

Joint Guidelines on Copyright and Academic Research

Guidelines for researchers and publishers
in the Humanities and Social Sciences

Published jointly by the British Academy
and the Publishers Association

April 2008



The British Academy

THE NATIONAL ACADEMY FOR THE HUMANITIES AND SOCIAL SCIENCES

**THE PUBLISHERS
ASSOCIATION**

The British Academy
10 Carlton House Terrace,
London SW1Y 5AH

Telephone: 020 7969 5200
Fax: 020 7969 5300

Web site: www.britac.ac.uk

The Publishers Association
29b Montague Street,
London WC1B 5BW

Telephone: 020 7691 9191
Fax: 020 7691 9199

Web site: www.publishers.org.uk

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Introduction

These Joint Guidelines set out to give those seeking or granting permission in the field of academic research information on the application of copyright in current issues involving literary works. It is hoped this will be equally helpful for researchers, authors, publishers and other relevant rightsholders. Other copyright works, such as artistic, musical or other works, are beyond the scope of these guidelines.

The first part looks at the position in general (giving illustrative examples), while the second part examines the way the law works in some common situations where in our experience difficulty has been encountered. While the guidelines treat the researcher as primarily a *user* of copyright material, they also keep in mind that the researcher is a *producer* who may originate copyright work. They also recognise that a publisher may be seeking permission from another rightsholder as well as granting permission for its own author's work.

Where the law is open-ended or unclear, the guidelines seek to provide a reasonable and balanced interpretation of its effects, hoping to influence outcomes in a number of potentially problematic situations.

While the second part provides some guidance on specific situations, it is always necessary to read these in the light of the first part (especially section 14 on fair dealing), and we suggest that users read the whole of the first part for purposes of orientation. Both the British Academy and the Publishers Association will be encouraging their members to make use of these guidelines, to assist, and inform, future permissions negotiations. While every effort has been made to ensure their accuracy, it should be stressed that only general guidance can be given here, and that the interpretation of the law and its application to particular facts is always open to argument in the absence of authoritative court rulings, particularly at a time when EU and UK copyright law is developing (and will continue to develop) rapidly, to take account of technological changes. In addition, the particular detailed circumstances of individual cases can have a significant bearing on their final outcomes. For these reasons this document does not deal with the law in exhaustive depth or detail. There is a list of sources of further information at the end of the text. In cases of dispute or difficulty, specific legal advice should be sought.

Credits

These guidelines were prepared by a joint working party of the British Academy and the Publishers Association. We are particularly grateful to Professor Hector MacQueen, Fellow of the British Academy, and Hugh Jones of the Publishers Association, and for the research assistance provided by Dr Dinusha Mendis, Department of Law, University of Central Lancashire. Further information can be obtained from the Policy Section, The British Academy, 10 Carlton House Terrace, London, SW1Y 5AH. Telephone 020 7969 5200. Email: v.hurley@britac.ac.uk

The law is stated as at 31 March 2008.

Part 1: Copyright in General

1. A brief history of copyright law in the UK

- 1.1** The history of copyright in the UK is usually traced back to privileges granted by the monarch in the early modern period before 1700, giving printers (but not authors as such) exclusive rights to print and distribute books. After the Anglo-Scottish Union of 1707, the author gained the exclusive 'right and liberty' of printing books through the Statute of Anne 1709; a right and liberty usually exercised, however, by granting a licence to the actual printer. The Statute of Anne confined the right to a 14-year term, renewable once (21 years for works already in print). Questions about whether the author was entitled to a perpetual right to copyright under the common law, or whether the statute had restricted its duration, were answered by the courts in favour of the latter view. Henceforth copyright in most cases was clearly a right dependent only on statute, lasting for only a limited period of time.
- 1.2** During the nineteenth century, however, copyright was extended as to subject matter, bringing in art, drama and music as well as literature, and the term of the right grew in length. The law also developed an international character when the Berne Convention for the Protection of Literary and Artistic Works 1886 provided a minimum framework of principles to be observed around the world. A key feature of this Convention was provision for a balance between protecting the intellectual work of creators whilst also providing the public with the right in certain specified cases to access and build on such works. This underpins concepts of fair dealing with a copyright work which may not require the rightsholder's licence or constitute infringement if done without authorisation, provided certain specified conditions are complied with. A further result of the Convention is that copyright can now be enjoyed world-wide in Convention countries. But it is important to stress that national copyright laws remain significantly different from each other in many respects, and that one can only have in any country the rights which that country has chosen to establish. The present account is therefore limited to law in the UK, and activities in this country.
- 1.3** The late nineteenth and twentieth centuries saw further expansion of copyright to cover new ways of producing and disseminating creative works: photographs, films, sound recordings, broadcasts, computer programs and databases are all protected by copyright and neighbouring rights such as Database Right. Most recently, the Internet and the expanding use of digitally based media have thrown up new issues with which copyright - sometimes in amended form - has had to deal. The length of the copyright term has continued to be extended. The UK's membership of the European Union has also required participation in a continuing project for the harmonisation of copyright across the Union, achieved here by continuing amendment of the present governing statute, the Copyright, Designs and Patents Act 1988. Although this has brought the various national laws of the member states closer together, they remain distinct in a number of important aspects: we have not yet reached a Europe-wide copyright law, and a uniform world-wide law is an even more distant dream.

2. What copyright covers

- 2.1** Copyright like patents and trade marks is a form of intangible property ("intellectual property") in certain kinds of original work. It is different from the property which may exist in the physical forms or media in which the work happens to be embodied (of which there may be a very large number), and the two kinds of right will not necessarily, or even very often, be vested in the same person. So an author may own literary copyright in the words, while a publisher may own typographical copyright in a published edition, and others may own separate software [or other]

rights in any online services or websites used, all of which are different from the physical ownership of a printed book purchased in a bookshop.

2.2 Copyright law in the UK now protects the following:

- literary, dramatic and musical works;
- databases;
- artistic works;
- the typographical arrangement of published editions of literary, dramatic or musical works;
- sound recordings;
- films;
- broadcast, internet and other transmissions (online or offline).

The works above have copyright whether or not they are published, apart from typographical arrangements, which must be in published editions.

2.3 In relation to **literary, dramatic and musical works**, copyright will not subsist in any of these categories unless and until it is recorded, in writing or otherwise. In the case of electronic information, this includes being put into retrievable form. Furthermore, it is the expression of the work, and not the ideas in the work, which is protected by copyright. A literary work is one that is written, spoken or sung. Thus the category includes printed and electronically published matter, manuscripts, typescripts, poetry and prose, song lyrics, and personal, official and business material. Computer programs are classified as literary works, as will be word processed documents, spreadsheets and emails. Words and music which have been recorded in media other than writing - for example, tape recorded - have copyright in their own right.

2.4 As far as **databases** are concerned, a 'database' for the purposes of determining the existence of copyright means a collection of independent works, data or other materials, which are -

- (i) arranged in a systematic or methodical way, and
- (ii) individually accessible by electronic or other means.

Databases, it should be noted, can also be protected by a special (*sui generis*) right over and above copyright. This special right, and its relationship with the copyright in the database, is dealt with in more detail later in these Guidelines (see section 18).

2.5 **Artistic works** are graphic works (which include paintings, drawings, diagrams, maps, charts, plans, engravings, etchings, lithographs and woodcuts), photographs, sculptures, collages, works of architecture (buildings or models rather than plans) and works of artistic craftsmanship. All these have copyright irrespective of artistic quality, apart from works of architecture and artistic craftsmanship.

2.6 **Sound recordings, films and broadcasts** are mostly self-explanatory, but it should be noted that the definitions in the copyright legislation avoid medium-specificity in order to accommodate past, present and future technological developments.

