

# JISC COMMENTS ON THE DIUS/IPO DOCUMENT “© THE FUTURE: DEVELOPMENT OF A COPYRIGHT AGENDA FOR THE 21<sup>ST</sup> CENTURY”

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Naomi Korn and Professor Charles Oppenheim

## Overview

JISC welcomes further discussion on developing an appropriate copyright regime for the 21<sup>st</sup> Century. In particular, in the UK, the realization of the full benefits arising from substantial public sector investment in ICT to support teaching, learning, research and administration, is being severely hindered by an archaic and out-of-step copyright system. Areas of concern include:

### Copyright Exceptions must balance the interests of rights-holders and users

Fair and user-friendly copyright Exceptions must support the commitment in the WIPO Copyright Treaty to “...serve as means of achieving creative, social and economic ends and not as ends in themselves. These laws and regulations must serve, and never overturn, the basic human rights to health, education, employment and cultural life.”<sup>1</sup>

### Contract law and Technical Protection Measures must never over-ride the Exceptions

Copyright Exceptions must be enshrined in law and never over-ridden by Contract law and Technical Protection Measures. Without such regulatory measures, access to content of benefit to teaching, learning and research will continue to be locked down to the detriment of open access.

### Copyright Exceptions need to reflect the use of ICT across teaching, learning and research

Copyright Exceptions must be medium and technology neutral consistent with the use of ICT across teaching, learning and research and compatible with the implementation of such measures across other EU member states.

### Access to the UK's cultural heritage for future generations is at risk

Specific Copyright Exceptions are vital for public sector organisations who own works for which the rights holders are unknown or cannot be traced. The lack of legal certainty in the use of so called “orphan works” presents unnecessary risks for owners of such works as well as the potential for works of academic and historic value to be restricted access.

### Copyright exceptions need to be harmonised across Europe

Harmonised exceptions which are fit for the digital age are vital to avoid a fragmented and out-of-step copyright system across Europe, which is stemming the flow of scientific data, scholarly research results, accurate and up to date business information and cultural content.

### Retention of term for sound recordings and performers rights

Any extension to term for sound recordings and performers' rights will have a substantially detrimental effect on JISC's digitisation programme and other activities. It is vital that the UK Government honour its findings within the Gowers Review of IP, consider the full negative implications of such measures across the UK and subsequently seek to block such proposals.

These unresolved issues severely impede access to legitimately owned content and present substantive barriers in the realisation of: “A successful HE sector at the forefront of research and learning and teaching needs to enjoy and exploit world class ICT infrastructure tailored for the needs of Higher Education Institutions (HEIs) which can be personalised for students, lecturers, researchers and administrative staff”.<sup>2</sup>

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<sup>1</sup> <http://www.ipcharter.org/>

<sup>2</sup> From “ICT in Higher Education”, a paper prepared by Professor Sir Ron Cooke, Chair of JISC Board, for John Denham, MP, Secretary of State, Innovation, Universities and Skills

## Context

1. The Joint Information Systems Committee (JISC)<sup>3</sup> supports UK higher and further education by providing strategic guidance, advice and opportunities to use information and communication technologies to support teaching, learning, research and administration. The JISC is funded by the UK Higher and Further Education funding bodies.
2. JISC is committed to ensuring that access to JISC-funded resources and projects is free to the community and in accordance with internationally recognised open standards. To this end, it encourages the use of Open Access models and, where appropriate, Open Source solutions.
3. JISC's strategic aims include:
  - Delivery of innovative and sustainable ICT infrastructure, services and practice that support institutions in meeting their mission.
  - Promoting the development, uptake and effective use of ICT to support learning and teaching.
  - Promoting the development, uptake and effective use of ICT to support research.
  - Promoting the development, uptake and effective use of ICT within institutions and in support of their management.
  - Developing and implementing a programme to support institutions' engagement with the wider community.
  - Continuing to improve its own working practices.
4. HEFCE, through JISC and the HE Academy, is proposing to invest £45 Million over the next 5 years in its open educational agenda to ensure that the UK does not start to lag behind in generating and making available high quality modern learning and teaching resources. JISC also works collaboratively with international funding bodies across the range of its activities, in support of its strategic priorities.
5. JISC's work supports the recent statement made by the Secretary of State, Innovation, Universities and Skills.

