Guidelines on Copyright and Academic Research

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Introduction

These guidelines set out to give academic researchers information both general and particular on the application of copyright in the context of their work. 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 difficulty has been encountered in the experience of Fellows of the British Academy. While the treatment sees the researcher as primarily a user of copyright material, it also keeps in mind that the researcher is a producer who may originate copyright 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. Where your study of these guidelines suggests that permission for a reproduction or other use of a copyright work is not required, but your publisher maintains that it is, we suggest that you refer them to the relevant passages of these guidelines.

While every effort has been made to ensure the accuracy of this set of guidelines, 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. The particular detailed circumstances of individual cases can have a significant bearing on their final outcomes. Nor does this document 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

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PART I: 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. 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 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 the setting up of a balance between protecting the intellectual work of creators whilst also providing the public the freedom to access and build on such works. This underpins concepts of fair dealing with a copyright work not requiring the right-holder’s licence or constituting infringement if done without authorisation. A further result of the Convention is that copyright can now be enjoyed world-wide. 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. 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 Subject matter

2.1 Copyright is a form of intangible property in certain kinds of work. It is to be distinguished from the property which may exist in the physical manifestations 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.
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;
- broadcasts.

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. Furthermore, it is the expression of the work, and not the ideas in them, which is protected by copyright. A literary work is one that is written, spoken or sung. Thus the category includes printed 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’ means a collection of independent works, data or other materials, which are –

- are arranged in a systematic or methodical way, and
- are 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 23).

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 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 subject-matters which is, 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 be an original structure for a database, since the author did not create the alphabet. 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 further below, section 23.)

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 of 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 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:

<table>
<thead>
<tr>
<th>Subject-matter</th>
<th>Event</th>
<th>Period</th>
</tr>
</thead>
<tbody>
<tr>
<td>Literary, dramatic, musical</td>
<td>Author’s death</td>
<td>Author’s lifetime + 70 years</td>
</tr>
<tr>
<td>Artistic</td>
<td>Author’s death</td>
<td>Author’s lifetime + 70 years</td>
</tr>
<tr>
<td>Databases</td>
<td>Creator’s death</td>
<td>Author’s lifetime + 70 years</td>
</tr>
<tr>
<td>Films</td>
<td>Death of last to die of principal director, screenplay/dialogue author, music composer</td>
<td>That death + 70 years</td>
</tr>
<tr>
<td>Typographical arrangements</td>
<td>Publication</td>
<td>25 years</td>
</tr>
<tr>
<td>Sound recordings</td>
<td>Making, publication, public playing/communication</td>
<td>50 years</td>
</tr>
<tr>
<td>Broadcasts</td>
<td>Making</td>
<td>50 years</td>
</tr>
</tbody>
</table>
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.

4.3 If the authorship of a literary, dramatic, musical or artistic work or film is unknown, whether through anonymity or pseudonymity, copyright expires at the end of the period of 70 years from the end of the calendar year in which the work was made. But if during that period the work is made available to the public, then the copyright expires at the end of the period of 70 years from the end of the calendar year in which it is first so made available (but see further section 8.3). If the author is subsequently identified, then the ordinary rules kick back into place.

4.4 Until 1 August 1989 unpublished literary, dramatic, musical and artistic works 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. This 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 guidance should be sought in specialist works.

4.5 The term differs from the above where the work is entirely computer-generated – e.g. through database analysis. In such cases, copyright expires at the end of the period of 50 years from the end of the calendar year in which the work was made. The term is also different for Crown copyright – which will be considered at section 10 below.

4.6 When the copyright term expires, all the right-holder’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 further section 11 below). 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 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

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1 A useful flow chart taking one through the various possibilities can be found in Christina Michalos, The Law of Photography and Digital Images (Thomson/Sweet & Maxwell, 2004), p 50.
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.