2.7 A final point worth making is that *a product may embody more than one copyright work*. Thus a book will have copyright as a literary work, but there will also be a separate copyright in its typographical arrangement, as would also be the case with printed dramatic scripts and musical scores. A database has copyright in the selection and arrangement of its contents, but this does not affect any copyright those items of content may have in their own right. A film has been held to be also a dramatic work, even when it was not a recording of such a work. A sound recording of a piece of music will involve copyrights, not only in the sound recording as such, but also, separately, one in the music. And if the work recorded is a song, there will be a further copyright in the song lyrics. A broadcast of a film or sound recording will have copyright as a broadcast, but this will leave unaffected the copyrights in the film or sound recording. While the sound track accompanying a film is treated as part of the film for copyright purposes, a copyright may also subsist in the sound track as a sound recording. With the advent of digital technology, the multimedia product (e.g. a computer game, the Microsoft Encarta encyclopaedia), which consists of digitised material combining audio, video, text and images still and moving played through a computer, and with which the user may interact, has become commonplace, raising difficult questions about the mixture of copyrights which such a product may have.

3. Originality

3.1 To have copyright, literary, dramatic, musical and artistic works must all be original. This simply means, for most purposes, that a work must be the product of the skill, effort and labour of its author and not copied from another preceding work. 'Originality' does not impose any other standards of quality or creativity. There is no express requirement of originality as such in relation to films, sound recordings, broadcasts, and typographical arrangements of published editions, but copyright does not subsist in any of these works if, or to the extent that, it is, respectively, a copy taken from a previous film or sound recording, a repeat broadcast, or a reproduction of the typographical arrangement of a previous edition.

3.2 There are special rules here for database copyright. A database is original if, and only if, by reason of the selection or arrangement of the contents of the database the database constitutes the author's own intellectual creation. So for example an alphabetical listing of names would not in itself be an original structure for a database, since the author did not create the alphabet (although an original arrangement or selection within the alphabet may be). The standard is generally taken as slightly more demanding than ordinary 'originality'. (There is no requirement of originality in the special, *sui generis* database right - see section 18.)

4. Term

4.1 As already noted (section 1.1), copyright lasts for a limited period of time (the **term of protection**). The term is, however, different for different categories of copyright work. Various formulae are used, generally involving a period lasting from creation of the work (or in some cases publication) until either 70 or 50 years from the end of the calendar year in which a given event occurred. The use of 'the end of the calendar year' as part of the formula is to avoid disputes as to precisely when the event in question occurred. With literary, dramatic, musical and artistic works, databases and films, the copyright period is tied first to the lifetime of the author, with the 70-year period added on after the end of the year of his or her death (*post mortem auctoris*). With other copyrights, there is generally a 50-year period, not tied to any particular lifetime, but rather to the making or publication of the work.

4.2 The main rules can be seen in simplified form in the following table, bearing in mind that the specific period of time mentioned runs from the end of the calendar year in which the ‘event’ took place:

Subject-matter	Event	Period
Literary, dramatic, musical	Author’s death	end of year of author’s death +70 years
Artistic	Author’s death	end of year of author’s death + 70 years
Databases (a) copyright term	Creator’s death	end of year of author’s death + 70 years
(b) Database right	Completion of work	15 years from end of year of completion
Films	Death of last to die of principal director, screenplay/dialogue author, music composer	End of year of that death + 70 years
Typographical arrangements	Publication	25 years from end of year of publication
Sound recordings	Making, publication, public playing/communication	50 year
Broadcasts	Making	50 years

There are, however, a number of exceptions to these general rules about the length of copyright, and some of the most important for academic research purposes are set out in the following paragraphs. Note also the rules on ‘orphan works’, discussed in detail in section 8 below.

- 4.3 Unpublished works made before 1 August 1989.** Until 1 August 1989 unpublished literary, dramatic and musical works created before that date enjoyed perpetual copyright. The law that then came into force placed a date of expiry on all such works in existence at that date whose authors had died. The date in question is 31 December 2039. The rule also applies to photographs taken on or after 1 June 1957 and still unpublished at 1 August 1989. For other photographs, the position is complicated as a result of several changes to the term of their protection in the course of the twentieth century, and specialist guidance should be sought.
- 4.4 Joint authorship.** Copyright in a jointly authored work (defined as one where the contributions of the authors are not distinguished from each other) will expire 70 years from the end of the calendar year in which there occurred the death of the author who died last of the group of joint authors. Where the identity of one or more of the authors is known, and the identity of one or more is not, copyright expires 70 years from the end of the calendar year in which died the last of the authors whose identity is known.
- 4.5 Computer-generated works.** Where the work is entirely computer-generated - e.g. through data base analysis - copyright expires at the end of the period of 50 years from the end of the calendar year in which the work was made.
- 4.6 Crown and Parliamentary copyright.** The term is also different for Crown and Parliamentary copyright, which will be considered at section 10 below.
- 4.7 Effect of expiry of copyright term.** When the copyright term expires, all the rightsholder's rights come to an end, and the work enters the unfettered public domain, free from all constraints on copying, publication, performance, playing, showing, broadcasting or transmitting on the Internet, or adaptation (see section 11). But, especially, where there is only one unique copy of a work, such as a letter or an unpublished work of art, there may still be difficulties in taking advantage of the freedom from copyright. The item in question will continue to be owned by someone as physical property, which has no terminus other than the property itself ceasing to exist, and no fair dealing or public interest limitations. The owner has the right to exclude others altogether, or to restrict and control their access and use of the object, and this is unaffected by the expiry of copyright. This right to control access and use of the object itself does not, of course, affect the ability of others to use images of the object that may have been created and which they have the right to use (e.g. because the image is no longer in copyright, or, being in copyright, a licence permitting the use has been acquired).

5. First ownership

- 5.1** The basic principle with literary, dramatic, musical and artistic works is that the author - the person who creates the work - is the first owner of the copyright. There may be joint authorship where a work is produced by the collaboration of two or more authors in which the contribution of each is not distinct from that of the others; in this case, the joint authors are joint owners. A film is treated as a work of joint authorship by the principal director and the producer. First copyright in a sound recording is owned by the producer; in a broadcast, by the person making it; and in a typographical arrangement, by the publisher.

- 5.2** UK law also states that where an employee in the course of his employment creates a literary, dramatic, musical or artistic work, then it will belong to the employer. This has caused some debate about the position of academics employed by universities: is the copyright in the academic's work owned by the university? The concept of 'course of employment' is important here: to what extent is it in the course of the academic's employment to produce copyright works? Case law exists showing that a court will not necessarily see this as the position, and has also held that an employer's long-standing practice of allowing employees to take the copyright in their works will prevent a subsequent claim to copyright in those works by the employer. An employer can, of course, set out to change its practice for the future. Ideally, the position will be clarified in the employment contract.
- 5.3** As a matter of custom, many higher education institutions have employed a practice of waiving any rights of ownership of copyright, particularly, in research material. One of the reasons for this may be that both faculty members and HEIs regard most research as having no direct market value unless patents are involved. In 2000, the UK JISC Committee for Awareness, Liaison and Training (JCALT) carried out a survey to determine whether HEIs in the UK actually do waive their copyright in research material. The findings showed that those who waived some of their control, waived copyright on journal articles and books (80%), closely followed by personal lecture notes (73%).

6. Transfer of copyright to subsequent owners

- 6.1** As an item of property copyright can be transferred (bought and sold). The transfer is known technically as an assignment (assignation in Scotland). Since copyright is actually a bundle of several different rights, a transfer may be of one or part of them rather than of the whole. The assignment must be in writing signed by or on behalf of the assignor (as must any grant of an exclusive licence). Transfers do not affect the duration of the copyright, which continues to be calculated (in the case of literary, dramatic, musical or artistic works) around the original author's lifetime. Ownership of documents or other material records of a copyright work - e.g. the manuscript of a novel or a musical work, or the original of a painting - is also separate from the copyright in the work. So if an author gives or sells his or her manuscripts to a library, the gift or sale will not also carry the copyright unless that is specifically included in the transaction. Outright transfers of ownership of copyright are different from licences, under which ownership is retained but the other party is enabled to carry out certain acts which would otherwise infringe copyright. Licences are dealt with in more detail in section 13 below.