*“Our aim should be the best by showing that online learning can offer those features of higher education which make our university world class today: Our challenge is to support students in developing their skills of evaluation, critical analysis and reflection, synthesis, problem-solving, creativity and thinking across discipline boundaries, as well as giving them any extra skills they need to make their use of IT fully effective.”<sup>4</sup>*

## General points about the consultation

6. JISC welcomes further discussion on developing an appropriate copyright regime for the 21<sup>st</sup> Century, and in particular, is pleased at the emphasis in the Minister's foreword on a fair and reasonable system for users, including the 'consumers who often are not directly engaged in the copyright debate', which includes, we hope, researchers, teachers and students.
7. At the same time, it is surprising that this consultation appears to cut across the work that is being undertaken to implement the recommendations outlined within the Gowers Review of IP. The Gowers Review, which adopted an appropriate evidence-based approach, recommended a number of changes to UK copyright law, in particular to the limitations and exceptions with the intention of reflecting the reality of current practice in the creation, dissemination and use of materials in the digital environment.

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<sup>3</sup> Further information about the JISC can be found at <http://www.jisc.ac.uk>

<sup>4</sup> Taken from the Secretary of State, Innovation, Universities and Skills, John Denham speech to the Universities UK Conference on 11 September 2008

8. Used for the benefit of research, learning, education, health and culture, these limitations and exceptions are essential to the UK's Knowledge Economy. They reflect the necessary balance in copyright between rights holders interests and those of the user. They are essential to the successful function of any copyright regime and within the context of the UK's educational establishments, are a necessary balance to ensure that content can be accessed and used.
9. However, in the UK, the realization of the full benefits arising from substantial public sector investment in ICT to support teaching, learning, research and administration, is being severely hindered by an archaic and out-of-step copyright system. The UK's copyright framework neither addresses the dramatic change in ICT over the last twenty-five years nor the importance of balance between users' interests and those of rights holders. At the same time, the apparent polarization between the two ignores the reality that often creators are users and vice versa. Indeed, the UK's higher and further educational establishments make a substantial contribution to research and innovation to the benefit of UK PLC. For example, the contribution of copyright, and in particular scholarly publications by UK researchers, is estimated in a recent report by the Research Information Network, to be 3.3% to the global research base<sup>5</sup>. The recent report by Paul Wellings makes a similarly compelling case<sup>6</sup>.
10. In addition, the UK also lags behind the copyright frameworks implemented by many other countries across Europe and Internationally. These issues leave our educational establishments open to legal uncertainty and unacceptable risks, inequalities when working collaboratively with colleagues abroad and unnecessary administrative burdens which drain core Government investment.
11. The real impact on colleges, universities and their funding bodies of the current legislative framework includes:
  - Substantially increasing the administrative burden in certain situations of rights administration and clearance as the impact and speed of ICT use and adoption in providing access increases
  - Exposing the HE and FE sectors and their funding bodies to increased levels of risk and legal uncertainty
  - Presenting unnecessary barriers in long term core funding investments, such as proposed open educational content activities, and investment in elearning, escience and research.
12. Like the Gowers Review of IP, it is important that the current review of copyright started by DIUS is evidence-based, and that the approach should always be that the law only needs changing if there is compelling reason to do so. DIUS represents both industry and education and it needs to recognise that it therefore represents creators (both in industry and in education) and users (both in industry and in education). It would be a mistake to only listen to creators in industry without listening to, and reflecting on the opinions of creators in higher education, and users of all kinds.
13. We note that the Rt. Hon. David Lammy MP states in his introduction that "around 25% of UK internet users engaged in music 'piracy' in 2007". However, no source for this claim is provided, so it cannot be examined objectively. We suspect that it is based on surveys of a sample of Internet users who were asked whether they ever downloaded music. Not all downloading of music is illegal, and not all unauthorised downloading is 'piracy'; the latter term means re-selling or re-disseminating the downloaded music to third parties without permission. We would also point out that piracy is not a problem in regard to academic material. In this case, we believe that issues in one sector are being ported into other areas

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<sup>5</sup> See [http://www.rin.ac.uk/files/Income-&-cost-flows-report-\(summary\)-final.pdf](http://www.rin.ac.uk/files/Income-&-cost-flows-report-(summary)-final.pdf) for more information

<sup>6</sup> [http://www.dius.gov.uk/policy/intellectual\\_property.html](http://www.dius.gov.uk/policy/intellectual_property.html)

of the creative economy where they are not an issue.