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 identified by the AAU Task Force in the USA is that both faculty members and HEIs regard most research as having no direct market value except where patents may be involved.2 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 study was entitled Policy Approaches to Copyright in HEIs.3 In this study, sixty-six HEIs were presented with the same question: ‘Does your institution waive copyright on any in the list below [sic]?’ 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. 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.

7 Transfer after the death of the right-holder

7.1 Copyright may also be bequeathed by the right-holder on death, or transmit 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

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3 Weedon R., Policy Approaches to Copyright in HEIs: A Study for the JISC Committee on Awareness, Liaison and Training (JCALT), The Centre for Educational Systems, University of Strathclyde (2000) at http://www.strath.ac.uk/ces/projects/jiscipr/RevFinal_amd%20(5)JCALT.pdf (last accessed 7 June 2005). This link is now not in use but a power point presentation of the above article can be found at http://www.surf.nl/copyright/files/Ralph%20Weedon.ppt

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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. Often 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 The UK legislation deals explicitly only with the case of the literary, dramatic, musical and artistic work the author of which remained anonymous or used a pseudonym. 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.

8.2 Only if this is the position will it be safe to use the material in question. The following steps might constitute reasonable inquiry:

- If the work was published, contact the publishers or their successors
- 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).

8.3 In considering reasonable grounds for assuming copyright has expired, 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 2006, any work published anonymously or pseudonymously in or before 1955 is out of copyright. Only after 31 December 2039 will the rules described in section 4.3 apply in full.
- 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 above section 4.4); while 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 the rules described in section 4.3 above apply, i.e. unless the author is meantime identified, the copyright expires 70 years from the making of the work.

8.4 As a result of the second of the points in section 8.3, the alternative route of having reasonable grounds to assume the author’s death more than 70 years ago (see section 8.1 above, second bullet point) is especially important for unpublished works. This alternative route allows one to reproduce the work despite the fact that it is still in copyright. 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.

8.5 There is no ‘reasonable inquiry’ rule with regard to anonymous films, sound recordings or broadcasts.

8.6 A further possible case is the work, published or unpublished, where the author is identified and there is no reason to suppose that a pseudonym is being used; but the only readily available information about the author is the name on the work. 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 should be applied by way of analogy.

8.7 Finally, 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. The present rules do not seem to reach this situation, and the best suggestion is to pursue the principle of ‘reasonable inquiry’ outlined in section 8.2 above. 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.

8.8 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 right-holders appropriately should they make themselves known (although such proceeding has no statutory basis).

9. Licences

9.1 Another way of exploiting a copyright 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 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 in respect of the licensed activity). A licence can be implied from the way the copyright holder manages (or fails to manage) the rights or conducts him- or herself.

9.2 In the digital era various ‘open-access’ or ‘creative commons’ licences have been developed for use with works distributed in electronic or digital form, often via the Internet, with models along such lines as –

1. Attribution licence – ‘all usage allowed including reuse for commercial purposes so long as the source is identified’
2. Commercial use limited licence – ‘all usage allowed except for commercial purposes’
3. Licence under which the author keeps exclusive commercial exploitation rights – ‘all rights reserved (by the author) apart from those specifically granted’.
10 Crown and Parliamentary copyright

10.1 Copyright material produced by 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 civil servants and central 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 licences on the Queen’s Printers behalf. The Queen’s Printer for Scotland (QPS) manages Crown copyright material originated by the Scottish Executive. The Information Policy team of the Office of the QPS licences on the QPS’s behalf.

10.2 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).

10.3 A Crown copyright work enjoys a different term of copyright protection – 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 (above, section 8) do not apply.

10.4 Parliamentary copyright covers Bills of the Westminster and Scottish Parliaments, as well as other literary, dramatic, musical or artistic works made by or under the control of the Houses of 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). 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).

10.5 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.

11 Exclusive rights: economic rights

11.1 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 below section 12). Copyright owners have the right to charge for (through licensing or contractual permission) or to prohibit the following activities, unless one of the exemptions described at section 14 below 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, when a computer makes a transient copy of a webpage or “caches” it, it constitutes a copy.

