

Consultation on Copyright Response by LACA: the Libraries and Archives Copyright Alliance

March 2012

Introduction

The Libraries and Archives Copyright Alliance (LACA) is a UK umbrella group convened by CILIP (Chartered Institute of Library and Information Professionals). LACA brings together the UK's major professional organisations and experts representing librarians and archivists to lobby in the UK and Europe about copyright issues which impact delivery of access to knowledge and information by libraries, archives and information services in the digital age.

LACA welcomes the Government's determination to implement the recommendations made by Professor Hargreaves in his review and the opportunity to respond to this consultation on implementation. We have submitted a large body of evidence to all the UK reviews of Intellectual Property and to EU consultations on copyright over the years to highlight and communicate to policy makers the deficiencies in the current copyright framework in relation to the organisations we represent¹. A lot of this evidence features in the consultation document and its associated impact assessments and we have little new national evidence to present, so our comments below are brief. Much of our effort has been focused on encouraging institutions to provide separate submissions containing fresh evidence to inform the Government's decisions. However, below we offer some additional thoughts on the Government's proposals.

¹ LACA's consultation responses can be downloaded from <http://www.cilip.org.uk/get-involved/advocacy/copyright/pages/about.aspx>

Copyright licensing: orphan works

Question 1: Does the initial impact assessment capture the costs and benefits of creating a system enabling the use of individual orphan works alone, as distinct from the costs and benefits of introducing extended collective licensing? Please provide reasons and evidence about any under or over-estimates or any missing costs and benefits?

The Government is particularly interested in the scale of holdings you suspect to be orphaned in any collections you are responsible for. Would you expect your organisation to make use of this proposed system for the use of individual orphan works? How much of the archive is your organisation likely to undertake diligent searches for under this proposed system?

What would you like to do with orphan works under a scheme to authorise use of individual orphan works?

LACA welcomes the recognition of the need to give attention to the problem of orphan works. At present an orphan work cannot be used by businesses or cultural bodies without risk of action for infringement of copyright, so its value to society is being lost. Libraries, archives and cultural institutions are striving to digitise their collections and make them available online for the public good, but cannot legally do so without the rights holder's permission. Rights clearance can be complex and costly.

"In From the Cold"², a 2009 report commissioned by JISC and the Collections Trust to assess the scale and scope of orphan works, found that the average proportion of orphan works in collections across the UK public sector was 5-10%; this proportion was found to be higher in archives. The survey concluded that publically funded organisations spent on average half a day tracing rights for each orphan work, in many cases without any success. Therefore it would take in the region of 6 million days effort to trace the rights holders for the 13 million works represented in the survey, equivalent to over 16,000 years. In certain high profile projects, some organisations had spent large resources of time on chasing rights holders.

The British Library/ARROW study 'Seeking New Landscapes'³, published in September 2011, confirmed these findings. It established, from a sample comprising 10 books from each of the 14 decades between 1870 and 2010, that 43% of the potentially in-copyright works were orphaned, equating to 31% of the total sample. The study found that, on average, it took 4 hours per book to undertake a manual "diligent search" to clarify the copyright status of the book and any embedded works within it, identify and locate rights holders and request permissions (of which locating rights holders and seeking permissions for just over half the sample took on average 2.75 hours per book). The study showed that

² <http://www.jisc.ac.uk/media/documents/publications/infromthecoldv1.pdf>

³ <http://www.arrow-net.eu/sites/default/files/Seeking%20New%20Landscapes.pdf>

manual rights clearance for a typical mass digitisation project of 0.5m books would take one researcher over 1,000 years.

The National Archives estimate that 40% of its records are likely to be orphan⁴.

Question 2: Please provide any estimates for the cost of storing and preserving works that you may not be able to use because they are/could be orphan works. Please explain how you arrived at these estimates.

As explained above, using orphan works in projects such as mass digitisation is severely hindered by the current copyright framework. However, orphan works can be used in ways that do not infringe copyright, so estimating the cost of storing and preserving works that “may not be able to (be) use(d)” is very difficult.

The Bodleian Libraries estimate that the annual cost of storing and preserving orphan works in their new Book Storage Facility is £520,000⁵.

The National Archives estimate that the annual cost of storing and preserving its orphan works is around £5m⁶.

Question 3: Please describe any experiences you have of using orphan works (perhaps abroad). What worked well and what could be improved? What was the end result? What lessons are there for the UK?

No comment.

Question 4: What do you consider are the constraints on the UK authorising the use of UK orphan works outside the UK? How advantageous would it be for the UK to authorise the use of such works outside the UK?

Copyright law is not extra-territorial and, at the moment, the constraints on passing orphan works across boundaries are absolute. Even with the proposed EU-wide Directive for Orphan Works, the situation will be eased only to a limited degree as the Directive is focused on literary works, cinematographic, audiovisual and audio works, whereas the orphan works problem encompasses all media types.

In the digital era, when most content is likely to be used online and therefore available worldwide, authorising the use of UK orphan works outside of the UK would bring extensive benefits to many archives and research libraries who wish to use this material, so long as all

⁴ See the National Archive's response to the Consultation on implementation of the Hargreaves recommendations on copyright reform (2012)

⁵ See the Bodleian Libraries/University of Oxford's response to the Consultation on implementation of the Hargreaves recommendations on copyright reform (2012)

⁶ See the National Archive's response to the Consultation on implementation of the Hargreaves recommendations on copyright reform (2012)

media are included. It would also increase the chances of a rights holder emerging. However, we recognise that licensing across territories is legally complex. Trying to distinguish UK material from material of overseas origin also poses problems in some instances.

Question 5: What do you consider are the constraints on the UK authorising the use of orphan works in the possession of an organisation/individual in the UK but appearing to originate from outside the UK: a) for use in the UK only b) for use outside the UK? How advantageous would it be for the UK to authorise the use of such works in the UK and elsewhere?

