

Paper Two

Fair Dealing in an Institutional Repository: a Report for KULTUR

As part of the Intellectual Property Rights work package undertaken by VADS for the KULTUR project, this paper will look specifically at the issue of '*fair dealing*' and whether it is relevant and / or a valid defence for Universities when un-cleared copyright content is uploaded to their Institutional Repositories, as a whole or part of another piece of research material.

Firstly, we will provide a definition of an institutional repository and then seek to understand the basics of Intellectual Property Rights, and of copyright in particular. In that context we will then look at exceptions to copyright law and *fair dealing* in particular, and assess how it can be interpreted in an institutional repository setting.

An **Institutional Repository** is an online space for collecting, preserving, and disseminating, in digital form, the intellectual output of an institution. Two primary objectives for having an institutional repository are:

- a. a place for sharing, storing, managing and preserving these files;
- b. a marketing tool which provides global visibility for an institution's scholarly research.

An institutional repository commonly contains materials such as research journal articles, both in the process of, or having undergone peer review, and digital versions of theses and dissertations. An institutional repository from a creative arts institution will by necessity also contain images and time-based media, for instance in the form of digital versions of painting, photography, film, graphic and textile design, and records of performances, shows and installations.

In addition to these materials, repositories can also contain other digital assets generated by normal academic life, such as administrative documents, course notes, learning objects and unpublished or otherwise easily lost ("grey") literature (e.g., internal reports and policy documents).

Intellectual Property Rights constitute a suite of legal rights afforded to the creators or owners of original works. Intellectual Property Rights include copyright, patents, trademarks, design rights and data protection. By proportioning Intellectual Property Rights to works of original creative endeavour, it is hoped that creators and owners enjoy sufficient protection, incentive and reward for their work, while balancing the need for dissemination and sharing of such material for the good of society as a whole.

Indeed, as early as 1803 the politician Lord Ellenborough expressed the inherent tension between the need to simultaneously protect copyrighted material and to allow others to build upon it when he wrote, in the context of emerging mechanical reproduction,

'while I shall think myself bound to secure every man in the enjoyment of his copy-right, one must

*not put manacles upon science.*¹

It is clear that Institutional Repositories throw up a similar dilemma.

Works protected by Intellectual Property Rights can relate to the industrial, scientific, literary or artistic domains and can take on many formats, such as a brand or name, a manuscript, a painting, software or an invention. While patents, design rights and trademarks are generally associated more with the commercial domain, copyright is the Intellectual Property Right associated with the creation of artistic or literary works.

Copyright is a major branch of Intellectual Property and it protects the 'expression' of an idea, but crucially not the idea itself. To merit copyright protection, the work must be in an expressible form or information that is substantive and discrete. Copyright arises automatically and does not require formal registration, unlike, for instance, a patent. It gives the creator exclusive rights to control the work's distribution for a certain time period, to be credited for the work, to determine who may adapt or perform the work and benefit financially from it.

The law which governs copyright in the UK is the Copyright Designs and Patents Act of 1988.² This law was, however, largely written for an analogue world, and has therefore been subject to a number of amendments since its inception. One of the major amendments was in response to the Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001³ on the harmonisation across the EU of certain aspects of copyright and related rights in the information society. It was made under the internal market provisions of the Treaty of Rome and intended to implement the WIPO Copyright Treaty⁴. These amendments, brought into affect in the UK in October 2003, begin to address the idiosyncratic issues posed by the internet, but many have thought that they do not go far enough. Indeed, in 2005 Gordon Brown, the then Chancellor, as part of his pre-budget report, and in recognition that the current law was not fully fit for the information age, commissioned the Gower Report in Intellectual Property⁵, which was published in December 2006, and whose 54 recommendations are currently subject to public consultation through the UK Intellectual Property Office⁶. Many of those recommendations are particularly relevant to the academic community, but the changes proposed are unlikely to become law until early 2009 at the very earliest. The first public consultation on the review was completed on 8 April 2008 and the next stage is being scoped with the intention to begin the second stage of the consultation later this year.

While still protecting the rights of the original creator, copyright also grants others literally the 'right to copy', within certain parameters through some pre defined copyright exceptions. These legal 'exceptions' to the law were created to operate mainly in the context of personal research, criticism, review and reporting. Such exceptions are termed as '*fair dealing*' in the UK and are concerned specifically with exceptions to the law of copyright. As such, '*fair dealing*' is a legal defence for copyright infringement, rather than a right in itself.

1 Cited in the case *Carey v. Kearsley* 4 Esp. 168, 170, 170 Eng. Rep. 679, 681 (K.B. 1803).

2 http://www.opsi.gov.uk/acts/acts1988/UKpga_19880048_en_1.htm

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

4 <http://www.wipo.int/portal/index.html.en>

5 http://www.hm-treasury.gov.uk/gowers_review_index.htm

6 <http://www.ipo.gov.uk/>

Fair Dealing

"**Fair dealing**" refers to the ability granted by copyright laws to reproduce limited portions of copyrighted works without permission and without infringing the legitimate interest of the authors or copyright owners. This right exists in the UK and other regions whose copyright ordinances are derived from the UK (such as Australia, Canada, New Zealand and Hong Kong). In the US, the term "fair use" is adopted.

A certain amount of copying is allowed under *fair dealing* for purposes of "non-commercial research or private study"⁷ for "criticism and review and reporting."⁸ The law does not define exactly how much original material can be copied, although a number of societies and associations have issued guidelines which are generally accepted to be an appropriate interpretation of the law but which are, crucially, not legally binding.

The Intellectual Property Office states that "Fair dealing has been interpreted by the courts on a number of occasions by looking at the economic impact on the copyright owner of the use; where the economic impact is not significant, the use may count as fair dealing."⁹ So, for example, it is within the scope of the above fair dealing exception to make single photocopies of short extracts of a copyright literary work for non-commercial research or private study, or to record and distribute a short extract from a play for the purposes of criticism and review."