(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 and sale 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 right to disseminate is much more important from the point of view of revenue-earning. 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 lawfully.

(c) **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’.

(d) **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 public 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.

(e) **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).

(f) **Broadcasting a work or using other electronic means to communicate a work to the public.** This includes posting copyright works to the Internet or otherwise showing or playing a work via an electronic transmission.

12 Exclusive rights: moral rights

12.1 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 right-holder. They last as long as the copyright in the work.

12.2 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.

12.3 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. Acts falling under this right could include tweaking a play script, altering the wording in a speech, painting a sculpture a different colour or tying ribbons to it. Here again, an author or artist can waive the right to object to derogatory treatment. This may come about, for example, when an artist lends a painting to a museum. If the artist trusts that the museum will use professional standards in reproducing her image on a promotional poster or in an educational catalogue, she may want to waive her moral rights contractually so that the museum feels comfortable that it can use the image with a reasonable amount of autonomy, not having to pass everything by the artist. In other circumstances, an author or artist may not want to relinquish this right.
13 Infringement

13.1 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. **Substantiality** here depends more on the quality of what is appropriated rather than its quantity. So, for example, an extract of some 20 bars and lasting about 50 seconds taken from a musical work which took about four minutes to play (“Colonel Bogey”) was held to be a substantial part, because it was that bit of the music which the public would immediately recognise (the ‘hook’). Again, a film or broadcast may be infringed by making a photograph of the whole or a substantial part of an image in the work. 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. 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, above section 11.1c).

14 Fair dealing

14.1 The above bundles of rights conferred upon authors and artists can be circumvented without licences or waivers in certain circumstances set out in the copyright legislation. These circumstances, to be described below, are usually known as ‘fair dealing’ or copyright ‘exceptions’. 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 –

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

14.3 The UK recognises a number of ‘special cases’, of which for present purposes the most important are fair dealing for purposes of research, private study, research, criticism and review. Later reproduction of the copyright work in these contexts does not interfere with the ordinary publication of the material, and does 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, it can be argued that to be fair dealing, an unauthorised use ought normally to be relatively short, with use of more than just such a small part 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: for example, how to criticise or review a work of art, music or poetry without reproduction or quotation of the whole or at least of a substantial part? Summary or alternative verbal expression is either impossible or absurd.
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 right-holder’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. It could well be argued that the effect of good criticism and review is to increase rather than diminish the market for a work.4

A. Research and Private Study

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

29(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 – . . .

(b) … 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.

A1 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. This may create a difficulty where the only source for a piece of music is a sound recording: what may be fair dealing with the music could amount to an infringement of the copyright in the sound recording.

A2 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 UK have not found it necessary to discuss either term in detail, and are likely to give both a fairly wide interpretation; but the two are clearly to be seen as distinct.

A3 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.5 This view is based on section 29(3)(b) (above), presumably (although not explicitly) reading it to mean that the publisher of a research paper or monograph is someone ‘providing copies of substantially the same material to more than one person at substantially the same time and for the same purpose’, and so not entitled to the benefit of the exception.

4 Adverse criticism can of course diminish the market, but unfairness in this regard is probably best treated in the law of defamation rather than copyright.

A4  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
(above 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 can be covered by the ‘research’ exemption, because only then is it possible to make
acknowledgement meaningfully. There may also be an argument about what Parliament
intended by section 29(3)(b). Its principal (only?) target was the provision of course packs of
photocopied material for students in universities and colleges; and it is clear as a result that
such activities require a copyright licence (see the case of Universities UK v Copyright
Licensing Agency in 2002). The sub-section therefore meant to confine the private study rather
than the research exception. In any event it may be questioned whether the publication of
research results is the provision of the material to more than one person at substantially the
same time and for the same purpose.

A5  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 below.