Since as soon as an item is imported into the UK it becomes subject to UK copyright law, the constraints on importing orphan work materials into the UK are identical to those stopping the copying of orphan works within the UK itself. As stated above, distinguishing UK material from material of overseas origin is sometimes impossible.

Authorising the use of orphan works originating from outside of the UK inside the UK would bring extensive advantages, especially for research libraries, as a significant proportion of their holdings originate from outside of the UK. However, what constitute a diligent search for works of overseas origin would have to be reflected in the guidelines, as a search of only UK sources would not be very diligent.

Regarding use outside of the UK, please see our response to question 4.

Question 6: If the UK scheme to authorise the use of orphan works does not include provision for circumstances when copyright status is unclear, what proportion of works in your sector (please specify) do you estimate would remain unusable? Would you prefer the UK scheme to cover these works? Please give reasons for your answer.

Any work published between 70 and 120 years ago is inherently of uncertain status, and these works make up a significant proportion of orphan works. The “Seeking New Landscapes”⁷ study found that 22 out of 140 titles published between the 1870s and 1950s had an unclear copyright status because not enough information was available to determine the correct status. A lot of material would remain unusable if orphan works of “unclear” status were excluded from the UK scheme, therefore, so LACA would like to see such works included.

Users should be entitled to make a reasonable judgment of the age of a particular orphan work, and therefore whether the material is still in copyright or not. There is precedent for this within the Copyright Act already. Sections 57 and 66A of the CDPA 1988, and Regulation 21 of the Copyright and Rights in Databases Regulations provide model wording.

⁷ <http://www.arrow-net.eu/sites/default/files/Seeking%20New%20Landscapes.pdf>

Question 7: If the UK's orphan works' scheme only included published/broadcast work what proportion of orphan works do you estimate would remain unusable? If the scheme was limited to published/broadcast works how would you define these terms?

It is not always possible to determine if a work has been published or broadcast, so a scheme limited to published/broadcast works would mean that a lot of material remains unusable. Archival and special collections material would be largely ruled out altogether.

A large proportion of the British Library's mass digitisation projects to date have focused on unpublished works, one reason being that researchers are particularly interested in unpublished material because it is unique.

Question 8: What would be the pros and cons of limiting the term of copyright in unpublished and in anonymous and in pseudonymous literary, dramatic and musical works to the life of the author plus 70 years or to 70 years from the date of creation, rather than to 2039 at the earliest?

Although the lifetime of copyright in unpublished works is no longer "perpetual", it is still extremely long for some old works. There are works published in the 1870s that are still in copyright, for example (see appendix). Unpublished literary works and some anonymous works remain in copyright in the UK until 2039. LACA calls for the Copyright Term Directive (2006/116/EC) to be properly implemented in this country so that the standard terms applicable to published works would apply. Until recently Ireland had perpetual copyright for some works, but chose, when implementing the Directive, to replace this with the standard term, which has released a great deal of valuable historical material into the public domain.

Applying standard terms to unpublished works would also remove overheads from public sector bodies that currently have to consider issues relating to the reuse of very old material, which was in the main not produced for commercial purposes, in the same way as for commercially produced material in a publisher's front list.

Question 9: In your view, what would be the effects of limiting an orphan works' provision to non-commercial uses? How would this affect the Government's agenda for economic growth?

LACA welcomes a proposal to allow the commercial re-use of orphan works, as this would stimulate economic growth through the creation and production of new creative works such as documentaries and films, but any provisions for commercial re-use must comply with the Berne Convention and other relevant laws.

Question 10: Please provide any evidence you have about the potential effects of introducing an orphan works provision on competition in particular markets. Which works are substitutable and which are not (depending on circumstances of use)?

No comment.

Question 11: Who should authorise use of orphan works and why? What costs would be involved and how should they be funded?

A neutral body would be best placed to authorise use of orphan works beyond the exceptions, so that all parties can have confidence in the authorisation process.

Question 12: In your view what should constitute a diligent search? Should there be mandatory elements and if so what and why?

What constitutes a diligent search will vary according to the manner in which a work is orphaned and the type of materials being considered. A work might, for example, definitely be in copyright but the originator is anonymous; definitely be in copyright and the originator is known to be dead; definitely be in copyright and the originator is known to be alive but is unlocated (there are other scenarios). Some works have been published, others have not. A pragmatic, flexible approach to diligent search might be appropriate for unpublished material, especially as such works are not represented by collecting societies. A different, more formal type of search is required for works that were commercially produced and published within the last few decades. It is unhelpful to have a single criterion of diligence, therefore. Any guidance should be scalable depending on the type of material and the manner in which the work is orphaned. The legal test of reasonableness should be used in any legislative wording.

Question 13: Do you see merit in the authorising body offering a service to conduct diligent searches? Why/why not?

LACA would have no objection to an authorising body offering diligent search services for a fee, providing the authorising body is independent. However, there should be an open market in such services, as librarians and information scientists have the necessary skills and experience to offer services in their own right. Diligent search providers should probably have some form of approval to act in this capacity, for example by way of a kite mark system.

The Digital Copyright Exchange proposal envisages that the databases of collecting societies should be freely available to facilitate the licensing of rights. Diligent searches will often require a search of these databases, so LACA believes it is important that access is freely available to all.

Question 14: Are there circumstances in which you think that a diligent search could be dispensed with for the licensing of individual orphan works, such as by publishing an awaiting claim list on a central, public database?

For individuals seeking to copy a single orphan work beyond the exceptions there should be no requirement for a formal diligent search. A check with the proposed Digital Copyright Exchange should be a minimum requirement, however.

Question 15: Once a work is on an orphan works registry, following a diligent search, to what extent can that search be relied upon for further uses? Would this vary according to the type of work, the type of use etc? If so, why?