7. Transfer after the death of the rightsholder

- 7.1** Copyright may also be bequeathed by the rightsholder on death, or transmitted in accordance with the rules on intestate succession. A bequest of an original document or other material thing recording or containing a testator's *unpublished* literary, dramatic or musical work or sound recording or film carries the copyright in the work with it *unless* the testator manifests a contrary intention in the will - for example, entrusts the rights to a relative or literary/artistic executors.
- 7.2** The post mortem position with regard to copyright can become unclear over the long posthumous period of many copyrights, especially where an individual has left the originals of *published* material to a repository such as an archive or library without the copyright position also being made clear. Ownership of the physical property on which a copyright work was first recorded does not necessarily also carry with it the copyright in such circumstances, nor will the date of the author's death always be known so as to determine precisely when the copyright

expires. If the copyright passed to descendants, tracing them in search of permissions is frequently difficult. Often too the actual identity of the author is not known, whether through that person's original choice (e.g. use of a pseudonym) or because the context of composition was not such as to require the author to identify him- or herself (e.g. official document). This gives rise to the problem of the 'orphan work'.

8. The 'orphan work'

- 8.1** 'Orphan works' are literary or other works still in copyright, but whose copyright owners cannot be found - even after diligent good faith search - in order to grant permission to reproduce them or substantial parts of them. This is a problem for publishers as much as academics and other users - see the Publishers Association Position Paper at http://www.publishers.org.uk/en/home/copyright/issues_and_papers/. The UK legislation deals explicitly only with the cases where the author of a literary, dramatic, musical and artistic work remained *anonymous* or used a *pseudonym*.
- 8.2** A first point to note is the statutory presumption for the case of the *anonymous published* literary, dramatic, musical or artistic work. The effect of this is that, if a name purporting to be that of the publisher appears on copies of the work as first published, that person is presumed, until the contrary is proved, to have been the owner of the copyright at the time of publication.

Example:

A publisher compiled and published a directory of solicitors from a magnetic tape owned by the Law Society and containing names and addresses of practising solicitors; information gathered directly from solicitors thus identified; and a database compiled by the publishers' employees. The information was then sorted into the required form by a third party commissioned by the publisher. Only the publisher's name appeared on the actual publication; no author was named. The publisher was presumed to be the owner of the copyright and able to challenge infringements unless it could be proved by the defendant that someone else had the right.

Where it applies, this presumption means that the would-be user of a published anonymous work should first seek a licence from the person or company identified as its publisher. The presumption does not deal, however, with either the unpublished work or the work where the name that appears as author is a pseudonym, and, in either case, the identity of the author is not reasonably discoverable.

- 8.3** In such circumstances, the would-be user of the material must make
- 'reasonable inquiry' to ascertain the author's identity AND
 - have reasonable grounds to assume that copyright has expired OR that the author died more than 70 years before the beginning of the current calendar year.

Only if both conditions apply will it be safe to use the material in question.

- 8.4** **Reasonable inquiry to ascertain author's identity.** It is important that the potential user should be able to demonstrate that serious efforts have been made in good faith to locate and contact the

rights owner, including all reasonably available avenues of inquiry, before any use of the work not already permitted by law (e.g. fair dealing: see section 14) may be made. The initial responsibility is that of the would-be user, who should therefore make and keep a record of the efforts made. The following steps might constitute *reasonable inquiry*:

- If the work was published, make serious effort to contact the publishers or their successors (remember the presumption discussed at 8.2).
- If the work is unpublished, ascertain from the current owners of the document or other original record of the work what its provenance is.
- Advertisement in appropriate journals or other publications (compare the practice of solicitors and others advertising for missing persons in relation to the administration of estates and actions for presumption of death).
- Checks of reasonably accessible library catalogues and databases of rights owners for relevant information.

8.5 Reasonable grounds for assuming copyright has expired. In considering this aspect, the following points must be borne in mind:

- Was the work *published more than 50 years ago*? This is because there are special rules for works published anonymously before 1 August 1989, under which their copyright expires 50 years from the end of the calendar year in which the work was first published. Thus, in 2008, any work published anonymously or pseudonymously in or before 1957 is out of copyright.
- Works *published anonymously/pseudonymously on or after 1 August 1989* will still be in copyright. A new regime will come fully into effect after 31 December 2039 under which copyright will expire 70 years from the end of the year of publication, but this will be of no effect until 2040.
- If the work is *unpublished but can be dated to before 1 August 1989*, then it will still be in copyright (until 31 December 2039 - see section 4.3).
- Any *unpublished work produced since 1 August 1989* will be in copyright until at least 31 December 2059, and probably for some time after that. This is because, unless the author is meantime identified, the copyright expires 70 years from the making of the work. So the copyright in an unpublished work made in 2005 will expire at the end of 2075 unless the author is identified before then and died in, say, 2012, in which case the copyright endures until the end of 2082.

8.6 Reasonable grounds to assume the author's death more than 70 years ago. At present, this alternative to 'reasonable grounds for thinking the copyright expired' (section 8.5) is especially important for unpublished works produced before 1 August 1989. This alternative route allows one to reproduce the work despite the fact that it is still in copyright under the rules on unpublished works (section 4.3). Note that therefore this is not a rule about how long copyright lasts, but about whether or not it is infringed: the person using the material without licence has a defence against further claims of infringement.

8.7 Before invoking this possibility, it should therefore certainly be checked:

- Whether there are any other works known to be by the same author and if so, what their dates may be.

- Does the work have any internal evidence as to the age of the author, which might be set against average lifespans?
- If nothing else is known of the author's identity or work, a reasonable approach might be to follow the rules on presumption of death. In England and Wales these apply if there is no acceptable affirmative evidence that a person was alive at some time during a continuous period of seven years or more and that persons likely to have heard from him or her in that time have not done so, and all due and appropriate inquiries have been made. In Scotland, more simply, death is presumed if a person has not been known to be alive for seven years. Taken together with the legislation's 70-year period, this would suggest that a period of between 75 and 80 years from the author's last-known work is reasonable in law.

Example:

A poem is completed in MS in 1940, the author remaining anonymous or using a pseudonym but dating the work and making clear that he is a soldier facing the prospect of active service. The author is killed in action at El Alamein in 1942 but the fact that he wrote poetry or poems is not generally known. The MS of the poem is recovered from among debris on the battlefield and deposited with much other similar material in the Imperial War Museum. The copyright in the poem will expire on 31 December 2039. However if in 2013 a would-be user (e.g an editor or publisher wishing to include the poem in an anthology of war poetry) can show reasonable grounds for supposing that the author died before 1943 (here this might be the provenance of the MS), the reproduction in the anthology will not be an infringement of the copyright expiring in 2039. If further scholarship (or indeed serendipity or chance) identifies the author before the end of 2039, then publication before the end of 2012 will need a licence from whoever is now the rightsholder; but not from 1 January 2013 on.

- 8.8** The rules above leave at least two situations untreated as regards copyright term. One is the case where the work is neither anonymous nor pseudonymous. A name appears upon the work, and there is no reason to think that this disguises the author's true identity; but there is no knowledge, or immediate way of finding out, whether the author so named is alive or dead, and if the latter, when the death occurred. The second untreated case is where it cannot be ascertained when the anonymous/pseudonymous work was made and it remains unpublished. Elements of these two cases may combine to form a third situation likewise not dealt with in the present law: an unpublished work of uncertain date but with an author identified by a name which is not a pseudonym. While it may be possible to use such sources as registers of deaths (increasingly available on-line), that may not categorically identify one individual as the author, so leaving the would-be user in reasonable doubt about the copyright position of the work. It is suggested that in such cases the rules on anonymity and pseudonymity might be applied by way of analogy, remembering always that the responsibility for active inquiry lies with the would-be user (see sections 8.4-8.7). Finally, there is no 'reasonable inquiry' rule at all with regard to anonymous films, sound recordings or broadcasts.
- 8.9** A commonly encountered case is where, although the author or original copyright owner is known, the tracing of subsequent ownership is extremely laborious or even impossible (section 7.2). The present rules do not seem to reach this situation either, and the best suggestion is to pursue the principle of 'reasonable inquiry' outlined in section 8.4. Where the original or last known copyright owner was a company which has ceased to exist (e.g. as a result of insolvency or take-over), a reasonable inquiry might begin with a search of the Companies Register.