A6  With regard to study, it must be one’s own study, not that of others, so that an exam
crib book on The Loneliness of the Long Distance Runner was not justified under this head in
having extensive quotations from the novel. But section 29(3)(b), already discussed above,
does not altogether 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 galleries6)
may supply readers with copies of material which they require for purposes of
research and private study, provided that the reader meets at least the cost of making the
reproduction (which can include a charge in respect of the institution’s overheads or general
running costs).

A7  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: below, section 14.5.B1)

A8  The most difficult part of the research exception is that the user’s work 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 copyright 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.

6  Not as the result of any specific prohibition, however, but simply because they are not mentioned by the legislation.
A9 The Libraries and Archives Copyright Alliance (LACA) carried out a survey in December 2002 to find out whether individuals would have problems distinguishing between research for a commercial purpose and research for a non-commercial purpose. In the analysis, 43% said yes, 32% said no and 25% said it was not worth the trouble distinguishing. 30% were of the view that non-commercial copying takes place for professional development purposes.

A10 The approach recommended here is to consider the primary purpose for which the research is undertaken at the time of carrying out the research. This will avoid confusion and take care of the situation where research primarily carried out for private study or curiosity ultimately turns in to some form of commercial exploitation. Academic research, where the primary objective is to put material into the public domain for the public benefit, should be seen as non-commercial whether or not it is published commercially, 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. Accordingly, scholarly research would in almost all cases be non-commercial.

B. Criticism and Review

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

30. – (1) 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.

B1 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. Notice that, unlike the non-commercial research and private study exceptions, this applies to ALL forms of copyright work, except that, as noted above in section 14.5A7, the original work must have been made available to the public (i.e. published) prior to the extract or quotation being made. Fair dealing for the purposes of criticism or review must also include a sufficient acknowledgement of the original author. 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).

14.6 To conclude the section on fair dealing, a Publishers Association comment on the subject, made in 2006 in response to the Gowers Inquiry, is appropriate –

Publishers have always understood that copyright is not an absolute monopoly, and was never intended to be. The various exceptions to copyright are perhaps as important to UK culture and society as a whole, and particularly for the research, education and library worlds, as the limited exclusive rights granted to authors and publishers to encourage their creativity and investment in the first place. The limited term ensures that all copyright works will fall ultimately back into the public domain, for use and access by all, and that even while the copyright term is still running, certain specified exceptions will benefit scholars and other key users in the public interest.7

7 http://www.publishers.org.uk/paweb/paweb.nsf/pubframe!Open
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 research and private study - and perhaps ultimately criticism and review - but the right-holder, or possessor of the only copy of the original in existence, refuses to grant access or to provide copies without making a charge for the privilege. This can seem to negate the whole benefit of the research/private study exception. The issue has been reinforced in the context of digital works - computer programs, CDs, DVDs, databases and websites - by the deployment of technological protection measures (TPMs), which inhibit the capacity to use the work in any way until the would-be user has paid for the access required (e.g. encryption, passwords, activation codes). Indeed, TPMs could go further and prevent access to works that are out of copyright and, theoretically, in the unfettered public domain. The question is whether, in effect, contract may prevail over copyright exceptions; or, put another way, whether a user has any right to the benefit of the exceptions with which the right-holder’s express lack of consent may be overcome. Or are the exceptions merely defences that can be invoked only against claims of infringement in court?

16.2 Although the Canadian Supreme Court has recently given its imprimatur to the notion of ‘user rights’, the general UK position on this matter is unclear, although there are a number of specific statutory provisions with a bearing on the matter in particular contexts. The Copyright, Designs and Patents Act 1988 describes the limitations and exceptions to copyright as “permitted acts”, language hardly redolent of user rights. 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. Another example of contract prevailing over exceptions relates to the permitted act of temporary reproduction or adaptation of a computer program necessary for a lawful user’s lawful use of the program: a term of any contract regulating the circumstances in which the user’s use is lawful, and prohibiting the copying or adaptation in question, will make those acts infringements (CDPA 1988 section 50C). On the other side of the coin are provisions in CDPA not allowing contract to prevail over exceptions and limitations, mostly relating to permitted acts with regard to databases and computer programs.