If a diligent search has been conducted and the work has been added to a registry, the default position should be that the search can be relied upon for further uses, provided the definition of “diligent” for the initial search does not differ according to the intended use. An element of professional judgment will be required.

Question 16: Are there circumstances in which market rate remuneration would not be appropriate? If so, why?

It is difficult to see how the fee can be set at market rate if the orphan is an unpublished work since there is no market, and the works were not, for the most part, created with the intention of being used for economic gain.

Question 17: How should the authorising body determine what a market rate is for any particular work and use (if the upfront payment system is introduced)?

No comment.

Question 18: Do you favour an upfront payment system with an escrow account or a delayed payment system if and when a reversionary copyright holder appears? Why?

LACA can see the benefits of upfront payment with an escrow account rather than delayed payment for orphan works. Actuarial science is sufficiently strong to make any escrow payments very modest whilst still catering for the needs of reversionary copyright holders, should they appear. If the escrow account does build up in credit over the years, then the surplus should be put to good uses to assist creators and users generally.

Question 19: What are your views about attribution in relation to use of orphan works?

We agree with authors and creators that no attribution data should be stripped from orphan works. Librarians and archivists are highly skilled in the recording and updating of metadata (that is, key bibliographic information surrounding a creative work). It is imperative that this practice be applied to all creative works, particularly those being made available online, as a robust system of recording at least the author and date of creation is vital to prevent creative works becoming orphaned in the future.

Moral Rights should be unwaivable. The paternity right should be automatic and not have to involve an assertion.

Question 20: What are your views about protecting the owners of moral rights in orphan works from derogatory treatment?

The current Moral Rights regime does not need to be altered for orphan works. By definition, as soon as a creator is identified, they would have the moral right to be attributed as the creator and to object to derogatory treatment, because the work is no longer an orphan work.

Question 21: What are your views about what a user of orphan works can do with that work in terms of duration of the authorisation?

Where not covered by an exception, the user should be entitled to carry out any act of copying, issuing copies to the public, communicating the work to the public or any other restricted act as defined in the CDPA1988 for, ideally, an unlimited duration. If subsequently an owner becomes identified, the user would not be allowed to continue such restricted acts without the permission of the rights owner, but the owner would have no right to restrict what has already occurred.

If an act committed under licence has created new rights in the work (performance or adaptation, for example), the rights of the new rights holders must also be respected.

It also needs to be borne in mind that, in some cases, the act may affect the duration of copyright: for example showing a work in public may start a second copyright clock ticking if the work was previously unpublished.

Extended Collective Licensing (ECL)

Question 22: What aspects of the current collective licensing system work well for users and rights holders and what are the areas for improvement? Please give reasons for your answers.

Since the adoption of the Public Sector Information Directive in 2003 the great majority of Crown copyright material, and much non-Crown material as well, is available for re-use on terms that are simple, clear and readily available as part of the UK Government Licensing Framework.

As identified in “Seeking New Landscapes”⁸, collecting societies have historically sought to work with each other where possible to identify efficiencies, such as offering licences that contain bundles of rights and linking their databases and processes, which works well for

⁸ <http://www.arrow-net.eu/sites/default/files/Seeking%20New%20Landscapes.pdf> (p12)

users and rights holders. An example of this is CLA's arrangement with DACS that enables the licensing of reproductions of illustrations in printed material along with literary content.

Blanket licences that do not require individual record keeping, reporting and/or payment also work well and benefit users. Difficulties arise when users have to monitor and track, and sometimes predict, everything they are doing. For example, the NLA licence requires advance commitment to an exact set of sources and specific uses, whereas in reality one cannot predict what news will be of interest, nor in what news source it might appear.

LACA also has concerns over transparency with regard to the charging matrixes employed. Some pricing structures, such as the NLA's, are overly complex, and it can be difficult to foretell price increases, making it hard to budget for licence fees.

There are gaps in the current arrangements for collective licensing that hinders use of some works. A sizeable number of rights holders and works are excluded from CLA licences, for example, and there is no dominant licensing body for film. There is also no licensing body for unpublished works. The failure to provide appropriate licences needs to be addressed. Although there is a statutory remedy for this (CDPA 1998 sections 140 & 141) it is difficult in practice to organise a petition to the Secretary of State.

Copyright licensing is also insufficiently international in focus and scope.

Question 23: In the Impact Assessment which accompanies this consultation, it has been estimated that the efficiencies generated by ECL could reduce administrative costs within collecting societies by 2-5%. What level of cost savings do you think might be generated by the efficiency gains from ECL? What do you think the cost savings might be for businesses seeking to negotiate licences for content in comparison to the current system?

Cultural institutions, as well as businesses, will benefit from ECL.

LACA doesn't have any evidence to offer regarding potential financial cost savings generated by ECL. However, as ECL will negate much of the need for diligent search, costs associated with this will be significantly reduced.

One of the efficiencies of ECL will be the ability to utilize certain types of material in ways that are currently unfeasible. For example, large scale digitisation projects will be made possible. Small scale projects will also benefit. The Seeking New Landscapes study found

that a diligent search for a relatively small number of books took on average 4 hours per monograph.⁹

Question 24: Should the savings be applied elsewhere e.g. to reduce the cost of a licence? Please provide reasons and evidence for your answers.

LACA would expect any benefits that accrue to be fairly proportioned between stakeholders.

Question 25: The Government assumes in the impact assessment for these proposals that the cost of a licence will remain the same if a collecting society operates in extended mode. Do you think that increased repertoire could or should lead to an increase in the price of the licence? Please provide reasons for your answers.

As the increased repertoire is not a result of increased investment by the collecting societies, there is no justification for increasing the price of the licence.

Question 26: If you are a collecting society, can you say what proportion of rights holders you currently represent in your sector?

