



LORD CHANCELLOR'S
ADVISORY COUNCIL ON NATIONAL RECORDS AND ARCHIVES

Taking Forward the Gowers Review of Intellectual Property: Second Stage Consultation on Copyright Exceptions

1. Background on the Advisory Council on National Records and Archives

- 1.1 The function of the Lord Chancellor's Advisory Council on National Records and Archives is to advise the Lord Chancellor, and through him other ministers as appropriate, on all matters relating to records and archives in the United Kingdom and in particular in England and Wales. It is chaired by the Master of the Rolls.
- 1.2 The Advisory Council on National Records and Archives embraces two further bodies: the Advisory Council on Public Records, established by s1(2) of the Public Records Act 1958(2), and the Advisory Council on Historical Manuscripts, established by the Lord Chancellor to advise him on matters formerly the responsibility of the Royal Commission on Historical Manuscripts. All three bodies share the same members.
- 1.3 The terms of reference of the Advisory Council on National Records and Archives are to consider and advise the Lord Chancellor upon:
- Major objectives, programmes and policy changes for The National Archives
 - Proposed legislation affecting The National Archives
 - The implications for records and public services of any proposed change to the status of The National Archives
 - Any subjects brought to its attention by the Lord Chancellor

2. The Advisory Council's overall views

- 2.1 Archives form a major part of the information landscape in the United Kingdom and of Government's information strategy. Government has recently refreshed and restated its strategic objectives for publicly-funded archives in *Archives for the 21st Century*, which was published in November 2009. This is now proceeding to implementation through The National Archives and the Museums, Libraries and Archives Council (in partnership with CyMAL in Wales). They have just launched *Archives for the 21st Century in Action*. See <http://www.nationalarchives.gov.uk/policy/aft21c/default.htm> for further information.
- 2.2 Archives are not confined to organisations which bear the name of archives. Archival collections will also be found in great abundance in libraries and in museums and galleries. The concern of the Advisory Council is with archives in this widest sense, not simply with the content of designated archival repositories. Likewise, beyond The National Archives,

the Advisory Council seeks to take into account the interests of archivists and archive managers, the users of archives and the owners/depositors of archives.

- 2.3 Archives are of a very diverse nature and comprise material in every medium which has ever been used for the recording and transmission of information, including audio-visual and digital formats. Although they mostly constitute unpublished sources, many archives also incorporate published documents. The distinction between what is published and what is unpublished is being rapidly eroded in the digital age. Therefore, every dimension of archival collections is touched by copyright issues in some shape or form, including the unexpired transitional protection for works which were unpublished at the time of the passage of the Copyright Designs and Patents Act 1988.
- 2.4 The Advisory Council considers that, in several important respects, the Copyright Designs and Patents Act 1988 now lags behind the changes in the information environment which have occurred during the intervening two decades. Accordingly, it recognises the need for copyright reform as set out in the evidence and recommendations of the Gowers Review. It welcomes the steps which Government is taking to consider those recommendations in depth and to proceed to implement them, where appropriate, through legislative change. The Advisory Council understands that this is a complex process, with a need not simply to balance the interests of rightsholders and users but to adhere to obligations set down in European and other international copyright frameworks.
- 2.5 The Advisory Council believes that copyright exceptions are fundamental to the preservation and dissemination of archival content. It has concerns with the current copyright regime in two respects: undue complexity and anomalies/inconsistencies. For the regime to be effective in practice, and understood and observed by archivists and archival users, it needs to be simplified and harmonised wherever possible. Copyright exceptions should also, in our view, be format-blind. An exception, once granted, should be applicable to all formats of information, and not just some. These are the two litmus tests which we have used to evaluate the Government's proposals as set out in the Second Stage Consultation.
- 2.6 With regard to Gowers Recommendation 9: Research and Private Study, the Advisory Council fully supports the expansion of the fair dealing exception in s29 to cover sound recordings, films and broadcasts and the extension of s43 to include unpublished artistic works. However, we wish to register serious reservations about the proposed restriction of fair dealing (and of copying by libraries and archives) to members of educational establishments in respect of sound recordings, films and broadcasts.
- 2.7 With regard to Gowers Recommendations 10A/10B: Libraries and Archives, the Advisory Council welcomes Government proposals to expand the exception for preservation copying to all classes of work, to permit format shifting, and to enable museums and galleries to benefit from the provisions. We believe that any definition of 'permanent collection' should be subjective, and we highlight a particular issue with image libraries. We are disappointed by the Government's unwillingness to change current arrangements in respect of digital rights management, since this may act as an effective break on appropriate preservation copying in certain circumstances, thereby limiting the benefit of the extended exception.
- 2.8 The Advisory Council has no particular opinion to express about the third of the Gowers Recommendations which is the subject of this Second Stage Consultation, relating to Educational Exceptions. These impact less directly upon the world of archives, not least since Government has indicated that it does not intend to broaden the definition of an educational establishment to include libraries, archives and museums (p. 12, paragraph 70). As it stands, therefore, this recommendation falls somewhat outside the scope of the Advisory Council's work.