14. The fifth paragraph of the background states (correctly) that currently format shifting is illegal, but fails to note that Gowers Review of IP has recommended that this no longer be the case. Neither has it been referenced that the major industries involved have indicated they have no objection to this change to the law. We therefore question why this information has not been mentioned within the Background? We must therefore ask whether the proposed exception is going to be introduced or not, and would welcome the IPO's response to this question.
15. We were disappointed that the discussion document hardly addresses orphan works. In fact a recent survey by the Strategic Content Alliance and the Collections Trust has pointed to an average figure of 5-10% of all works across the public sector; 89% of public sector organisations responding that these works impacted upon their public service delivery. In addition, the consultation, with its emphasis on enforcement rather than on user rights, fails to address the issue of contracts over-riding exceptions to copyright, and the use of technical protection measures to severely impede access to legitimately owned content. We are surprised, that note has not been taken of the fact that the law in Belgium and Eire does not permit contracts to over-ride exceptions to copyright, and so as a result the question "should the UK introduce similar legislation?" is not raised.

### **Our responses to the questions**

"Does the current system provide the right balance between commercial certainty and the rights of creators and creative artists? Are creative artists sufficiently rewarded/protected through their existing rights?"

The question is curiously biased towards "creative artists" rather than all creators, and within the context of research, fails to acknowledge the role and contribution of academic researchers. Indeed, within this specific context, academics are often placed in positions of losing control of their publications by publishers who request the assignment of rights in return for the publication of their work. This is often accompanied by contractual clauses which override both the academic and their institution's ability to benefit from any limitations and exceptions. This is highly undesirable when substantial investment and commitments are being made into open access, including the technical infrastructure to support this, such as the JISC's Repositories Programme<sup>7</sup>.

It should also be noted that the Government's proposed support to extend the duration of term for performer's rights and sound recordings, is an appropriate example of the potential negative impact resulting from any measures to increase the rights of creators. In this case, the proposed extension of term is likely to impact upon the work of JISC in the following ways:

- For current and future digitisation projects, it would greatly increase the costs of \*tracing\* copyright holders, already a hugely time consuming business for post-1958 recordings.
- For current and future digitisation projects, it would also increase the costs of \*clearing\* rights, as performers will be able to continue claiming rights in works beyond 50 years after creation
- The excessive costs involved in IPR clearance might prevent digitisation taking place, and lead to the loss of material held on fragile media, thereby destroying our cultural and scholarly heritage.

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<sup>7</sup> <http://www.jisc.ac.uk/home/whatwedo/themes/eresearch.aspx>

- More broadly, despite claims to the contrary in the proposal, these issues would restrict access to content of cultural and scholarly worth, thereby damaging the possibilities for research, teaching, learning, creative re-use and general enjoyment and understanding.

Ramifications of any extensions to enforcement provisions will surely result in the creation of more “orphan works”, and the encountering of even more onerous administrative costs in rights clearance by our educational establishments. Ultimately, this will be to the detriment of the full realisation of the benefit of ICT within the context of teaching, learning and research.

In this regard, JISC therefore supports the position of Bournemouth University and signed by leading academics in a letter to Jose Manuel Barroso<sup>8</sup>, in which the negative impact of such an extension is outlined. We also support the findings of “The Recasting of Copyright & Related Rights for the Knowledge Economy”<sup>9</sup> carried out on behalf of the EC’s DG Internal Market and Services by The Institute for Information Law (IViR) of the University of Amsterdam, in which the authors note:

*“The term of related rights must reflect a balance between incentive and market freedom. This balance will be upset when terms are extended for the mere reason that content subject to expiration still has market value. The public domain is not merely a graveyard of recordings that have lost all value in the market place. It is also an essential source of inspiration to subsequent creators, innovators and distributors. Without content that still triggers the public imagination a robust public domain cannot exist.”*

“Is our current system too complex?”

The emphasis of the consultation appears to be one of simplification. In the context of exceptions, simplification would imply a move away from our list of explicit exceptions to more generic exceptions on the American fair use model. This is unlikely to be acceptable to most rights owners and there is no reason to believe that it would improve the clarity of exceptions. If people cannot understand what ‘fair dealing for the purposes of criticism or review’ means how will they understand what is a ‘fair use’?

