

The Libraries and Archives Copyright Alliance

Convened by CILIP: the Chartered Institute of Library and Information Professionals

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BIS Select Committee Inquiry into the Hargreaves Review of Intellectual Property and the Government's Response to that Review

Response by LACA: the Libraries and Archives Copyright Alliance August 2011

Executive Summary

- LACA broadly supports all of the Hargreaves Recommendations and warmly welcomes the Government's Response to them, particularly with regard to the sectors that LACA represents.
- One of the key recommendations for LACA is the updating of the exceptions and limitations in copyright law. This will encourage economic growth and allow libraries, archives and educational institutions to achieve their full potential with regard to supporting learning and research.
- As a result of responding to lobbying from industry rather than assessing evidence from all sectors, previous changes to the copyright framework have routinely favoured intellectual property enforcement and disregarded the value to the economy and society of the exceptions and limitations; this has stifled innovation and research.
- Without adequate exceptions and limitations, institutions such as libraries and archives struggle not only to provide a relevant service to researchers but also are prevented from preserving valuable cultural, historical and research material.

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Representing ARA: The Archives & Records Association, ARLIS/UK & Ireland: The Art Libraries Society of the UK and Ireland, BIALL: British and Irish Association of Law Librarians, The British Library, CILIP: the Chartered Institute of Library and Information Professionals, IAML/UK & Ireland: The International Association of Music Libraries, Archives and Documentation Centres, JISC: Joint Information Services Committee, LIS-COPYSEEK online community, The National Archives, The National Library of Scotland, The National Library of Wales, Royal National Institute of Blind People (RNIB) National Library Service, Society of Chief Librarians in England and Wales, and SCONUL – Society of College, National and University Libraries.

About LACA

1. 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.
2. LACA has submitted a large body of evidence to all the UK reviews of Intellectual Property and to EU consultations on copyright over the years¹ to highlight and communicate to policy makers the deficiencies in the current copyright framework in relation to the organisations that it represents. However, despite a recognition from the Intellectual Property Office (formerly the Patent Office) that a number of anomalies exist in the Copyright, Designs and Patents Act (CDPA) 1988 which adversely affect educational and cultural heritage organisations², the Government has failed to implement changes (even minor ones) which would significantly enhance the services provided by them.

The Copyright Framework and Previous Reviews

3. Changes to UK copyright law in recent years have largely concentrated on intellectual property (IP) enforcement. The last legislative change to the CDPA was in 2007, where Trading Standards were empowered to use section 107A to seize counterfeit materials and prosecute those involved in criminal copyright infringement³. This was a direct implementation of recommendation 42 of the Gowers Review of 2006. This trend of enforcement continued with the implementation in 2010 of recommendation 36 of the Gowers Review in the Digital Economy Act, which increased financial penalties to a maximum fine of £50,000 for certain online infringement. This continued strengthening of enforcement measures has served to set a precedent of control, policing and monopoly over content, particularly digital.
4. The IPO's Audit of Recommendations from Previous Reviews of Intellectual Property clearly shows a priority on enforcement over and above exceptions such as private copying, educational exceptions and research⁴. As a result, the balance in the copyright framework has shifted to one in which rights holders are empowered to the detriment of cultural and educational development.

¹<http://www.cilip.org.uk/get-involved/advocacy/copyright/Pages/default.aspx>

²LACA's response to the Gowers Review
<http://www.cilip.org.uk/sitecollectiondocuments/PDFs/policyadvocacy/laca/LACAGowersresponseFINAL21apr06.pdf> p.1

³<http://www.ipo.gov.uk/section107abrochure.pdf>

⁴<http://www.ipo.gov.uk/preview-doc-a.pdf>

5. LACA therefore agrees with the Hargreaves Review and the Government's Response that "the UK's intellectual property framework, especially with regard to copyright is falling behind what is needed", and would urge the Government to implement its proposals for change to allow the cultural heritage, education and non-commercial research sectors to better serve the public.