No comment.

Question 27: Would your collecting society consider operating in extended licensing mode, and in which circumstances? If so, what benefits do you think it would offer to your members and to your licensees?

No comment.

Question 28: If you do not intend to operate in extended licensing mode, can you say why?

No comment.

Question 29: Who else do you think might be affected by the introduction of extended collective licensing? What would the impact be on those parties? Please provide reasons and evidence to support your arguments.

No comment.

Question 30: What criteria do you think should be used to demonstrate that a collecting society is "representative"? Please provide reasons for your answer.

No comment.

Question 31: Do you think that it is necessary for a collecting society to obtain the consent of its members to apply for an ECL authorisation? What should qualify as consent- for example, would the collecting society need to show that a simple majority of its members have agreed to the application being made?

No comment.

⁹ <http://www.arrow-net.eu/sites/default/files/Seeking%20New%20Landscapes.pdf>

Question 32: Apart from securing the consent of its members and showing that it is representative, are there other criteria that you think a collecting society should meet before it can approach the Government for an ECL authorisation? Please give reasons for your answer.

The collecting society should have an approved code of conduct.

Question 33: When, if ever, would a collecting society have reasonable grounds to treat members and non-member rights holders differently? Please give reasons and provide evidence to support your response.

No comment.

Question 34: Do you have any specific concerns about any additional powers that could accrue to a collecting society under an ECL scheme? If so, please say what these are and what checks and balances you think are necessary to counter them? Please also give reasons and evidence for your concerns.

No comment.

Question 35: Are there any other conditions you think a collecting society should commit to adhering to or other factors which the Government should be required to consider, before an ECL authorisation could be granted? Please say what these additional conditions would help achieve?

No comment.

Question 36: What are the best ways of ensuring that non-member rights holders are made aware of the introduction of an ECL scheme and that as many as possible have the opportunity to opt out, should they wish to?

Frequent advertisements in relevant media aimed at the in-commerce and out-of-commerce market, and at rights holders and their heirs, would seem appropriate.

Question 37: What type of collecting society should be required to advertise in national media? For example, should it need to be a certain size, have a certain number of members, or collect a certain amount of money?

No comment.

Question 38: What would you suggest are the least onerous ways for a rights holder to opt out of a proposed extended licensing scheme?

There needs to be in place a transparent, clear procedure for opting out.

Question 39: Should a collecting society be required to show that it has taken account of all opt out notifications? If so, how should it do so? Please provide reasons for your answers.

No comment.

Question 40: Are there any groups of rights-holders who are at a higher risk of not receiving information about the introduction of an ECL scheme, or for whom the opt-out process may be more difficult? What steps could be taken to alleviate these risks?

No comment.

Question 41: *What measures should a collecting society take to find a non-member or missing rights owner after the distribution notice fails to bring them forward?*

As ECL will only be applied in special cases where there is an inability to find and negotiate on a one-to-one basis with every rights holder, LACA believes that, to facilitate cost-effective mass use of digital content, collecting societies should be obliged to search for rights holders in a pragmatic and reasonable manner. This will avoid the extremely high transactional costs that currently sit with those wishing to digitise being transferred to the society.

Question 42: *How long should a collecting society allow for a non-member rights holder to come forward?*

Seven years, so it is in line with the Limitations Act 1980.

Copyright licensing: codes of conduct for collecting societies

Question 43: *Aside from retention by the collecting society or redistribution to other rights holders in the sector, in what other ways might unclaimed funds be used? Please state why you think so?*

Unclaimed funds should not be retained by the collecting society. After a reasonable deduction to cover administrative costs, such funds, including accrued interest, should be put to use for the public good. LACA suggests funding causes that support creators, as well as libraries, archives and other cultural institutions. Decisions relating to use of unclaimed funds should be governed by a board that represents all sectors.

Question 44: *What do collecting societies do well under the current system? Who benefits from the way they operate? Please explain your response and provide evidence for it.*

Please see the answer to question 22.

Question 45: *What are the areas for improvement in the way that collecting societies operate at present? Who would benefit from these improvements, and what current costs (if any) could be avoided? Please give reasons and provide evidence for your response.*

Please see the answer to question 22.

Question 46: *Do you agree with the analysis contained in the impact assessment of the costs and benefits for collecting societies and their users? Are there additional costs and benefits which have not been included, or which you are able to quantify? Please provide reasons and evidence for your response.*

No comment.

Question 47: *Who else do you think would be affected by a requirement for collecting societies to adhere to codes of conduct? What would the impact be on them? Please provide reasons and evidence for your response.*

No comment.

Question 48: Is one year a sufficient period of time for collecting societies to put in place a code of conduct? Please provide reasons for why you agree or disagree? Please also provide evidence to show what a workable timeline would be?

Collecting societies would have the most pertinent evidence as to the feasibility of the proposed one year implementation period, but from the perspective of the user community a period no longer than one year seems appropriate.

Question 49: What other benefits or rewards could accrue to a collecting society for putting in place a voluntary code? Please provide evidence for your answer.

No comment.

Question 50: In your view, does it make a difference whether there is a single code, one joint code, or several joint codes? Please give reasons for your answer.

LACA agrees with the Government's view that, irrespective of whether there is an individual code or a joint code, minimum standards have to be incorporated. Users will benefit from an overarching framework, however, so if joint codes are developed the greater the level of commonality the better. Customers should be involved in setting up this overarching framework.

Question 51: Are there any other areas that you think should be covered in the minimum standards, or areas which you think should be excluded? Please give reasons for your response, including evidence of alternative means of securing protection in relation to any areas you propose should be excluded from the minimum standard.

No comment.

Question 52: Are there any additional undertakings that a collecting society should give with regard to its members and the manner in which it represents them? Should any of the proposed minimum standards about members be excluded? Please provide reasons and evidence to support your response.