16.3 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. It would be better, in their view, to distinguish types of fair use, those excludable by contract and those not.8

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). Digital rights management systems (DRMs) 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. In the early days of the digital, the primary kind of protected work was the computer program; but databases, CDs, commercial websites on the Internet and DVDs quickly joined the ranks of works technologically protected against unauthorised access, copying and use. Such systems are of particular importance in the Internet context, through which most tracing and identification activity is likely to be conducted.

17.2 Making and supplying devices to enable such technical protection measures and rights management systems 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 DRMs 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).

17.3 The potential for TPMs and DRMs to render fair dealing and other exceptions nugatory is recognised in the legislation, which enables the Government to intervene and issue civilly enforceable directions to right-holders after a complaint to this effect from a person with lawful access to the protected work. No such intervention has yet occurred; and no complaint may 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 party making material available for a price, however exorbitant, is unlikely to be on the receiving end of government directions to change its ways.

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PART II: COPYRIGHT IN SOME COMMON SITUATIONS

18 Image reproduction

18.1 An issue identified by art historians, archaeologists and others in the course of the research underlying this guide was that of image reproduction, and the practice of public museums and galleries of charging those wishing to use such images for purposes of private study and research and then to publish them in research monographs where the works captured by the images would be subject to criticism and review. Such images, it is said, have often been captured digitally by the museum or gallery as part of a general policy of conservation with regard to the institution’s collection, rather than specially made for the researcher. Further, sometimes the work which is the subject of the image is no longer in copyright. Finally the digital image transferred to the researcher will often have TPMs (such as watermarks) and digital rights management systems (DRMs) attached to it, restricting access and use by the researcher.

18.2 A controversial and not wholly resolved initial issue is whether a digital representation of an artistic work enjoys its own copyright (as a photograph), quite apart from that of the work thus represented (if indeed it has any). It seems reasonably clear that a photograph of a 3D object (such as a sculpture) enjoys its own copyright, but there is some doubt about a photographic image of a painting which has set out to reproduce as exactly as possible an image of the latter.9

18.3 On the view that the digital image or photograph has copyright in its own right whatever the artistic subject, it will none the less be subject to the fair dealing exceptions for non-commercial research, private study, criticism and review. The image could be quoted in order to criticise or review the object itself (see section 14.5 B1). With regard to non-commercial research, the difficulty discussed in Part I at section 14A arises, namely whether academic research leading to commercial publication (in the sense that a publication is made publicly available for a price) can ever amount to non-commercial research. The recommendation of the Working Party is that research of this kind should not be seen as commercial, and that it is therefore within the scope of the exception. But the exception probably only applies where it is the researcher or someone acting on their behalf who makes the copy, not where someone else makes copies which researchers can then use. A person providing research tools or resources for others to use is not obliged by the research exception to provide them free to those others.

18.4 Further support for the view that museums and galleries are entitled to charge for images made and supplied by them to researchers comes from analogy with the explicit exception in relation to libraries and archives, also mentioned in section 14A above. This enables such bodies to make and issue copies to others for the purpose of the latter’s non-commercial research and private study, provided that a charge covering at least the cost of making the reproduction (which may include a contribution to the supplying institution’s overheads). There seems no good policy reason in this context for distinguishing between libraries and archives, on the one hand, and museums and galleries on the other.

18.5 The libraries and archives exception does, however, point to the basic principle that should, it is suggested, underlie charging policies, at least with regard to public institutions: that is, the basis for the charge should be the marginal cost to the institution of making the specific reproduction for delivery to the researcher, rather than the costs of creating and maintaining a collection of images or of making provision for a profit margin on transactions.