- 8.10 Clear acknowledgement/attribution.** In cases of doubt, it is sensible in any publication incorporating the 'orphan work' in whole or in part to disclaim any intention to infringe and to indicate willingness to acknowledge rightsholders appropriately should they make themselves known (although such proceeding has no statutory basis). In all cases there should be clear and adequate attribution to the work, and to the copyright owner(s), throughout any actual use of the work. Where the work contains a copyright or similar rights notice, credit should be given in a way which reflects the notice. The user should avoid derogatory treatment (see further section 11) of the work.
- 8.11** The ability to use an orphan work, even in good faith, cannot be for more than one use only. A second would-be user cannot rely on the first user's reasonable inquiry as a basis for further use, while the first user has no right to control or give permissions for further use of the orphan work. But the second user's inquiries may start from, and use, those already carried out.
- 8.12 Reasonable remuneration.** A copyright owner in an orphan work who appears in due course may have a right to remuneration for the use made of the work, although account may also be taken of the legitimate interests of any user who had made reasonable inquiry in good faith prior to publication (e.g. the costs and investment of the user in making inquiry and carrying out publication). Remuneration is unlikely to exceed any licence fee applicable had permission been sought and granted in the normal way. The rightsholder may also be able to seek removal or take down of the material from the user's publication (e.g. if it has been posted on the Internet).
- 8.13 Reform.** The law on orphan works is clearly not in a satisfactory state. Publishers are working with bodies such as the European Commission, the UK Intellectual Property Office, the library community and voluntary licensing agencies, to improve the law and smooth the path of those pursuing information on rights in orphan works to allow both their use and the proper recognition of rights where they exist. Meanwhile, see the Publishers Association's Position Paper on Orphan Works referred to at 8.1.

9. Crown and Parliamentary copyright

- 9.1** Copyright material produced by government ministers and employees of the Crown in the course of their duties, falls into the ownership of the Crown - Crown copyright. Therefore, Crown copyright protects most material originated by government ministers and civil servants. It does not, however, extend to local government. The Director of the Office of Public Sector Information (OPSI) in her role as the Queen's Printer is appointed by Her Majesty the Queen to manage all copyrights owned by the Crown on Her Majesty's behalf. OPSI's Information Policy team licenses on the Queen's Printer's behalf. The Queen's Printer for Scotland (QPS) manages Crown copyright material originated by the Scottish Administration. The Information Policy team of the Office of the QPS licenses on the QPS's behalf.
- 9.2** OPSI maintains a very helpful website to which reference should be made for guidance on the use of Crown copyright material (<http://www.opsi.gov.uk/advice/crown-copyright/index.htm>). Guidance is also available on the Office of the QPS site at: <http://www.oqps.gov.uk/>
- 9.3** Crown copyright work enjoys a different term of copyright protection - up to 125 years from the end of the calendar year in which the work was made, OR, if it is published commercially within 75 years of its making, for 50 years from the end of the year in which it was so published. The rules on anonymity and pseudonymity (section 8) do not apply.
- 9.4** Parliamentary copyright covers Bills of Parliament, as well as other literary, dramatic, musical or

artistic works made by or under the control of the Houses of Parliament and the Scottish Parliament. There are similar provisions for the measures of the Northern Ireland and Welsh Assemblies. The copyright in a Bill or draft measure ceases when it completes its parliamentary progress (i.e. on Royal Assent, defeat, withdrawal, or because un-passed at the end of a parliamentary session). It follows that Acts of Parliament and secondary legislation are subject to Crown Copyright protection. For other works, Parliamentary copyright expires 50 years from the end of the calendar in which the work in question was made. See further the OPSI website (<http://www.opsi.gov.uk/advice/parliamentary-copyright/index.htm>).

- 9.5** No special rules apply to the copyright of works produced by local authorities or other public bodies which do not form part of the Crown. To such bodies the ordinary rules of ownership (notably the employment rule) and term apply.

10. Exclusive rights: economic rights

10.1 Copyright owners are generally endowed with two sets of ‘bundles’ of rights. The pecuniary set of rights requires no application or formalities, but comes into existence upon a work’s creation. This first set of rights, also called *economic rights*, coexist with moral rights (for which see section 11). Copyright owners have the right to allow (free of charge or for a fee) (through licensing or contractual permission) or to prohibit the following activities, unless one of the exemptions described at section 14 applies:

- (a) *Copying the work*. This includes photocopying, writing something down verbatim, and scanning a written or pictorial image into a computer, amongst other means of copying. The current list of copying actions that could be considered acts of infringement reflects the fact that digital copies can be easily reproduced and manipulated. For example, every time a computer makes a transient copy of a webpage or ‘caches’ it, it constitutes a copy. An attachment sent by email creates another copy, as does the act of opening it.
- (b) *Issuing a work to the public* - i.e. disseminating copies to other people. An author usually assigns to or licenses the publisher to use this right, for example, with the production, sale or licensing of multiple copies of the work. While the publisher will have had to make a copy of the author’s work to set the process of publication in motion, and so require at least a licence for that, the rights to disseminate or make available are today often much more important from the point of view of revenue-earning. As it applies to physical copies, the right is limited to putting the work into public circulation *for the first time*, however. This right cannot be called upon, for example, to prevent sales of a copy that has already been legally disseminated. The second-hand bookseller does not need a copyright licence to operate law fully.
- (c) *Broadcasting a work or using other electronic means to communicate a work to the public*. An important new exclusive right for rightsholders under the 2001 EU Copyright Directive has been the right of communication or making available to the public, implemented in the UK in 2003. This includes not only broadcasting but also posting copyright works to the Internet so that they can be used by others, or otherwise showing or playing a work via an electronic transmission. Typically this will be the primary right for digital online exploitation of a copy right work, generally by way of licensing.
- (d) *Making adaptations of a work*. Adaptation for purposes of copyright law includes translating a written work, converting a computer program into a different code or format, or otherwise taking an original version of a work and turning it into a different format. It deals principally,

therefore, with a number of cases which do not fall clearly under the rubric of ‘copying’.

- (e) *Renting or lending copies of the work to the public.* Rental or lending are exclusive rights of the copyright holder, so the video rental shop and the lending library do require copyright licences to operate lawfully. However, the lending library does not need a licence in relation to works falling under the Public Lending Right (PLR) mechanism. The PLR scheme provides payment for authors in respect of loans of their works from local library authority libraries. Libraries which are not public libraries and which are not conducted for profit are also not subject to the lending right, so this exempts most university libraries and others which are not generally open to the public at large.
- (f) *Performing, playing or otherwise displaying the work in public.* This includes musical performances, theatrical plays, speeches and lectures, and other formats of taking copyrighted content and communicating it to the public. Educational establishments such as universities have some exemption with regard to the performance of literary, dramatic or musical works, or the playing or showing of a sound recording, film or broadcast, in the course of their instructional activities before audiences of persons directly connected with those activities (teachers, students).