No comment.

Question 53: Are there any additional undertakings that a collecting society should give with regard to its licensees, or should any of the proposed minimum standards be excluded? Please give reasons and evidence for your response, included why you consider any standards which you propose should be excluded to be unnecessary.

An obligation of timeliness should be included in the code.

Collecting societies should not be allowed to issue any unjustified threats or notices implying that a potential licensee has been infringing, or misleading statements such as "copyright infringement leads to a fine/prison". Licensees should be represented on management boards of all collecting societies. Mediation should be available if a collecting society and a licensee, or would be licensee, cannot reach an agreement.

Question 54: Are there any additional expectations for licensees that should be set out by a collecting society in its code, or should any of those listed be excluded? Please give reasons why.

No comment.

Question 55: Are there any additional measures that a collecting society should put in place to ensure proper control of the conduct of its employees, agents, and representatives? Should any of the proposed standards be excluded? Please say what these are and provide evidence to support your response.

Please see our answer to question 53.

There should also be a requirement to refrain from inappropriately high pressure selling techniques. "Off the record" advice by employees, agents and representatives to third parties should not be allowed.

Question 56: Are there any additional provisions that you believe would enhance the transparency of collecting societies? Should any of the proposed provisions be excluded? Please give reasons and evidence to support your response.

Publishing the number of complaints and how they were dealt with would enhance transparency.

LACA believes that all collecting societies, since they enjoy a degree of statutory protection, should be subject to the Freedom of Information Act.

LACA would also welcome a clear definition of what constitutes a collecting society, as well as the introduction of a register of collecting societies.

Question 57: Are there any other criteria that a collecting society should report against? Should any of the proposed criteria be excluded? Please give full reasons and evidence for your answer, describing what impact it would have and on whom.

No comment.

Question 58: Are these criteria sufficient for the creation of a complaints procedure that is regarded as fair and reasonable by the members and users of collecting societies? Should any proposed criteria be excluded? Please provide reasons and evidence to support your response.

Any complaints handling procedure must be fully transparent in regard to other rights the complainants have (i.e. access to the Copyright Tribunal and/or Copyright Ombudsman) and its place in the broader grievance handling framework.

Question 59: Please indicate whether you think a joint ombudsman or individual ombudsmen would work better. Please say why you would prefer one over the other?

LACA welcomes the proposal to establish an ombudsman scheme. A single ombudsman would be sensible as the expertise required is common to all media. It would also reduce costs.

Question 60: Is the ombudsman the right person to review the codes of conduct? Please give reasons for your answer, and propose alternatives if think the ombudsman is not best placed to be the code reviewer.

Yes. The ombudsman is sufficiently independent.

Question 61: What do you think about the intervals for review? Are they too frequent or too far apart? Please provide reasons for your answers.

No comment.

Question 62: What initiatives should the Government bring forward to provide recognition of high performance against voluntary codes of conduct? Please give reasons and evidence for your response.

We would support the Government's suggestion of allowing high performing collecting societies to display a kite-mark or charter mark.

Question 63: What do you consider the process and threshold for non-compliance should be? For example, should Government test compliance on a regular basis (say by following Ombudsman's reports) or on an ad-hoc basis? What evidence would be appropriate to demonstrate non-compliance? Please give reasons for your response.

No comment.

Question 64: What, in your view, are suitable penalties for non-compliance with a statutory code of practice? For example, are financial penalties appropriate, and, if so, what order of magnitude would be suitable? Please give reasons and provide evidence for your answer.

We find it difficult to recommend financial penalties for non-compliance without assurances that costs will not be passed on to licensees.

The ultimate sanction should be the removal of licence to practice. In the case of wilful non-compliance, sanctions could be imposed against directors.

Question 65: Do you agree that the imposition of a statutory code should be subject to review? How long should such a code be in place before it is reviewed? Please give reasons for your response.

No comment.

Question 66: If you are a collecting society which may qualify as a micro-business, would you be likely to introduce a voluntary code? If you are a user of collecting societies, what do you believe the Government should do to encourage good practice in any collecting societies which are exempt from the power to introduce a statutory code? Please give reasons for your response.

As recognized in Impact Assessment BIS031, collecting societies are monopolies, therefore LACA does not agree with the proposal to exempt any collecting society that meets the criteria of a micro-business. We feel that this would defeat the object of the codes of conduct.

Exceptions to copyright

Private copying (questions 67-71)

LACA has no specific comments to make in response to the five questions raised. We do want to put on record, however, that in principle we recognize that the action proposed by the Government in relation to private copying needs to be taken.

Preservation by libraries and archives

Question 72: *Should the preservation exception be extended:*

- *to include more types of work?***
 - *to allow multiple copies to be made?***
 - *to apply to more types of cultural organisations, such as museums?***
- How might this be done, and what would be the costs and benefits of doing it?***

LACA endorses proposals to make it easier to preserve creative content held in permanent collections by widening the existing preservation exception and extending it to cover all types of copyright work (we note that extension to artistic works is mentioned in 7.57 but not in 7.66; artistic works must be included) and to apply to more institutions. As stated in LACA's evidence to the House of Commons BIS Select Committee Inquiry into the Hargreaves Review of Intellectual Property¹⁰, without an extension of sections 42 of the CDPA to artistic works, sound recordings, films and broadcasts, these types of works will not only spend at least the next thirty years with restricted access, but the works themselves can pose a serious threat to the health and safety of those working on and around them. Waiting until copyright expires also dramatically increases the cost of preservation, as the expertise, techniques and hardware required becomes rarer and more expensive.