2.9 For further information about our response, please contact Dr Grazia Zaffuto, Advisory Council Secretary on Tel: 0208 392 5377 or by email:

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3. Advisory Council's response to Gowers Recommendation 9: Research and Private Study

- 3.1 The Advisory Council welcomes the expansion of the fair dealing exception in s29 to cover sound recordings, films and broadcasts, in addition to the literary, dramatic, musical and artistic works to which it already applies (p. 28, paragraph 187; p. 30, paragraph 201). The Council also supports Government's decision not to differentiate between non-commercial research and private study (p. 29, paragraph 195); not to limit the extended exception to specific purposes or subjects (p. 30, paragraph 206); and not to prescribe the amount of a work that may be copied, nor to define fair dealing (p. 32, paragraph 220).
- 3.2 However, the Advisory Council is extremely concerned that the expanded exception for fair dealing in respect of sound recordings, films and broadcasts is to be limited to 'members of an educational establishment', with the requirement that 'copying must be for the purposes of a course of study or research being undertaken at that establishment' (p. 28, paragraph 187; p. 29, paragraph 196; p. 31, paragraph 217). We note with regret that this restriction is to be embedded in an amended library declaration form (p. 33, paragraph 232).
- 3.3 This limitation is at odds with fair dealing in respect of literary, dramatic, musical and artistic works where non-commercial research and private study are not, and will not be (p. 31, paragraph 217), confined to any particular class of researchers or students. Not only does this fail the Advisory Council's anomaly and complexity tests, since yet another inconsistency is being introduced into copyright law (with scope for consequential confusion), but we see no convincing empirical evidence being brought forward for such a restriction. So far as we are aware, there is no material proof that the principle of fair dealing has hitherto compromised the economic interests of rightsholders. We note that there is no such requirement in Article 5(3)(a) of the Information Society Directive, nor is it implicit in the Three Step Test.
- 3.4 Furthermore, this limitation would appear to contradict other elements of Government policy, both the generic encouragement to pursue informal and lifelong learning, and (in our particular context) the desire to see archives opened up and utilised by the widest possible constituency (as reflected in the Government's strategy for publicly-funded archives). All forms of archives, but especially those managed by local authorities, are heavily used by informal learners and independent scholars, many of whom go on to publish the outcomes of their research, thereby adding to the collective understanding of our national and local history and cultural heritage.
- 3.5 Should this restriction be implemented, archives and other information organisations, whether located in educational establishments or not, will be required to differentiate between two groups of users, those who are members of educational establishments and those who are not, and to offer them a different level of service. This will be seen as discriminatory and will also be very hard to police. Certainly, it will be difficult, if not impossible, for librarians and archivists to validate the additional information about educational establishment which is being sought on the new declaration forms. As with the present declaration forms, they will simply have to accept it at face value, unless they have immediate reason to doubt its veracity.

3.6 The potentially detrimental effect of this limitation on archives is further compounded by Government's unwillingness to designate libraries, archives and museums and galleries as educational establishments (p. 12, paragraph 70).

3.7 If Government's principal concern in proposing this limitation is to prevent fair dealing in sound recordings, films and broadcasts from being applied for the purposes of entertainment, then the restriction to members of educational establishments seems a peculiarly blunt instrument for achieving this end. The problem surely lies in the fact that, unlike many European Union countries, the United Kingdom has failed to implement a private copying exception. For this if for no other reason, the Advisory Council considers it unfortunate that, in this Second Stage Consultation, Government has announced that it does not intend to proceed with such a private copying exception (p. 25, paragraph 171).

3.8 In respect of copying by libraries and archives, the Advisory Council likewise approves in principle the new s39A and s43A, which are designed to enable librarians and archivists to make copies of, respectively, published and unpublished sound recordings and films (p. 30, paragraph 202; p. 32, paragraph 226). However, as with fair dealing, we do not support the limitation of the making of such copies for the benefit solely of members of educational establishments, and for exactly the same reasons.

3.9 The extension of s43 to include unpublished artistic works removes an obvious anomaly (p. 33, paragraph 228) and is to be welcomed. There remain unresolved issues with s39 in that the copying of published copyright works is restricted to librarians, whereas such works may also exist in archives; and with s43 where, strictly speaking, the copying of a manuscript which has later been published is not permitted. The Advisory Council does not believe that it was the intention of Parliament to prevent either act and thus hopes that Government may be willing to contemplate some amendment of these sections, in respect of these two particulars, also.