11. Exclusive rights: moral rights

- 11.1** The second set of rights owned by the author of a work is not pecuniary in nature; they are called *moral rights*. Unlike the economic rights, they are inalienable, that is, they cannot become the subject of commerce or be transferred. They can however be waived by the rightsholder signing an instrument in writing to that effect. Further, any act to which the rightsholder has consented (whether or not in writing) cannot infringe moral rights. The rights of paternity and integrity (see below) may not apply to certain works, such as periodicals, collective works of reference or news papers. The moral rights last as long as the copyright in the work.
- 11.2** An author has the right to be identified as the author of his or her work. This is known as the *right of paternity* or the right of attribution. To exercise this right, an author or artist must assert his or her wish to be identified; the right does not arise automatically. The assertion must normally be in writing signed by the author. If, for example, a professor writes an academic article and passes it along to a colleague to post on the latter’s blog, the professor does not automatically have the right to have his name attached to it; he must assert that right in writing. It is now common practice for published books to contain a statement that the author has asserted the moral right to be identified under the copyright legislation. The assertion may occur, however, *after* the publication of the work: for example, when a hitherto anonymous author reveals her identity to the world, she may go on to assert the right to be identified in relation to her existing works. Delay in assertion can however affect the court remedies available to the rightsholder (e.g. it may be difficult to get damages for non-identification prior to the assertion). The right does not apply to certain works, including employee works, or those published in newspapers, magazines, periodicals or collective works such as encyclopaedias or dictionaries.
- 11.3** An author or artist also has the right to object to derogatory treatment of his or her copyrighted work; this is called the *right of integrity*. Acts that amount to distortion or mutilation or which are otherwise prejudicial to the honour or reputation of the author fall under this heading. This right does not need to be asserted. Acts falling under this right could include cutting a play script, altering the wording in a speech, painting a sculpture a different colour or tying ribbons to it. But it must be clear that these actions are prejudicial to the author’s honour and reputation, a test not easily passed. Once again, an author or artist can by signed instrument waive the right to object

to derogatory treatment. Waiver may come about through contract: for example, when a publisher wishes to exploit film or book club rights on an author's behalf: film studios or book clubs often require prior waivers (although these may frequently be conditional). Whatever the circumstances, authors or artists will need to consider - for example, with their publishers - whether, and to what extent, any waiver makes sense. As with the right of attribution, waiver does not apply to all works (see 11.2).

- 11.4** A person has a right not to have a work attributed to him, the counterpart of the right to be identified as the author. The right applies to the whole or any part (without any requirement of substantiality) of the work.

Example:

False attribution was found to have occurred when the London Evening Standard published a series of articles entitled 'Alan Clark's Secret Election Diary' or 'Alan Clark's Secret Political Diary' and set beside a photograph of Clark, a prominent Conservative politician and an author well-known for the publication of his personal diaries, when in fact the Standard articles sought to parody or spoof the real diaries, and contained a statement that 'PETER BRADSHAW... imagines what a new diary might contain'. This statement was in a font bigger than that of the main text but much smaller than the heading and title. The court decided that the 'counter-messages' about Bradshaw's contribution did not cure the false attribution. To be effective, such counter-messages have to be as bold, precise and compelling as the false statement.

12. Infringement and "Substantial Parts"

- 12.1** Copyright infringement occurs when one of the restricted acts takes place in relation to a substantial part of the copyright work without the prior authorisation of the copyright owner. What is 'a substantial part'? It is first important to remember that copyright subsists in expression rather than ideas or information.

Example:

An academic historian carries out research on the history of Christianity on the basis of which she publishes a research monograph putting forward controversial theories about the early Church and its subsequent development. A novelist uses the historian's book in writing and publishing a work of fiction. The novelist is entitled to deploy the historian's theories as the basis of his fiction so long as he does not deploy the historian's words to any substantial degree or take over her exact selection, arrangement and interpretations of source material. The same test would apply to the authors of school, college or university textbooks on church history, or the writer of a history book aimed at the general reader rather than the academic market.

Substantiality depends as much (perhaps more) on the quality of what is appropriated as on its quantity. Some previous publishing industry assumptions, for example that taking up to 400 words is 'safe', are now unreliable. So, for example, an extract of 250 words from James Joyce's *Ulysses* (less than one thousandth of the entire work) was held to be substantial on the basis of their unique and distinctive quality. Similarly, an extract taken from the musical work 'Colonel Bogey', consisting of some 20 bars and lasting only 50 seconds, was held to be

a substantial part, because it was that bit of the music which the public would immediately recognise (the 'hook'). There are accordingly no quantitative rules regarding what amount of a given type of work it is acceptable to copy or quote: a small taking could be substantial, a large one insubstantial, depending on the nature of the work being copied. The larger the taking, however, the more sensible it may be for the user not to rely on claims of insubstantiality, but to bring his use within the concepts of 'fair dealing' which exempt from infringement, especially for purposes of 'criticism and review' (see section 14). It should be noted finally that infringement can occur across different formats. Copying, for example, includes such acts as making transient copies of a database as well as any other reproduction in any material form, storage of a reproduction in any medium by electronic means and, in the case of artistic works, making a 3D reproduction of a 2D work and vice versa (note also infringement by adaptation, section 10.1d).

13. Licences

13.1 A typical way of exploiting a copyright, especially in the digital environment, is to grant a licence to someone else permitting them to do something which would otherwise be an infringement of copyright - usually (but not always) for a price. While authors can assign copyright to their publishers, it is more common in general or trade publishing to grant a licence instead, with the publisher paying 'royalties' (a share of the revenue generated by the publisher's marketing efforts), rather in the way a tenant pays rent to a landlord. Licences do not need to be in writing unless they are exclusive (that is, granted to the licensee to the exclusion of all others, including the author, in respect of the licensed activity). A publisher investing significantly in an author's work will normally want at least an exclusive licence. A licence can be implied from the way the copyright holder manages (or fails to manage) the rights or conducts him- or herself, but a written licence on clear terms is always preferable.

13.2 In the digital era various 'open-access' or 'creative commons' licences have been developed for use with works whose authors wish to see them distributed more freely in electronic or digital form, often via the Internet, with models along such lines as -

- (a) *Attribution licence* - 'all usage allowed including reuse for commercial purposes so long as the source is identified'
- (b) *Commercial use limited licence* - 'all usage allowed except for commercial purposes'
- (c) *Licence under which the author keeps exclusive commercial exploitation rights* - 'all rights reserved (by the author) apart from those specifically granted'.

Publishers, and the Publishers Association, have significant reservations about any general use of such licences, particularly if they affect normal use or re-use of the work for commercial purposes. They may have their place for creators who wish to disseminate their work widely but completely non-commercially, but should only be entered into on a fully informed basis, particularly if the licence purports to be irrevocable.

14. Fair dealing

14.1 The copyright legislation contains certain specific exceptions to the above bundles of rights conferred upon authors and artists, making licences or waivers unnecessary in given circumstances. These circumstances, to be described below, may fall into a category of copyright

exceptions usually known as ‘fair dealing’, or may constitute other, specific, copyright ‘exceptions’ (for example, for library or educational purposes, or for visually impaired people). The exceptions convert what would otherwise be infringements into lawful acts; they are of course not needed if the taking involved was not an infringement of copyright in the first place. The legislation emphasises that nothing should be inferred about what constitutes infringement from the scope of copyright exceptions.

14.2 The international background is of increasing significance here. The Stockholm revision of the Berne Convention in 1967 introduced the all-important ‘three-step test’ for exceptions to the reproduction right. Three conditions must be observed in the introduction of any limitations on, or exceptions, to the rights conferred by copyright. They are that:

- the limitation or exception can only apply in certain special cases;
- the limitation or exception must not conflict with a normal exploitation of the work; and
- the limitation or exception must not unreasonably prejudice the legitimate interests of the author.

This key test was included verbatim in Article 5.1 of the EU Copyright Directive, implemented in the UK in 2003.

14.3 The United Kingdom recognises a number of ‘special cases’, of which for present purposes the most important are fair dealing for purposes of non-commercial research, private study, criticism and review. Library and educational exceptions can also be relevant, although these are not dealt with here. Later reproduction of the copyright work in these contexts must not conflict with normal exploitation of the material, and should not lead to an unreasonable loss of remuneration for the author.

14.4 Generally speaking, to be fair dealing any excerpt or extract made from a copyright work must not be an appropriation of an entire work or of that part which would represent the substance of the author’s skill and labour. To do this would be to preclude or replace the need for the original. Thus, to be fair dealing, an unauthorised use ought normally to be of a relatively small part of a work, with use of any more needing the permission of the copyright owner. However, as with infringement, a purely quantitative approach would not be taken by the courts, and a number of difficult cases can be easily figured in relation to normal academic research activity:

Example:

An academic researcher wishes to publish a work of criticism on e.g. the paintings of a particular artist; a genre of relatively short poems such as the Japanese haiku, or sonnets; or popular music lyrics. Even extremely brief extracts may amount to a substantial percentage of the whole of any one of works of this kind, and effective criticism may entail quotations of several such extracts which taken together amount to the whole or virtually all of it.