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9 A painting of a photograph is, however, more likely to enjoy a copyright in its own right.
18.6 Both the exceptions for non-commercial research (above section 14A) and for criticism or review (above section 14B) should enable publication of reproductions of works of art that are available to the public, either to criticise/review the work of art in question, or to use the reproduction to criticise another work: for example, the earlier writing on the subject of another critic. The difficult question is how much of the work of art may be reproduced for this purpose. As already noted, it may be extremely difficult to criticise or review a work of art without reproducing substantially the whole of it; yet such reproduction is likely to be exactly that for which the copyright owner or the institution holding the work of art wishes most to charge. A fair point of departure in such cases would again appear to be the marginal cost to the institution of making the copy actually delivered to the critic/reviewer; and if a charge has already been incurred at the study/research stage, no further charge should be made.

18.7 Finally, note that making a graphic representation, photograph, film, or broadcast of a visual image of a 3D artistic work permanently situated in a public place or in premises open to the public is not an infringement of copyright in the work, nor is issue to the public, or public communication, of anything made under this exception. If a museum or gallery is a place open to the public, and if an exhibit falls within the categories of 3D artistic works (sculpture, building or work of artistic craftsmanship), there might still be a question whether this exception could be asserted to over-ride a prohibition on photography as one of the conditions of entry to the museum or gallery (see section 16).

19 Film clips and ‘captured stills’

19.1 Another issue obviously causing difficulty is the use of clips and stills in the course of film research and its publication. Films are a category of copyright protected work, the key restricted acts in relation to which are:

- Copying a substantial part (i.e. a clip or an image)
- Storage in any medium by electronic means
- Making a photograph of the whole or any substantial part of any image forming part of the film (i.e. a still from the film)
- Publication/distribution
- Public rental/lending
- Public showing/playing
- Public communication (i.e. broadcasting, the Internet)

19.2 There is no provision exempting fair dealing with films for research and private study purposes from liability for copyright infringement. But there are exemptions for –

- fair dealing with a publicly available film for purposes of criticism, review or news reporting
- its incidental inclusion in another work
- acts for purposes for non-commercial instruction if accompanied by a sufficient acknowledgement
- Playing or showing a film before an audience at an educational establishment for purposes of instruction.
20 Musical extracts

20.1 The issue identified here concerns the reproduction, whether in printed or audio form, of extracts from music in musicological research publications. Music is a category of work protected by copyright, but must be distinguished from any accompanying lyrics (literary copyright) and sound recordings of the music (which enjoy their own quite distinct copyright – see further below, section 21). An edition of a score may enjoy copyright in its own right, regardless of whether the original piece is still in copyright, provided the editor’s input satisfies the criteria of originality (above, section 3).

20.2 Key specific applications of the law to music include the following –

Restricted acts:
- Copying of a substantial part, judged by quality rather than quantity; note the example of this given above at section 13.1
- Public performance
- Public communication (i.e. broadcasting or transmission over the Internet)
- Adaptation, which explicitly includes arrangement or transcription.

These can be offset by the following exceptions –
- Fair dealing for non-commercial research, private study, criticism, review, news reporting (see discussions above in sections 14 and 19)
- Incidental inclusion in a sound recording, film or broadcast
- Things done for purposes of instruction/examination
- Educational establishment performance before an audience
- Recordings of folk songs for designated archives

21 Sound recordings

21.1 The issue here is similar to that with musical extracts: the use of sound recordings in musicology. As already noted, such recordings have their own copyright, distinct from any such right that may subsist in the material recorded. The key difference from the copyrights hitherto described in this note is the term or duration of the copyright, currently 50 years from making, OR from publication, OR from public playing/communication, of the recording.

21.2 The restricted acts particularly applicable to sound recordings include –
- Copying (again, the general principle of that the copying must be of a substantial part applies; see relevant comments on musical works, above)
- Issuing copies of the work to the public (in relation to sound recordings, this is typically the act of commercial pirates rather than musicologists, but insofar as an extract from a sound recording was included in published output resulting from the research, it is applicable)
- Public rental/lending/playing/communication (it is under the last of these alternatives that actions against file-sharing and ‘peer-to-peer’ networks have mostly been brought in the UK).