The Hargreaves Review of Intellectual Property

6. The Hargreaves Review of Intellectual Property and Growth, which led to the Digital Opportunity report, is commendable in terms of its evidence-based approach. Previous reviews of intellectual property have been heavily influenced by the power of industry and rights holder lobbying, which Professor Hargreaves picks up on in his report as "lobbynomics"⁵, and have resulted in increased enforcement and rigorous licensing. Yet there is an overwhelming body of evidence to suggest that copyright exceptions contribute significantly to economic growth; this was reported at length in one of LACA's submissions⁶.
7. The scope of the Review was focused fairly narrowly on how the IP framework impacts on innovation and economic growth in the UK. LACA's focus is wider, considering not only how libraries and archives contribute to economic growth through the management of information and research support, but also the public benefit of being able to access materials which otherwise remain dormant and under-used for their entire copyright term and, in the case of orphan works, potentially beyond the term.
8. Nonetheless, LACA broadly supports the recommendations made by the Hargreaves Review and particularly welcomes the emphasis on evidence and the broadening of the exceptions to copyright which will greatly benefit the cultural and education sectors.

Specific Recommendations

#1: Evidence should drive policy

9. LACA welcomes the recommendation that copyright policy should and must be driven by evidence. The Government's Response highlights the fact that there is "a near-total lack of high quality evidence on some issues and an overabundance of effective lobbying"⁷. In addition to the proposals for significant economic research to be undertaken by the IPO, there are initiatives afoot

⁵ <http://www.ipo.gov.uk/preview-finalreport.pdf> p.18

⁶ <http://www.cilip.org.uk/get-involved/advocacy/copyright/Pages/default.aspx>

⁷ <http://www.ipo.gov.uk/ipresponse-full.pdf> p.3

by funding organisations in the UK to address this lack of evidence. One such significant initiative is the Centre for Copyright and New Business Models in the Creative Economy, proposed by the Arts and Humanities Research Council (AHRC)⁸. These types of initiative will independently expand and develop the evidence base required to robustly inform intellectual property policy. This body of evidence will shape and inform IP policy, allowing more flexibility and quicker reaction to technological developments.

10. The Government has indicated a widening of the narrow scope of the Hargreaves Review to consider issues of fairness and social impact. 'Fairness', in the context of copyright, is not defined in the legislation, and therefore a focus on what is fair and proportionate should be introduced to ensure a balance of the rights of copyright holders and the liberties of users. This is particularly significant for the cultural sector.
11. LACA agrees that there must be a continued strength of support for copyright reform at EU level, with particular regard to consultations from the European Commission, WIPO treaties and intervention in significant cases in the European Court of Justice. These interventions in Europe are critical to ensure that the laws relating to UK cultural heritage, educational and non-commercial research sectors are on a par with their international counterparts.

#3: Copyright licensing

12. The concept of a Digital Copyright Exchange is one which would benefit users and creators alike. LACA believes that libraries and archives could contribute significantly to such a project by making their cultural heritage and research output material available for licensing online.
13. LACA strongly recommends that representatives from the cultural heritage and education sectors be involved in the development stages of the DCE, not least because their collaborative experience of metadata and knowledge exchange could greatly aid the technical and administrative processes that the DCE has to develop.
14. LACA agrees that collecting societies should be open and transparent and accountable for their actions. LACA welcomes the recommendations and proposals from the Government to ensure that collecting societies adopt a code of conduct with independent review mechanisms.
15. However, LACA strongly recommends that licensee stakeholders are also consulted as to the development and implementation of codes for collecting societies, as it is the users who will be affected.

⁸ <http://www.ahrc.ac.uk/FundingOpportunities/Pages/CopyrightNewBusinessModelsCreativeEconomyEoI.aspx>