UK law currently only allows for one copy to be made for preservation purposes. In this fast-paced digital environment, libraries and archives must be able to make as many copies as technically necessary and as frequently as necessary to cope with the constant change in

¹⁰ http://www.cilip.org.uk/get-involved/advocacy/copyright/consultation%20responses%202009-11/Documents/LACA%20response%20BIS_Select_Committee_sep11.pdf

platforms and formats (as specifically recommended by Gowers). However, the end result should not be the simultaneous availability of copies, as this would impinge on rights holders' interests. A preservation copy should always be regarded as equivalent to the original and access to it should be no wider than was possible with the original.

There is a need for appropriate work arounds to enable licensed institutions to unlock technological protection measures (TPMs) where no key is available (for example, if a publisher goes out of business). This is essential for preservation purposes, and has already been recognised by three of the Nordic countries (Norway, Denmark and Finland) who have made sufficient provision for preservation in their laws. LACA and the British Library presented evidence of how TPMs impair digital preservation to the All Parliamentary Internet Group (APIG) Inquiry into Digital Rights Management in 2005¹¹. Unless addressed, the dangers of losing valuable digital and cultural heritage will be exacerbated as time goes on.

Question 73: Is there a case for simplifying the designation process which is part of Section 75? How might this be done and what would be the costs and benefits of doing it?

The effort in becoming designated is over complex and is in effect a barrier to effective preservation, so LACA welcomes proposals to simplify the designation process which is part of Section 75 and Section 61.

Question 74: Should any other changes be made to the current exceptions relating to libraries and archives, and what would be their costs and benefits?

We believe that the following exceptions should be introduced or clarified in UK law under the auspices of 5.2(c) of the Information Society Directive:

- As discussed under question 72 (above), there are no exceptions under EU law for the circumvention of TPMs, which poses a threat to a library or archive's ability to preserve digital items. TPMs also prevent fair-dealing type uses and access to digital works by some disabled people.
- LACA would welcome the adoption of an internal copying exception for cultural institutions, which exists under Australian copyright law. This would reduce overheads by allowing the reuse of material that an institution already has lawful access to, which would facilitate more automated cataloguing practices. It would also allow for the copying of in-copyright materials for insurance purposes.

¹¹<http://www.cilip.org.uk/sitecollectiondocuments/PDFs/policyadvocacy/laca/LACAAPIGresponse20dec05FINAL.pdf>

- While the display of an artistic work in the context of an exhibition is lawful (S.19 of the CDPA 1988), there are no clear exceptions that unequivocally allow for the display of a literary, dramatic or musical work. LACA would welcome a change to the current exceptions to allow this.

Research and private study

Question 75: Would extending the copyright exception for research and private study to include sound recordings, film and broadcasts achieve the aims described above? Can you provide evidence of its costs and benefits?

LACA endorses the proposal to extend section 29 of the CDPA to include films, sound recordings and broadcasts. Given that a wealth of research material is now held in digital or analogue media rather than in print, researchers (particularly in the arts and humanities¹²) are currently unable to make copies of material from libraries and archives that are essential for their research. In most cases researchers can only access these materials by seeking out specialist archives containing rare footage or collections of sound recordings. The ability to copy and work with the material in their own study environment would enrich the researcher's research and greatly reduce the costs to the public purse, as they would have immediate access to the source material for the duration of their projects without having to make several trips to listen to sound recordings and view films.

We believe that market forces will mean that most, if not all, financial concerns of rights holders will be unfounded. The British Library, for example, charges a minimum of £45 + VAT for reproducing a sound recording, which equates to £180 + VAT per hour. Much music and film is available free on licensed services such as Spotify or You Tube, or if a researcher wants to physically own a copy, a new release of an album can usually be purchased for between £7.99 and £8.99 (less for a back list item). A cultural sector body is very much a place of last resort and we envisage that this would continue even if the law changes.

We also wish to stress that research is not undertaken solely for the purpose of pursuing a formal qualification. It is imperative that researchers who are not enrolled on a formal programme of study at a college or university are able to copy under this exception.

Users expect libraries and archives to be able to copy material for them under the Permitted Acts in copyright law. For decades the CDPA has allowed libraries and archives to provide a non-profit copying service for users under its Permitted Acts. It therefore stands to reason

¹² See <http://www.britac.ac.uk/policy/copyright-research.cfm>

that any extension of the fair dealing provisions for research or private study proposed for consumers and researchers (i.e. library/archive users) needs also be reflected in the library and archive copying provisions in sections 38 and 39 of the CDPA.

Question 76: Should the copyright exception for research and private study permit educational establishments, libraries, archives or museums to make works available for research or private study on their premises by electronic means? What would be the costs and benefits of doing this?

LACA would welcome an amendment of the UK CDPA, available under the EU Copyright Directive, to allow institutions such as libraries and archives to communicate works from their collections to people on their premises by electronic means for the purpose of research and private study. This would legitimize standard archiving and preservation practice. The British Library, for example, “delivers” to readers, through technological means, audio material prepared by staff in its sound studio, for the reader to listen to in sound booths on the premises. This is because, for preservation purposes, the Library does not allow the public direct access to such material.

Electronic delivery from a remote store would also save costs, as it is cheaper to transmit electronically than by road.

The amendment should not be used to sanction multiple copies being made from one original, however.

Text and data mining for research

Question 77: Would an exception for text and data mining that is limited to non-commercial research be capable of delivering the intended benefits? Can you provide evidence of the costs and benefits of this measure? Are there any alternative solutions that could support the growth of text and data mining technologies and access to them?

LACA strongly supports the introduction of an exception for text and data mining for non-commercial research. This would revolutionise the research environment, making large amounts of text and data available for analysis and thereby significantly speeding up discoveries in the fields of science and medicine, as well as within the arts, humanities and social sciences. A data and text mining exception is therefore essential to ensure that developments and innovation in the research field are timely and beneficial to the public, and also to keep up with international prowess.