21.3 The exceptions applicable to sound recordings do not include fair dealing for research and private study purposes. With recordings of music this creates the difficulty that while one can copy the music for research and private study purposes, one cannot do so with the recording which happens to embody the music. But the exceptions do include –
• fair dealing with a publicly available sound recording for purposes of criticism, or review; as explained above (sections 14 and 18), this should include the incorporation of material within published research output, whether to criticise the sound recording itself or some other work (e.g. a previous critique or analysis of the recording).
• acts for purposes for non-commercial instruction if accompanied by a sufficient acknowledgement.
• Playing or showing a sound recording before an audience at an educational establishment for purposes of instruction (this is explicitly stated to be not a public playing/showing of the work).

22 Broadcasts

22.1 The issue identified here concerns the copying of broadcast material for subsequent use in research and teaching, especially in media studies. Broadcasts have their own copyright, which is more like that for sound recordings than for other kinds of work previously discussed; in particular, there is a 50-year term.

22.2 The copyright is again infringed by -
• copying a substantial part
• making a photograph of the whole or any substantial part of an image in the broadcast;

22.3 But specific exceptions allow for ‘time-shifting’ recording and the making of photographs of images, provided that it is done in domestic premises for private and domestic uses. Academic research would not fall under this heading, nor is there any exception for non-commercial research or private study. Provisions do exist, however, allowing exemptions for:
• criticism or review
• things done for purposes of instruction/examination, playing/showing in educational establishments
• recording for educational purposes.

Designated archives may also make recordings for their purposes.

23 Databases

23.1 Databases are becoming increasingly important to the arts and humanities as well as the social science communities. Much relevant printed source material, especially if out of copyright, is being gathered together in large commercial databases, to which access is only possible, despite the absence of content copyright, on payment of substantial subscription or other charges. 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:

1. 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 above, 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.

2. 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.

23.2 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.

23.3 There is unclarity about the relationship 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 parallel with the copyright exemption for non-commercial research, which, as argued in section 10a above, 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 is a significant obstacle to, and source of uncertainty in, in the pursuit of academic research.

23.4 A final issue with databases is that the law fails to impose any limitations on either the copyright or the special *sui generis* right even where the database accumulated data from single-access sources or where the cost of amassing the data created what is virtually a ‘natural’ monopoly. The building of large databases has put some publishers in a dominant market position, thanks to their high charges to others for access and/or permission to use material on a database.

24 Editorial work

24.1 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 apparatus, 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 performance editions of early music. The 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 the editorial text. In the case about performance editions of early music, 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, research, criticism and review. The 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.

24.2 There is also a rule conferring a special, limited copyright on a person who publishes for the first time a previously unpublished literary, dramatic, musical or artistic work, 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.

25 Unpublished correspondence and private papers

25.1 A final issue brought to the attention of the Review Working Group was the refusal of some literary estates to allow access to, or reproductions from, the unpublished correspondence and/or private papers of writers and public figures, perceived in some quarters as a form of censorship. 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 obliged 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, the latter does enable a researcher to quote from copyright materials without any need for the copyright owner’s licence. 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. It is recognised that for many, if not most, literary estates copyright fees will be a prime source of revenue; but negotiations with researchers should 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 will 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. The laws of defamation, confidentiality and privacy, and the limitation of the exception for criticism and review to publicly available work, together provide sufficient protection against abuse of freedom of expression on the part of the researcher.
FURTHER SOURCES OF INFORMATION


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


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 (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.patent.gov.uk/copy/tribunal/triabissued.htm). (RPC = Reports of Patents etc Cases.)

The law is constantly changing and developing, so textbooks are always likely to be out-of-date. The internet may provide means of updating. A useful copyright website is maintained by the UK Patent Office: http://www.patent.gov.uk/copy/index.htm

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

http://www.opsi.gov.uk/advice/parliamentary-copyright/index.htm

On copyright developments in the European Union, consult:

http://ec.europa.eu/internal_market/copyright/index_en.htm

All URLs last checked 8 September 2006.