#4: Orphan works

16. LACA welcomes plans to move on orphan works, which have long been a complex and unresolved issue in libraries and archives in particular. Given that the term of copyright for most published works is the life of the author plus 70 years, finding the author of a forgotten or abandoned work can often prove impossible. In order to reproduce, display or digitise the work, then, many libraries and archives must adopt risk management strategies as to whether or not the original author of the work will come forward. This is not ideal, as dealing with copyright infringement claims can be costly.
17. Furthermore, there must be an element of future-proofing so that the number of orphan works decreases over time. LACA therefore urges the Government to factor into its proposals the need for attribution in the future of the author/creator of new copyright 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 will be vital to prevent creative works becoming orphaned in the future.
18. The commercial re-use of orphan works is also welcomed, as this will stimulate economic growth through the creation and production of new creative works such as documentaries and films. However, LACA agrees with the Government that provisions for commercial re-use of orphan works must be carefully considered and appropriate safeguards set in place to ensure compliance with the Berne Convention and other relevant laws.
19. One effective way to deal with a significant proportion of orphan works in cultural heritage institutions would be to properly implement the Term Directive⁹ in the UK. Unpublished works, which previously enjoyed perpetual copyright, even now still remain in copyright until 2039 at the earliest, whereas under the Term Directive, their lifetime should have expired 70 years after the death of the author. Anomalies in UK copyright law such as this render unpublished works in cultural heritage institutions practically useless, as often they are extremely old and have no identifiable rights holder. Many other European countries do not suffer from this problem, and as such are able to digitise many cultural artefacts for both preservation purposes and the benefit of the public.
20. As it is likely that orphan works will be the subject of legislative change, it would seem prudent to remove the requirement for unpublished works to remain outside the public domain until 2039 and instead subject them to the standard term of copyright (life of the author plus 70 years). The Government has said in its response to the Hargreaves Recommendations that it does not like to see a “wealth of copyright works” unusable; removing this extended copyright term of protection from

⁹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006L0116:EN:NOT>

unpublished orphan works would therefore solve a large part of the problem of orphan works, which in turn would greatly benefit the cultural sector and the public.

21. This does not negate the need for other solutions to the orphan works issue. For example, LACA welcomes proposals by the Government and the Hargreaves Review for extended collective licensing for mass digitisation, particularly in instances where libraries and archives have large volumes of orphan works for which diligent searches for each individual item would render the entire project impractical.

#5: Limits to copyright

22. LACA welcomes the Government's response to the recommendation to open up the UK's copyright exceptions regime to take full advantage of the provisions set out in the Information Society Directive in a way which avoids the need to introduce levies in the UK. Other EU countries have implemented the exceptions and limitations listed in Article 5 much more widely than the UK, with no significant detriment to the rights holders. The enormous public benefit from the adoption of broader copyright exceptions would outweigh the minimal impact on rights holders. LACA fully supports and endorses all the exceptions, specifically those which relate to the organisations it represents; these exceptions are listed in the following paragraphs.
23. **Copying for preservation purposes:** in accordance with Article 5.2(c) of the Information Society Directive¹⁰, LACA endorses the extension of sections 42 of the CDPA to artistic works, sound recordings, films and broadcasts. Without an extension for preservation for these types of works, they will not only spend at least the next thirty years with restricted access, but they can pose a serious threat to the health and safety of those working on and around them.¹¹ 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 platforms and formats (as specifically recommended by Gowers).
24. The preservation process for items must start on receipt by the library or archive rather than when deterioration has set in. The BBC's Domesday Project in 1986 is a prime example of the importance of preserving valuable resources. The laser videodiscs used in 1986 could no longer be read, which meant that the data became inaccessible and was nearly lost for good until technology had advanced enough to allow the BBC to resurrect it 25 years later¹². This situation must not

¹⁰ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML>

¹¹ Kodak's advice on the handling of nitrate base film
http://motion.kodak.com/motion/Support/Technical_Information/Storage/storage_nitrate.htm

¹² <http://www.bbc.co.uk/news/technology-13367398>

be repeated with other works as a result of hindrances to the preservation process by copyright law.