We believe that an exception is the only solution that could support the growth of text and data mining technologies and access to them. The process is not routinely permitted in

contracts with university researchers and, as such, negotiating appropriate clauses in contracts with numerous publishers to account for text and data mining would be more arduous and complex than introducing a copyright exception to allow for this activity. We do not see how a collective licensing approach could be feasible either, one reason for this being that collective licensing organisations do not have a mandate in regards to the 645 million websites that exist globally and are a valuable source of research. An exception would allow all UK and non-UK websites to be used within UK jurisdictional borders.

LACA acknowledges that there are competing interests that need to be balanced before an exception for commercial research could be introduced. We believe that it is the nature of the activity that determines whether or not research is commercial, however, and not the source of funding. If research qualifies as charitable research in accordance with Charity Commission guidance it should be considered non-commercial.

Parody, caricature and pastiche (questions 78-84)

LACA has no comments to make in response to the seven questions raised, other than to say that we support the introduction of an exception for parody, caricature and pastiche, as allowed for under the Information Society Directive.

Use of works for education

Question 85: How should the Government extend the education exceptions to cover more types of work? Can you provide evidence of the costs and benefits of doing this?

Currently, the permitted acts for educational purposes are largely unfit for the digital age, where teaching in educational establishments is interactive and computer software and the Internet are integral aspects of lesson and lecture delivery. Students need to be able to appraise information presented in any medium. The Government requires educators to “teach lessons that invariably capture the interest of learners” and make “creative use of resources”, but under current copyright law this is very difficult to do. The Government should widen the scope of educational exceptions to permit copying of works of any medium, so that copying is no impediment to teaching using digital technology.

This is especially important for artistic works. Some acts of copying are *de minimis*, and having something on screen is likely to be a *de minimis* amount. Use of insubstantial amounts from a film (for example) should be encouraged. However, artistic works are useful only as whole works, and at present lecturers and teachers cannot legally copy, digitise or

download images for use in teaching. Widening the educational exceptions for the use of artistic works in this way would benefit the teaching of all subjects.

Film and sound recordings can currently be used to teach production techniques, but widening the educational exceptions to cover these media would allow the teaching of, for example, the deconstruction of a picture using photomanipulation.

An expansion of S.32 (3) to cover third party material in past examination papers would be welcome. This would allow more extensive use of material in answering questions and preparing dissertations.

Question 86: Would provision of “fair dealing” exceptions for reprographic copying by educational establishments provide the greater flexibility that is intended? Can you provide evidence of the costs and benefits of such an exception?

No comment.

Question 87: What is the best way to allow the transmission of copyright works used in teaching to distance learners? What types of work should be covered under such an exception? Should on-demand as well as traditional broadcasts be covered? What would be the costs and benefits of such an exception?

Transmission over secure networks to authorised users should be allowed. This should include resident students accessing resources from private lodgings, as well as formal “distance learners”.

ERA+ licensed recordings are only available to UK-based students, and stations such as Al Jazeera aren't covered by the licence. It seems unfair to restrict the broadcasts to “on the premises” viewing, so not to allow students off-campus to see them.

Question 88: Should these exceptions be amended so that more types of educational body can benefit from them? How should an “educational establishment” be defined? Can you provide evidence of the costs and benefits of doing this?

The educational activity should be in association with a body that is currently defined as such an establishment. The UK Register of Learning Providers may be useful in identifying these establishments, presumably with the exclusion of for-profit companies.

Question 89: Is there a case for removing or restricting the licensing schemes that currently apply to the educational exceptions for recording broadcasts and reprographic copying? Can you provide evidence of the costs and benefits of doing this, in particular financial implications and impacts on educational provision and incentives to creators?

Licences provide opportunities to use copyright material in ways that go beyond what is allowed by the exceptions and limitations in the legislation. There is no need for any change.

Exceptions for people with disabilities

Question 90: How should the current disability exceptions be amended so that more people are able to benefit from them? Can you provide evidence of the costs and benefits of doing this?

LACA believes that the definition of disability should be amended to bring it into line with the definition of disability in the Equality Act 2010. This would remove an anomaly whereby print disabled people who are blind or partially sighted can be provided with an alternative format, but other print disabled people, such as those with dyslexia, cannot. All print disabled learners should be on an equal legal footing, with a right to have information provided in an accessible format, as required under Section 20 Clause 6 of the Equality Act.

Question 91: How should the disability exceptions be expanded so that they apply to more types of work? Is there a case for treating certain works differently to others? What would be the costs and benefits of amending the exceptions in this way?

The exceptions should be expanded to cover all types of work and the right to apply audio description, sub-titles and captions to all relevant formats should be permitted. Potential future developments in access to cultural content should not be constrained; disabled people need to be able to utilize future technologies as they become available.

Question 92: What are the costs and benefits of the current licensing arrangements for the disability exceptions, and is there a case for amending or removing them?

LACA acknowledges that publishers and the CLA have been supportive of attempts to enhance the provision of accessible formats, but we would prefer the removal of licences and the enactment of a broader statutory right along the lines preferred by the Government.

There are several problems with the current CLA licence. For example, it does not allow for material created under the CLA licensing scheme to be exported. This means that international disabled students who return home after their studies are unable to retain materials produced or sourced for them. An additional problem is the time that it can sometimes take to get permission from a publisher to use material in audio book format, as the CLA licence does not cover audio recordings. Long response times disadvantage students working to tight weekly deadlines.

Licences are often free of charge, so removing them would release the administrative costs of applying the scheme.

Question 93: How should this exception [subtitling of broadcasts] be modified in order to simplify its operation?

The requirement for bodies that are permitted to subtitle broadcasts to be designated by statutory order should be removed.