Instead, we would suggest that it is not simpler but more effective exceptions, appropriate for the digital age that are required, such as the removal of the anomaly of contract over-riding them. Indeed, a recent survey<sup>10</sup> carried out by the UK’s British Library of 100 contracts comprising a randomly selected collection of agreements offered to the British Library revealed that over 90% undermined copyright law. This means that the British Library is not alone in paying more for rights it entitled to under the law, as well as resulting in unnecessary restrictions on researchers, students, lifelong learners and the public at large.

There is also the suggestion that rights clearance is too complex. Within Higher and Further educational establishments, the costs of rights clearance, (including the tracing of rights holders) are an enormous administrative burden. These problems are exacerbated by the unreasonable length of copyright particularly in unpublished works, (in which copyright can last in some cases until 31<sup>st</sup> December 2039).

Solutions which would help include:

- Simplification of standard term of duration to (estimated) date of death of creator plus 70 years.
- Copyright exceptions which are fit for purpose and balance the interests of rights-holders and users in support the commitment in the WIPO Copyright Treaty to “....serve as means of achieving creative, social and economic ends and not as ends in

<sup>8</sup> <http://www.cippm.org.uk/images/Sound%20recordings%20%28Barroso%29.pdf>

<sup>9</sup> [http://www.ivir.nl/publications/other/IViR\\_Recast\\_Final\\_Report\\_2006.pdf](http://www.ivir.nl/publications/other/IViR_Recast_Final_Report_2006.pdf)

<sup>10</sup> <http://www.bl.uk/ip/pdf/ipmatrix.pdf>

themselves. These laws and regulations must serve, and never overturn, the basic human rights to health, education, employment and cultural life.”<sup>11</sup>

- Copyright exceptions which reflect the use of ICT across teaching, learning and research and help maximise core Government investment. They would also need to be in line with other EU states, and providing a level playing field for researchers and academics, medium and technology neutral consistent with the use of ICT across teaching, learning and research.
- Issues relating to orphan works addressed by legislative provisions and therefore providing legal certainty for public sector bodies. This would reduce the potential risks for owners of such works as well as unlocking access to works of academic and historic value.
- The Copyright exceptions to be enshrined within the legislation safeguarded against the possibility of being over-ridden by contract law and technical protection measures. Without such regulatory measures, access to content of benefit to teaching, learning and research will continue to be locked down to the detriment of open access.

#### “Does the copyright system provide the right incentives?”

The paper fails to acknowledge that copyright works made by the sort of creators that the IPO is thinking about comprise a small proportion of all copyright material. Within the context of teaching, learning and research, every documentary photograph, every sound recording, every letter, every e-mail, is potentially a copyright work. While recognising the right of creators to be rewarded, we should seek to ensure that everyday life, including the conduct of education and research, is not hampered by excessive emphasis on the enforcement of copyright.

The Gowers Review of IP aimed at achieving a balance, something that this discussion document does not address. JISC represents the interests of creators and users of copyright works, but is concerned that the business of the creation of teaching and research outputs will be hampered if too many barriers are put in the way of those in higher education accessing the fruits of others’ work. If the barriers to the use of others’ materials are too high, then creativity in the higher education sphere will become that much harder, i.e., the incentives to create teaching and research outputs will be reduced at the expense of the contribution of research in this sphere to UK PLC.

#### **Concluding Remarks**

HM Government has made a great play of developing evidence-based policy, particularly within the context of the Gowers Review of IP and recently in support of collecting UK-based evidence in response to the EC’s Green Paper on Copyright in the Knowledge Economy. We strongly support SABIP’s research programme and urge that no recommendations for changes to the law are made which strengthen the rights of creators, whilst ignoring the need to re-evaluate the exceptions and limitations. Only when any recommended changes are supported by convincing evidence that such changes (a) address an important need and (b) that the proposed change will, on balance, provide benefits to the UK population, should the UK Government consider such measures.

In addition, it should also be stressed that any extension to term for sound recordings and performers’ rights will have a substantially detrimental effect on JISC’s digitisation programme and other activities. It is vital that the UK Government honour its findings within the Gowers Review of IP, consider the full negative implications of such measures across the UK and subsequently seek to block such proposals.

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<sup>11</sup> <http://www.ipcharter.org/>

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