25. With regards to technological protection measures (TPMs), there is a need for appropriate work-arounds to enable licensed institutions to unlock 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 2006¹³. Unless addressed, the dangers of losing valuable digital and cultural heritage will be exacerbated as time goes on.
26. Widening the preservation exception to ensure that valuable cultural items are preserved so that once they are out of copyright they can be used by and displayed to the general public, or used by researchers, does not adversely affect the rights holders, preserves cultural history, improves research opportunities and reduces the danger to health and safety.
27. **Fair dealing for non-commercial research and private study:** LACA endorses the extension of 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 humanities) are currently unable to make copies of material from libraries and archives which is essential for their research. In most cases, researchers have no other access to these materials other than by seeking out specialist archives containing rare footage or collections of sound recordings. The ability to copy and work with them in their own study environment would enrich their 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.
28. In addition, 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 that any extension of the fair dealing provisions for research or private study proposed for consumers and researchers (i.e., library/archive users) need also be reflected in the library and archive copying provisions in sections 38 and 39 of the CDPA.
29. One particular issue that libraries and archives have is with the inability to copy free-standing artistic works, including the disembedding of artistic works from textual material. The CDPA currently only allows the copying of illustrations for non-commercial research and private study when they are surrounded by text, yet libraries and archives hold large amounts of photographs, drawings and other standalone artistic works. Extending the library provisions in the CDPA to include

¹³ <http://www.apcomms.org.uk/apiq/current-activities/apiq-inquiry-into-digital-rights-management.html>

the copying of artistic works for users undertaking non-commercial research or private study is a logical and necessary step, particularly as users are allowed to copy artistic works under the fair dealing provisions. Libraries and archives hold much valuable and often delicate older materials which have to be handled with care; it is therefore logical that professionals who are skilled in the art of handling fragile items should be allowed to make copies of them for researchers.

30. **Use for the sole purpose of illustration in teaching:** One area which it was not possible to expand upon given the narrow scope of the Hargreaves Review was the use of material for teaching purposes. 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. Yet the Government requires educators to “teach lessons that invariably capture the interest of learners” and make “creative use of resources”¹⁴, which under current copyright law is very difficult to do. By adopting Article 3(a) of the Information Society Directive, the Government will bring copyright law in line with its policies and inspection criteria for education and allow those involved in teaching and learning in public-funded institutions to use materials such as images from the Internet in a lawful way.
31. **Text and data mining:** LACA strongly believes that the introduction of an exception for text and data mining will 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 in particular. The Royal Society has recently opened a major new policy study on the use of scientific information as it affects scientists and society, looking at how information should be managed to support innovative and productive research that reflects public values.¹⁵ The British Academy submitted evidence for the study, supporting the requirement for openness and transparency of data, but also noting the benefits of scientific data to other non-science sectors such as humanities and social sciences:

To take one example, in food and health related issues there is a huge range of questions about public policy and social behaviour, even though the data and research may be located in the natural sciences. If access to scientific information is opened up, natural scientists and social scientists will be able to work better together to improve scientific literacy and public understanding of the status, character and quality of data¹⁶.

¹⁴Ofsted: Grade criteria for the inspection of initial teacher education 2008-2011 <http://www.ofsted.gov.uk/resources/grade-criteria-for-inspection-of-initial-teacher-education-2008-11>

¹⁵<http://royalsociety.org/policy/sape/>

¹⁶British Academy 2011: A Response from the British Academy to the Royal Society's call for evidence - Science as a public enterprise: opening up scientific information. p.1 <http://www.britac.ac.uk/policy/index.cfm>

To have a large body of data available requires a means of analysing it effectively. Data and text mining 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.

32. Furthermore, facts are not covered by copyright, and therefore the copying and analysis of facts would not be an infringement of copyright and would not require a licence to do so. However, much of the material required to text or data mine is covered by contract (often in the form of a licence) which restricts this type of activity. The process of text and data mining would not be an issue if the same material (under licence) was analysed using pen and paper. Computers merely make reprographic copies (as that is how they function) of data and text in order to run an analysis of them. Computers are infinitely faster at processing data than humans are (armed with pen and paper), and therefore if this activity is not restricted by human copying, it should not be restricted for machine copying either, as the activities are the same.
33. **Protection from override by contract.** LACA welcomes the Government's response and Hargreaves' recommendation that the exceptions and limitations to copyright should not be overridden by contract. This is specifically mentioned in Hargreaves Recommendation 5 and emphasised at length in Chapter 5 of the Digital Opportunity report. Licences play a large role in the digital environment and it is likely that most if not all information and data will be accessed via a licence in the future. Licences and contracts must not be allowed to override the exceptions and limitations in copyright law, as, if they do, any provisions which already exist in copyright law will become meaningless. Researchers, libraries, archives and educational establishments all thrive on the exceptions and limitations afforded to them by copyright law. Any attempt to monetise those exceptions through licence agreements is exploitative and against the spirit of the "encouragement of learning" aspect to copyright.
34. A clause to prevent contract from overriding copyright already exists in Irish, Portuguese and Belgian copyright law. Legislation is the only way forward for this particular issue, as previous attempts to find a voluntary solution have failed¹⁷. Voluntary solutions can also fall foul of competition law, not be adopted by all in the UK, and would not apply to the great number of foreign contracts which increasingly must be dealt with.