Use of works for quotation and reporting current affairs

Question 94: Should the current exception for criticism and review be amended so that it covers more uses of quotations? If so, should it be extended to cover any quotation, or only cover specific categories of use? Can you provide evidence of the costs or benefits of amending this exception?

It would be very useful to allow “quotation” for any fair purpose. There is already a body of practice and accepted norms, without statutory definition, similar to the widely accepted norms on the limits of fair dealing for private study and research. It is important to retain the application of the exception to “works” in general (CDPA 1988 section 30) including artistic works, as there is often a need to quote by illustration.

Question 95: Is there a need to amend or clarify the exception for reporting current events? Could this be done as part of a quotation exception, or would a separate measure be needed? What would be the costs and benefits of doing this?

No comment.

Question 96: Is there a need to amend the existing provisions relating to speeches and lectures, and what would be the costs and benefits of doing so? Should these provisions be combined within a quotations exception?

No comment.

Question 97: Would there be additional benefits if all three types of exception examined by this section were combined?

No comment.

Use of works for public administration and reporting

Question 98: How should the current exceptions for use by public bodies be amended to support greater transparency? How could such exceptions be limited to ensure that incentives to copyright owners are not undermined? Can you provide evidence of costs or benefits of doing this?

The current exceptions should be amended to allow materials to be made available on the internet. We agree that most people expect to be able to access public services and

information online, and that online access furthers the Government's plans to make the whole of the public sector more open, transparent and accountable.

Other exceptions permitted by the EU Directive (questions 99-102)

No comment.

Protecting copyright exceptions from override by contract

Question 103: What are the advantages and disadvantages of allowing copyright exceptions to be overridden by contracts? Can you provide evidence of the costs or benefits of introducing a contract-override clause of the type described above?

Some libraries and archives are managing large amounts of licensed digital content, and it is likely that most, if not all, information and data will be accessed via a licence in the future. Each licence brings with it slightly different terms, and these terms often override the exceptions and limitations that researchers, libraries, archives and educational establishments rely on. Evidence showing the extent of this issue can be seen in the British Library's analysis of 100 licence contracts¹³, which found that over 90% of the contracts undermine copyright law. Managing these different licences also creates a heavy administration burden. Whilst LACA has sympathy with creators who are also concerned about their rights being overridden by contractual terms, we would welcome a provision to protect copyright exceptions from override by contract, as already exists in Irish, Portuguese and Belgian copyright law. Legislation is the only way forward for this issue, as previous attempts to find a voluntary solution have failed.

If a blanket prohibition on override proves too difficult or damaging to rights holders' legitimate interests, consideration should be given to the protection of specific exceptions; to the protection of specific classes of work; to their restriction to specific circumstances (e.g. education and research) or to specific user groups.

Contracts should not prevent print disabled people from using assistive technology to access digital content that their library has legally procured.

TPMs should be in place solely to enforce the licence, not to provide an additional barrier to the legitimate exercise of rights afforded by copyright law.

¹³ See <http://pressandpolicy.bl.uk/ImageLibrary/detail.aspx?MediaDetailsID=691>

Copyright Notices

Question 104: Are there specific and or general areas of practical uncertainty in relation to copyright which you think would benefit from clarification from the IPO? What has been the consequence to you or your organisation of this lack of clarity?

No comment.

Question 105: Who do you think would benefit from this sort of clarification? Should it be reserved for SMEs as the group likely to produce the greatest benefit in economic growth terms?

Increased clarity and predictability in relation to copyright infringement would benefit the whole user community, including librarians, archivists and their users. This in turn would increase enterprise, innovation and economic growth as all parties would have increased confidence to utilize limitations and exceptions afforded under the law. Projects and research are currently thwarted by lack of clarity. Clarification from the IPO in areas of uncertainty would be useful, therefore.

Question 106: Have you experienced a copyright dispute over the last 5 years? If so, did you consult lawyers and how much did this cost?

LACA represents a diverse user group with a wide range of interest so, whilst we are aware of copyright disputes, we are unable to generalize about their nature or any costs involved.

Question 107: Do you think that it would be helpful for the IPO to publish its own interpretation of problem areas which may have general interest and relevance? What sources should it rely on in doing so?

No comment.

Question 108: Do you agree that it would be helpful to formalise the arrangements for these Notices through legislation? Please explain your reasons.

No comment.

Question 109: How do you think that the IPO should prioritise which areas to cover in these Notices?

An audit of queries received by the IPO in recent years should determine how the IPO prioritise which areas to cover in Notices.

Question 110: Does there need to be a legal obligation on the Courts to have regard to these Notices? Please explain your answer.

No comment.

Question 111: Are there other ways in which you think that the IPO can help clarify areas where the law is misunderstood? How would these work?

No comment.

Question 112: Do you think it would be helpful for the IPO to provide (for a fee) a non-binding dispute resolution service for specific disputes relating to copyright? Who would benefit and how? Are there any disadvantages of IPO operating such a service?

No comment.

Question 113: What would you be prepared to pay for a dispute resolution service provided by the IPO? Please explain your answer, for example by comparison with the time and financial cost of other means of redress.

No comment.

Question 114: Which would you find more useful: general Notices on the interpretation of the law (free) or advice on your specific dispute (for which there would be a charge)? Please explain your answer.

We feel that both are necessary.

Tim Padfield, Chair
Libraries and Archives Copyright Alliance

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Appendix

Examples of works published in the 1870s that are still in copyright

Author	Born	Died	Title	Pub. Date	Copyright expires end of	Duration
Louis Parker	1852	1944	There sits a bird on yonder tree	1874	2014	140
Frances McFall	1854	1943	Two Dear Little Feet	1873	2013	140
Alice Gray Jones	1852	1943	[verse]	1874	2013	139
Frederick Henry Evans	1853	1943	The chances of war	1877	2013	136
Mary Marhsall	1850	1944	The Economics of Industry	1879	2014	135