14.5 Such examples have not been tested in court as yet, but if and when they are, the judge is unlikely to be impressed by arguments based upon the percentages of reproduction involved, and to want instead to consider such issues as the substantiality of the taking and the extent to which either it is justified by the purpose or it adversely affects the rightsholder’s market.

Lengthy extracts from another work have been allowed in one case where the court was satisfied that the purpose was purely to enable criticism to be made effectively, rather than simply to provide the same information as the original work and to compete with it. In many cases, the effect of good criticism and review is to increase rather than diminish the market for a work.

14.6. Non-Commercial Research and Private Study

Section 29 of the Copyright Designs and Patents Act 1988 Act now reads as follows:

- (1) *Fair dealing with a literary, dramatic, musical or artistic work for the purposes of **research for a non-commercial purpose** does not infringe any copyright in the work provided that it is accompanied by a **sufficient acknowledgement** (emphasis added).*
 - (1B) *No acknowledgement is required in connection with fair dealing for the purposes mentioned in subsection (1) where this would be impossible for reasons of practicality or otherwise.*
 - (1C) *Fair dealing with a literary, dramatic, musical or artistic work for **the purposes of private study** does not infringe any copyright in the work (emphasis added).*
 - (2) *Fair dealing with the typographical arrangement of a published edition for the purposes of research or private study does not infringe any copyright in the arrangement.*
 - (3) *Copying by a person other than the researcher or student himself is not fair dealing if -*
 - (a) *in the case of a librarian, or a person acting on behalf of a librarian, he does anything which regulations under section 40 would not permit to be done under section 38 or 39 (articles or parts of published works: restriction on multiple copies of same material), or*
 - (b) *in any other case, the person doing the copying knows or has reason to believe that it will result in copies of substantially the same material being provided to more than one person at substantially the same time and for substantially the same purpose.*
- (a) Notice that the exception does NOT apply to the copyright in films, sound recordings, broadcasts or typographical arrangements, but ONLY to literary, dramatic, musical and artistic works. It also only applies to research ‘for a non-commercial purpose’.
- (b) The *Oxford English Dictionary* defines *research* as a process of search or investigation undertaken to discover facts and reach new conclusions by the critical study of a subject or by a course of scientific inquiry; or as a systematic investigation into and study of materials, sources and so on, to establish facts or collate information. *Study*, on the other hand, is more about the application of the mind to the acquisition of knowledge, or reading a book or text or other document with close attention. Courts in the United Kingdom have not found it necessary to discuss either term in detail, and are likely to give both a fairly wide interpretation (given that research is now restricted to that done for “a non-commercial purpose”); but the two are clearly to be seen as distinct.
- (c) In the most recent academic analysis of the law it is concluded that research for these purposes does not include the publication of research results. But if the exception is limited to the process of actually carrying out research, it is difficult to see how it is to be distinguished from private study. Further, how does one accompany such research with the ‘*sufficient acknowledgement*’ required by the legislation (A, section 29(1)). The use of that phrase with regard to research, but *not* private study, must at least imply that quotation from research

materials when publishing one's results (provided this is done for a non-commercial purpose) *can* be covered by the 'research' exemption, because only then is it possible to make acknowledgement meaningfully. A sufficient acknowledgement is an identification of the work in question by its title or other description and, unless the work is published anonymously or the identity of the author cannot be ascertained by reasonable inquiry, also identifying the author. It is not sufficient for it to be merely possible to identify the original work and author; the acknowledgement must be such as to suggest recognition of the position or claim of the author in respect of the original work.

- (d) Be all this as it may - and a test case on the point would clearly be helpful - quotation of other materials in a research publication may well anyway fall within the criticism/review exception, discussed further in section 14.5 B.
- (e) With regard to study, it must be one's own study, not that of others, so that a school study book on *The Loneliness of the Long Distance Runner* was not justified under this head in having extensive quotations from the novel. It is clear that any commercial copying (e.g. published anthologies or collections of source material) or multiple copying for students in universities and colleges (including course packs) requires a copyright licence, such as those offered by the Copyright Licensing Agency or the publisher. But the law does not preclude the possibility of a third party doing copying for a researcher (e.g. a personal assistant or student making one copy for the researcher's direct and exclusive use in study or research). Specifically, libraries and archives (but not museums and galleries) may supply readers with copies of material which they require for purposes of research and private study, provided that the librarian is satisfied, before making the copy, that the copy is required for such purposes. Librarians in any doubt may obtain Statutory Declarations from the reader, the wording and conditions for which are set out under regulations. The reader must also meet at least the cost of making the reproduction (which can include a charge in respect of the institution's overheads or general running costs).
- (f) The non-commercial research and private exceptions apply to published AND unpublished copyright material (contrast the criticism and review exceptions, which apply only to published work: section 14.5 B1)
- (g) The most difficult part of the research exception is that the fair dealing must be for a *non-commercial purpose*, a restriction introduced into the law only on 31 October 2003. Ordinarily an academic researcher who reproduces copyright work for research driven by curiosity, interest and a thirst for knowledge might be thought of as having a non-commercial purpose. However, large numbers of academic research projects ultimately turn into a commercial endeavour of some sort, which may indeed have always been at least a subsidiary objective. Once the research has been carried out, the researcher may write up for commercial publication a report/book on the results of the research, with the author receiving royalties from the publisher's sales revenues. Does the initial research fall within the exception of fair dealing for non-commercial purposes? As yet there is no judicial decision directly in point, and it therefore remains a grey area. Equally, many undoubtedly commercial organisations carry out research, which may not necessarily be 'commercial' initially, at least in the sense of directly aimed at producing revenue returns, but it is arguable that any research done by a commercial organisation must be at least indirectly "commercial".

Example:

An English court held in 2007 that the activities of a private research company amounted to commercial use where it had gained unlicensed access to a mapping database service made available only to universities and the public research communities in the UK. The company argued that its research using the service had been for the development of a mapping tool not yet completed, and was therefore still at a non-commercial stage. The court's rejection of the argument took account of the eventual commercial aim for the mapping tool as well as the extent and covert nature of the defendant's copying.

- (h) The approach recommended here is to consider the primary purpose for which the research is undertaken at the time of carrying out the research, but bearing in mind the requirement of the Berne Convention 3-step test that no copyright exception may be permitted to conflict with normal exploitation of the work. Academic research, where the primary objective is to put material into the public domain for the public benefit, would ordinarily be seen as non-commercial, and as distinct from commercial research which is undertaken either for the private purposes of a client or in the expectation of recovering the costs of the research through the proceeds of sale. The British Academy and the Publishers Association take different views, however, on whether any subsequent commercial publication of academic research comes within the exemption, or is rather likely to require consent or licensing in the normal way. In the absence of further legislative or judicial clarification, the answer to the question must remain uncertain. At least some quotation of research materials in a subsequent commercial publication may anyway fall within the scope of the exception for 'fair dealing for purposes of criticism and review', discussed in the next part.

Example:

An undergraduate student makes recordings and takes written notes during lectures. This could be fair dealing for purposes of private study (or may be justified as resulting from an implied licence - see section 13.1 - if the lecturer made no objection at the time). Having graduated, the student makes use of recordings and notes in researching a PhD thesis on the subject, including making transcription of the recordings and rewriting the notes for legibility and readability. This is almost certainly research for a non-commercial purpose. So long as quotation of the material in the thesis is made with sufficient acknowledgement of source, it seems as fair dealing to be exempt from claims of infringement. The PhD thesis is then published as a monograph by an academic press which depends for its survival upon the revenues generated by sales of its products. Should the quotation of the research material now be regarded as having a commercial purpose, or not? Are there distinct acts of exploitation here justifying a different approach to each? Would the position be any different if the PhD work had been carried out thanks to a commercially sponsored scholarship held by the student?