3.10 In answer to the specific questions posed in Annex B, paragraphs 1-3:

- We are not aware of any consequences which would render impractical the application of s29(3) to all works (paragraph 1)
- We are not aware that there is any legal justification for clarifying that legitimately acquired copies would be infringing copies if subsequently dealt with, since the matter seems to be adequately covered in the 1988 Act (paragraph 2)
- We do not support the restriction of the expanded exception to members of educational establishments (paragraph 3)

4. Advisory Council's response to Gowers Recommendations 10A and 10B: Libraries and Archives

4.1 The Advisory Council supports many elements of the Government's proposals for the amendment of s42 which will enable better preservation of the national documentary heritage, not least of those materials in audio-visual and digital formats. In particular, the Council welcomes the expansion of the exception: to cover all classes of work, including artistic works, films and sound recordings, in addition to other works which are already covered (p. 37, paragraphs 267 and 269); to permit format shifting, with no numerical

limitation on the number of copies (p. 37, paragraph 267; p. 38, paragraph 272); and to cover museums and galleries as well as libraries and archives (p. 39, paragraph 278).

4.2 We note that the extended exception will apply, as for classes of work which are already covered by it, to items which form part of the permanent collection of the relevant library, archive or museum or gallery and where it is not reasonably practicable to purchase a replacement copy (p. 37, paragraph 269; p. 39, paragraph 279). Archives are largely concerned with unpublished or otherwise unique material, and thus the question of the purchase of a replacement from a commercial source would rarely arise. Following accessioning, initial sorting and any scheduled review, it is also unusual for archives (as opposed to modern records centres) to dispose of collections (other than in the case of material on deposit and in the legal ownership of a third party, which could theoretically be recalled by that third party). Thus, the very essence of archives is that they comprise permanent collections, and this would be our principal response to the definitional question posed in Annex B, paragraph 12.

4.3 Notwithstanding this generic position, there is one particular area of archives where there may be some ambiguity about what constitutes a permanent collection. This concerns *non-commercial* image libraries comprising photographic copies – legitimately acquired – of works held in the permanent collections of other institutions, public or private. Such image libraries constitute a significant research and study resource in their own right and are properly regarded as part of the permanent collection of the library, archive or museum and gallery where they are held, even though the original works which they copy form part of the permanent collections of other institutions. In some cases, the original works may have subsequently disappeared (either entirely or from public view), and the copy constitutes the only publicly-accessible record. Many of these copies were made a long time ago, by non-digital techniques, and the resultant photographs fade over time or otherwise degrade. They thus require appropriate preservation and conservation treatment, which may include preservation copying. Accordingly, any definition of ‘permanent collection’ which is adopted by Government, should one be judged necessary, should be of the subjective kind, as set out in Annex B, paragraph 12(a), leaving the judgment to the authority responsible for the running of the relevant collection. This would address the issue of image libraries.

4.4 Meanwhile, with regard to image libraries, the Advisory Council’s reading of the substituted wording for s42 in Annex A, paragraph 18 is that preservation copying of photographic copies which form part of a permanent collection would not be prohibited since, although they may be copies of an item in the permanent collection of other libraries, archives, museums and galleries, those copies were not made for the purpose specified in subsection 2(c), i.e. replacement of an item which has been lost, destroyed or damaged. The Advisory Council would be pleased to receive confirmation from the Intellectual Property Office that our understanding is correct.

4.5 The Advisory Council has some concerns about paragraph 288 (p. 40), signalling Government’s reluctance to change the current arrangements with regard to digital rights management (DRM), in cases where technical protection measures may constrain the practical implementation of the extended exception, thereby rendering it inoperable. Like many information-related organisations, the Advisory Council considers that the current system of a notice of complaint to the Secretary of State is inadequate, and that DRM-workarounds should be allowed, at least for a limited number of ‘trusted intermediaries’, to enable preservation copying to take place with the minimum of inconvenience. However, the Advisory Council takes note of Government’s ongoing work in what we accept is a complex area.

4.6 In answer to those specific questions posed in Annex B, paragraphs 10-17 on which the Advisory Council has a view:

- The Advisory Council considers it to be the right approach not to restrict the number of preservation copies, not least since digital preservation is still in its relative infancy (paragraph 10)
- Libraries, archives, museums and galleries are not mutually exclusive and should not be treated as such – certainly, archival content will be found in them all (paragraph 11)
- Permanent collections should be subjectively defined and will increasingly include digital material that may not necessarily be held on a server located on the premises, or even under the direct control, of the archive concerned (paragraph 12)
- We consider that the proposed wording of s42(3) makes clear that what is being preserved is the content rather than the object (paragraph 14)
- We believe that the wording of the proposed amendments does meet the stated objectives (paragraph 15)
- We do not particularly foresee that the proposed amended definition of 'publication' will have undesirable consequences (paragraph 16)
- Statutory Instrument 1989/1212 will need to be brought into line with the proposed legislative changes (paragraph 17)

Advisory Council on National Records and Archives
31 March 2010