguish between a physical item that needs to be preserved and the copyright work that may be included within that work. It is clear that the Copyright, Design and Patents Act 1988 (as amended) and associated statutory instruments specifically deal with copyright works. We can not therefore see any reason for making such a distinction within s.42, particularly if it could cause problems in the future where the focus of preservation is the content which the electronic item records rather than the original format of the electronic item.

Question 15

19. We welcome the proposed provisions of s.42 (b), which we view as sufficiently broad to cover content which may be lost as a result of, amongst other things, the medium in which it is recorded becoming obsolete. However, it is also important that it is clear within this section that any preservation copies are then treated as original copies, so it is possible to make future preservation copies of them. This issue is of particular concern to the Trust as a large proportion of the Wellcome Library's digital content falls under this category. It is crucial that we have rights to update the medium on which its electronic content is stored before such media becomes obsolete. It is also for this reason important that no distinction is made between the physical item and the copyright works, as noted in our response to question 14.