As explained above, the law is currently uncertain here, and will depend on the facts in each case.

14.7 Criticism and Review

Section 30 of the Copyright, Designs and Patents Act states:

Fair dealing with a work for the purpose of criticism or review, of that or another work or of a performance of a work, does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement.

- (a) This exception clearly allows quotation from other works in the publication of research results. *Review* requires, as a minimum, some dealing with an original copyrighted work other than condensing that work into a summary. *Criticism*, on the other hand, is not solely focused on the style of a copyrighted work but can also extend to the ideas or theories that work contains.

Example:

- (1) A short but substantial extract from a poem used merely as an epigraph or decoration in a chapter-heading or on a title-page needs consent.
- (2) Quite lengthy extracts from the same poem analysed as part of, or to illustrate, the argument of another work may well be fair dealing.
- (3) Merely summarising the content of a previous work and using quotations to do so is neither criticism nor review.
- (4) Nor is merely re-ordering the content of the previous work.

Notice that, unlike the non-commercial research and private study exceptions, this exception applies to ALL forms of copyright work, except that, as noted in section 14.5A5, the original work must have been made available to the public (i.e. published) prior to the extract or quotation being made. Circulation of a version of a work amongst friends and colleagues is not publication for these purposes, whether the circulation is for information or entertainment, or made in order to receive comments back privately.

- (b) Fair dealing for the purposes of criticism or review must also include a sufficient acknowledgement of the original author and the work. See section 14.5 A3 for 'sufficient acknowledgement', which goes beyond mere identification of source to recognition of the basic copyright claim of the work in question.

Example:

Even though the merest glance at study aids on the work of well-known authors, aimed at school pupils, revealed the titles of the works and the names of the authors in question, they were held by a court not sufficiently to acknowledge the position or claim of the authors.

The UK courts have repeatedly stressed that the criticism/review exception is to be given a wide and liberal interpretation, consistently with the principles of freedom of speech and expression. The criticism or review may be of a work other than that being used; so one may fairly quote from Work A in order to criticise or review Work B (e.g. one may criticise a sound recording of music by quoting the work being performed on the recording).

15. Public interest

- 15.1** A final possible limitation on copyright is one which allows otherwise infringing acts - or encourages dissemination - on the grounds that this is in the *public interest*. The scope and, indeed, existence of this defence remain uncertain. Its clearest application to date has been in cases concerned with the unauthorised publication of information and material generated but

kept secret by public authorities with improper motives - for example, to conceal the failings of its officials. In such circumstances an unauthorised publication, including one on the Internet, may be justified. But public interest is not to be equated with what is interesting to the public, and will only rarely justify copying content rather than simply referring to or summarising it.

16. Fair dealing v. charging

16.1 A difficulty which not infrequently arises is when the researcher wishes to have a copy of a work for purposes of non-commercial research and private study - and perhaps ultimately criticism and review - but the rightsholder, or possessor of the only copy of the original in existence, does not wish to grant access or provide copies without charge. The issue may arise in the context of digital works - computer programs, CDs, DVDs, databases and websites - by the deployment of technological protection measures (TPMs), which prevent access to the work until the would-be user completes a procedure (e.g. supply of passwords or activation codes) which may also involve the making of payment to the rightsholder. Given the ease, speed and perfection with which copies can be made and transmitted around the world, it is difficult to see how works could be effectively exploited commercially without such systems in place. But TPMs can at least theoretically protect works that are out of copyright, although it is not publishers' intention to use them for that purpose. There are potential policy issues here and also about the interaction between TPMs and access for purposes of private study and non-commercial academic research, but it is hoped that the developing technology will find its own solutions as any problems arise.

16.2 The Copyright, Designs and Patents Act 1988 describes the limitations and exceptions to copyright as '*permitted acts*', which does not suggest that copyright exceptions have the status of fundamental rights for researchers. The Act further says that its provisions on permitted acts '*relate only to the question of infringement of copyright and do not affect any other right or obligation restricting the doing of any of the specified acts*' (CDPA 1988 section 28(1)), which is also clearly against the notion that the permissions are to be seen as user rights. At least one provision of the Act, an exception to copyright enabling educational establishments to make a limited quantity of copies of works for purposes of instruction, does not apply if a licence for such activity is available. In the most recent detailed study of the topic in UK law, the authors conclude that it is '*generally possible to contract out of the permitted acts. There is, however, a growing list of circumstances in which it is not possible to contract out of the permitted acts, Parliament and the European legislator having recognised that it ought not to be possible to exclude the exceptions in certain circumstances*'. They argue that such a piecemeal approach is preferable to the inflexibility which would arise from a blanket prohibition on contractual exclusion of the permitted acts. Nearly all the specific provisions about contract and the permitted acts relate to software and databases, and lie beyond the scope of these Guidelines.

17. Technological protection measures and digital rights management systems

17.1 The nature and importance of TPMs to the exploitation of digitised or digital works was made clear in the previous section (16). Rights management information systems (RMIs) are electronic tags or fingerprints included in copies of digital products enabling them to be traced and identified electronically wherever they may be in use, lawfully or otherwise. The systems identify the software, the copyright owner, and the rights held by that party and the users of the work. Textual copies of the systems may well often appear on the computer screen when the

work is installed or run. Such systems, often collectively dubbed 'Digital Rights Management' (DRMs), are of particular importance in the Internet context, through which most tracing and identification activity is likely to be conducted. A leading system currently being developed by publishers and the newspaper industry is the Automated Content Access Protocol (ACAP).

- 17.2** Making and supplying devices to enable DRMs to be evaded or removed has been made equivalent to infringement of copyright itself and, in the United Kingdom, also invites criminal penalties. Further, a person who actually circumvents an effective TPM (except in relation to a computer program), knowing or having reasonable grounds to know that he is pursuing that objective, is to be treated as a copyright infringer. This also holds good for a person who knowingly and without authority removes or alters RMIs associated with a copy of a work (e.g. on a CD), or appearing in a public communication of the work (e.g. in an Internet transmission), provided that this can be connected in some way to actual or prospective copyright infringement. The circumvention of a TPM is however a wrong even where it is carried out for purposes other than copyright infringement.
- 17.3** The potential for TPMs to cause difficulties for fair dealing and other exceptions is recognised in the legislation, which enables the Government to intervene and issue civilly enforceable directions to rightsholders after a complaint to this effect from a person with lawful access to the protected work. But no complaint can be made where the copyright work in question has been made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them. This would seem to suggest that the only complaint likely to be successful is one where access is completely blocked, and that a complaint against a party making material available for a reasonable price is unlikely to be successful, even where the use in question is non-commercial research or private study. In any event, no complaint about TPMs blocking the use of copyright exceptions has yet been made to the Government. However, publishers have for some time been investigating technological solutions to the problems of controlled access around TPMs for the beneficiaries of exceptions, such as visually impaired people. At the time of writing, two pilot schemes are under way with UK government support to enable access under tested and secure conditions to publishers' digital files as near as possible to the time of publication.

Part 2: Copyright in Some Common Situations

18. Databases

18.1 *Databases* are becoming increasingly important to the arts and humanities as well as the social science communities. Much relevant printed source material is being gathered together in commercial databases, to which access is only possible on payment of subscription or other charges. This occurs in some cases even when the content is out of copyright, but from the publisher's point of view the collection, selection and arrangement may still require significant investment.

Databases are protected, not only by copyright, but also by a *sui generis* database right. The essential differences between the two forms of protection are as follows:

(a) a database has *copyright* in the *selection and arrangement* of its contents, provided that that selection and arrangement manifests an 'intellectual creation' of the maker (generally taken to be a somewhat higher standard than the ordinary 'originality' - that is, not copied, author's own skill and labour in expression - of normal copyright). So only the selection and arrangement are protected against the restricted acts, and then only if an 'intellectual creation'. The restricted acts follow the usual pattern, however, as do the exceptions, including non-commercial research, private study, criticism and review (see section 14). This is without prejudice to the copyrights which individual items of content may also enjoy. Copying includes the making of transient copies or that incidental to some other use of the database; so accessing the database may amount to a restricted act if, for example, this is done on the Internet so that the entire database is reproduced when accessed. However an exception for temporary reproduction is probably available in such cases.