#8: Enforcement of IP Rights

35. Despite the outcome of previous reviews focusing on IP enforcement, there is still room for improvement, which is why LACA supports the Government's plans to introduce a small claims court for claims of copyright infringement of up to £5000. However, given that there is now such an emphasis on enforcement, users and consumers need to have their rights strengthened to protect

¹⁷ LACA submission to the Hargreaves Review <http://www.ipo.gov.uk/preview-c4e-sub-libraries.pdf> p.16 8.6

them against unjustified threats. In the UK, it is an offence in certain circumstances to make unjustified threats of legal action for patent infringement. It should be the same for copyright.

36. Recent examples indicate a worrying trend of unfounded legal threats of copyright infringement¹⁸. Additionally, some organisations (such as Righthaven) have made it their business to enforce intellectual property rights, but do not want to cooperate with the courts when they are on the wrong side of the law themselves¹⁹.
37. Other scenarios involve individuals or organisations (often known as 'trolls') who purchase the copyright in works and then seek to enforce their rights. For example, they may discover an instance where a newspaper article has been published without authorisation and then buy the copyright in the content with the specific intention of bringing a copyright infringement lawsuit. Such actions can lead to the 'trolls' being paid to resolve disputes through out of court settlements, especially where the infringer is concerned, at the cost of making a defence in court.
38. Libraries and archives may be adversely affected by the enforcement measures set out in the Digital Economy Act as intermediary providers of WiFi services. Any attempts to enforce IP rights must take into account the effect that this may have on intermediary internet providers such as libraries and archives, and the subsequent consequences. Intermediaries should not be penalised for the acts of their users, who may be successful at circumventing measures to prevent unlawful use such as file-sharing of third party copyright materials.

Conclusion

39. The current copyright framework in the United Kingdom is stifling innovation and economic growth. The direction of travel over the past ten years has been one of IP enforcement, as policy makers have listened to, and based decisions on, the effective lobbying by the creative industries rather than evidence. It is imperative that the Government bases its intellectual property policy on sound evidence and that it is committed to enhancing and developing this evidence base through the funding of independent research. The vast body of evidence submitted to the Hargreaves Review was an overwhelming indication that current copyright law is inhibiting creativity, in particular the type of creativity which would bring no economic harm to rights holders. A broadening of the exceptions and permitted acts under copyright law will not adversely affect rights holders as long as appropriate safeguards are in place.

¹⁸Davenport Lyons case - <http://www.sra.org.uk/sra/news/press/davenport-lyons.page> and <http://torrentfreak.com/anti-piracy-lawyers-accuse-blind-man-of-downloading-porn-110809/>

¹⁹<http://paidcontent.org/article/419-righthaven-ceo-steve-gibson-brushes-aside-fair-use-setbacks/>

40. LACA wholeheartedly supports the Government's response to the Hargreaves Review and welcomes the implementation of all ten of its recommendations in the proposals laid out within it. The benefits to the public and to public sector institutions will be significant and will finally allow the UK to catch up with its international counterparts in the areas of research, education, innovation and cultural preservation. Libraries and archives have an important role in supporting economic growth and innovation in research, but their full potential cannot be achieved until the provisions for their activities in the legislative framework are updated and improved. At the moment, a wealth of important content currently runs the risk of being warehoused for fear of copyright infringement. It is time to free this content for the greater public and national benefit. The Government, along with the IPO, should work swiftly to implement the proposals to ensure the stimulation of economic growth and to reap the long-lasting rewards of innovation and research.