(b) a database failing to meet the 'intellectual creation' standard may nonetheless have the special *sui generis* right, provided that the maker has made a 'substantial investment' in the 'obtaining, verification or presentation of the contents' of the database. The European Court of Justice has recently ruled that 'creating' data is not 'obtaining' for these purposes; a significant limitation. Thus sporting organisations' annual fixture lists were not protected by the special *sui generis* right, the data having been created rather than obtained. 'Obtaining' occurs when the creator of the database seeks out and collects existing independent materials, i.e. it is a process of research. The right *restricts extraction* (i.e. transfer of content to another medium, even if the content in question also remains on the database afterwards) *and re-utilisation* (i.e. making the database contents available to the public, covering any form of unauthorised distribution). Both of these restricted acts relate explicitly to the *contents* of the database, so the special *sui generis* right gives a wider form of protection for the database than copyright. It does not matter whether or not individual items of content have copyright. The *sui generis* right is also available even if the database also enjoys copyright. The right lasts only 15 years, but in a dynamic database there is renewal each time a further 'substantial investment' occurs.

18.2 The general exceptions already several times discussed apply to the copyright in databases; but the *sui generis* right has its own exceptions, related only to the restricted act of extraction:

- fair dealing by a lawful user (e.g. a person previously licensed to use the database) for the purpose of illustration for non-commercial teaching or research provided that the source is indicated.

No exceptions relate to re-utilisation.

18.3 There are important, and potentially confusing, distinctions between the exceptions applying to the copyright in a database and those applying to the special *sui generis* right. For example, only a 'lawful user' may enjoy the non-commercial research exception to the special *sui generis* right, whereas there is no such limitation in relation to the copyright in the database. Again, the lack of exemptions in relation to reutilisation is not in parallel with the copyright exemption for non-commercial research if that exception allows the user to publish copies of the material obtained in the course of the research, provided there is sufficient acknowledgement. Finally, the special *sui generis* right makes no provision for an exemption allowing criticism and review. Since all copyright databases in which there has been substantial investment also have the special *sui generis* right, this inconsistency in the application of exemptions remains a significant source of uncertainty, for academics and publishers alike.

19. Editorial work

19.1 It seems to be the law that an editor's skill and labour in producing an edition of a pre-existing text is capable of producing an editorial copyright for that edition, relating to both text and the editor's annotations and introduction, even if the pre-existing text is itself out of copyright (or never had it). That at any rate was the view of the courts in recent cases about editions of the Dead Sea Scrolls and modern performance editions of early music. The editor's work is literary in character and involves skill and effort. The fact that the aim of editorial work is often to produce a text as close as possible to the original being edited does not preclude the result being an original work. The editor as owner of a copyright may prevent unauthorised reproductions of his edition of the text.

19.2 In the case about performance editions of early music already mentioned, the copyright owner was able to prevent the issue of sound recordings of performances according to the edition. The copyright will of course be subject to the usual exceptions, enabling copying and quotation for purposes of private study, non-commercial research, criticism and review. The editor's editorial copyright does not extend to the original source or sources forming the basis of the editor's work: the freedom to copy that, or to quote from it, will be dependent on whether that original itself is in copyright.

19.3 There is also a rule conferring a special, limited copyright on any European Economic Area national who publishes for the first time in the EEA a previously unpublished literary, dramatic, musical or artistic work or film, despite that work having itself fallen out of copyright. The right is known as *publication right*, and lasts for 25 years from the end of the calendar year in which the publication took place. Publication is here given a wide meaning, including not only issue of copies to the public but also making the work available by means of an electronic retrieval system (e.g. a database), rental/lending to the public, performance, exhibition or showing of the work in public, or communication of the work to the public (i.e. broadcasting or Internet transmission). The difference from the editorial copyright described in the previous paragraph is that mere publication is enough; there is no need to show editorial skill and labour. The fair dealing exceptions apply to publication rights as to copyrights.

19.4 The editor's copyright in his editorial version of the text must be distinguished from the publishers' typographical copyright in the entire published edition.

20. Unpublished correspondence and private papers: literary estates

20.1 Literary estates use copyright to manage access to, or reproductions from, the unpublished correspondence and/or private papers of writers and public figures. As noted in section 4.6 (see also sections 6.1 and 7.2), the owner or custodian of an individual's personal papers is not obliged to allow access to them, and copyright owners are not generally bound to license reproduction. Where access has been granted, the exceptions for private study and research come into play, however, and, as discussed in section 14, these copyright exceptions should enable a researcher to quote from copyright materials without any need for the copyright owner's licence, subject to the conditions of each individual exception. The exception for criticism and review does not apply to unpublished works, however (see section 14.5B). It is in this kind of case, therefore, that issues about quantity and quality of quotation are likely to be at their most acute. For many, if not most, literary estates copyright fees will be a prime source of revenue; but it is hoped that negotiations with researchers would recognise the importance of the fair dealing exceptions and the support they give to research and freedom of expression. Further, as already remarked (section 14.5), the research may help draw attention to the deceased person's contribution to public life and letters which may in turn lead to continuing public interest in his or her work and benefit its sales.

Further Sources of Information

The standard works on copyright are *Copinger & Skone James on Copyright* (15th edition, 2005) and *Laddie Prescott & Vitoria, The Modern Law of Copyright* (3rd edition, 2000).

The relevant chapters of the following textbooks also contain considerable detail on the subject:

W R Cornish and D Llewelyn, *Intellectual Property* (6th edition, Thomson/Sweet & Maxwell, 2007)

L Bently and B Sherman, *Intellectual Property* (2nd edition, Oxford University Press, 2004)

H L MacQueen, C Waelde and G T Laurie, *Contemporary Intellectual Property: Law and Policy* (Oxford University Press, 2007).

A monograph of particular relevance to the discussion of fair dealing in these guidelines is R Burrell and A Coleman, *Copyright Exceptions: The Digital Impact* (Cambridge University Press, 2005).

A well-known case containing much useful analysis of the copyright exceptions in an academic context (albeit teaching rather than research) is *Universities UK v Copyright Licensing Agency* [2002] RPC 36 (text accessible at <http://www.ipo.gov.uk/ctribunal/ctribunal-decisionorder/ctribunal-decisionorder-20002003/ctribunal-decisionorder-20002004-uukvcla.htm>). (RPC = Reports of Patents etc Cases.)

On Crown and Parliamentary copyright, see the website of the Office of Public Sector Information - <http://www.opsi.gov.uk/advice/crown-copyright/index.htm> and <http://www.opsi.gov.uk/advice/parliamentary-copyright/index.htm>

The law is constantly changing and developing, so textbooks in particular are always likely to be to some extent out-of-date. The internet may provide means of updating. A useful copyright website is maintained by the UK Intellectual Property Office - <http://www.ipo.gov.uk/copy.htm>.

Between January and April 2008 the UK Intellectual Property Office carried out a consultation on reform of some aspects of copyright exceptions. The consultation paper may be read at <http://www.ipo.gov.uk/about/about-consult/about-formal/about-formal-current/consult-copyright-exceptions.htm>.

On copyright developments in the European Union, consult - http://ec.europa.eu/internal_market/copyright/index_en.htm.

All URLs last checked 11 March 2008.

Much useful copyright material may also be found on the British Copyright Council website: www.britishcopyright.org

The British Academy website is www.britac.ac.uk

The Publishers Association website is: www.publishers.org.uk

The British Academy
10 Carlton House Terrace,
London SW1Y 5AH

Telephone: 020 7969 5200
Fax: 020 7969 5300

Web site: www.britac.ac.uk

The Publishers Association
29b Montague Street,
London WC1B 5BW

Telephone: 020 7691 9191
Fax: 020 7691 9199

Web site: www.publishers.org.uk