The exemption under section 29 for research and private study only applies to literary, dramatic, musical and artistic works, and to the typographical arrangements of other editions: therefore sound recordings, films, broadcasts or cable programmes, as defined under section 1b) of the Act, are not included in the fair dealing exemption.

Fair Dealing in the Institutional setting

The fact that the research or private study that uses the copyright content must be 'non-commercial', creates potential conflicts of interest in the academic domain: The Copyright Licensing Agency and the British Library issued guidelines after this amendment was brought into effect in 2003, in which they state that "Commercial' is a broader term than 'profit-making'. They define 'Commercial' in practice as being synonymous with 'directly or indirectly income-generating.'¹⁰ It is therefore possible that work containing copyright material under the provision of *fair dealing*, that is (a) exhibited or sold by the academic/artist, or (b) sponsored by a third party, or (c) published in an institutional repository that has ostensible use as a marketing tool for the institution, can be deemed to be contributing to the commercial activity of the institution, and is thus an infringement of copyright because it does not meet the strict conditions of *fair dealing*.

While also restricted to literary, dramatic or musical work, and the typographical arrangements therein, the exemptions defined under sections 37 – 44 of the act, for Libraries and Archives, commonly termed as

7 Section 29, CDPA 1998

8 Section 30, CDPA 1998

9 <http://www.ipo.gov.uk/copy/c-manage/c-useenforce/c-useenforce-use/c-useenforce-use-exception/c-useenforce-use-exception-fairdealing.htm>

10 http://www.cla.co.uk/assets/91/bl_cla_faq.pdf

'library privileges', also states that librarians can make copies of periodicals (section 39) and published works (section 40) on condition

“(a) that copies are supplied only to persons satisfying the librarian that they require them for purposes of research or private study, and will not use them for any other purpose;

(b) that no person is furnished with more than one copy of the same material or with a copy of more than a reasonable proportion of any work;”

Fair Dealing in the Institutional Repository setting

Therefore, it is clear that in the repository there are potential issues regarding 'commercialisation' and distribution of work, and furthermore *fair dealing* currently does not cover sound recordings or films. It should, however, be noted that recommendation 9 of the Gower review stated that private copying for research should cover all forms of content, to include sound recording and film, so this may change in future.

Importantly, in Gower's recommendations for including all media (recommendation 9) and for allowing library copying (recommendation 10a) he suggests the changes “relates to the copying, not distribution, of media”¹¹ and “for archival purposes”¹² respectively.

There is also the issue of format shifting, which currently limits the work that can be permitted by librarians and archives, and while Gower recommends that format shifting for both private use (recommendation 8) and libraries (recommendation 10b) should be permitted, the latter is specifically lobbied for 'to ensure records do not become obsolete'¹³; by which we can infer for the purposes of archiving and preservation, and not for distribution. Therefore, should Gower's recommendations 8 to 10 be implemented, they may not alleviate the issue of distribution faced by Institutional Repositories.¹⁴

It appears therefore that the Act itself, and the Gower recommendations subsequent to it, provide for and promote the *fair dealing* exception to copyright for the primary user of the work; the creator/author, or the librarian/archivist. This privilege does not appear to transfer up a level, to the Higher Education Institution (HEI)/Repository, even if it is acting as the conduit/guardian of the intellectual output of its staff. In the Universities of Manchester and Oxford 's Paradigm Project report into the legal aspects of e-repositories, it states that “it should be inferred that the posting of all or part of an electronic publication on a network or website is unlawful and unfair.”¹⁵

This is because, although the Institutional Repository attempts to carry out some of the traditional tasks of the library/archivist, its work is not purely of an archival /preservation nature: the Institutional Repository has

11 http://www.hm-treasury.gov.uk/gowers_review_index.htm, paragraph 4.77

12 http://www.hm-treasury.gov.uk/gowers_review_index.htm, paragraph 4.84

13 Ibid.

14 It should also be noted that there are additional recommendations in the Gower report that could be pertinent to the creative arts institutional repository, which would allow for an exception to copyright for creative, transformative or derivative works (recommendation 11, paragraph 4.88), and for the purposes of caricature, parody and pastiche (recommendation 12, paragraph 4.90).

15 Paradigm: Legal Aspects of E-Repositories and E-Collections, sept 07

a clear dissemination/access/marketing remit.

It therefore seems that fair dealing can not be used as recourse to avoid seeking permissions from copyright owners when the material is to be accessible to others via an Institutional Repository. Indeed, in a Conference on “Institutional and National Services for Research Data Management”¹⁶ a senior solicitor for the University of Oxford stated that *fair dealing* exemptions “don’t apply because the material in the repository is being made available to the public or a section of the public” and that “material that benefited from a fair dealing exemption in its original form will lose that protection in the repository”¹⁷.

To conclude, as the law stands at the moment, it seems unlikely that institutional repositories can rely on the *fair dealing* provisions in the Copyright, Designs and Patent Act, or the Library privileges as a caveat on which to rely when publishing academic data in e-Repositories without explicit permission because:

- a. *fair dealing* is specifically intended for use in non-commercial private study, research, criticism and review; posting material on a publicly and widely accessible Institutional Repository would seem to contravene the ethos of this;
- b. the library and archive privileges do not permit the creation of multiple, format migrated copies of the copyrighted works for distribution;
- c. sound recordings and films are not covered by *fair dealing* at all.

It should therefore be noted that the Institution could be at risk of copyright infringement, either through the action of its agents (employees) or by virtue of secondary infringement (by providing the apparatus which allows infringement), under section 26¹⁸ of the Copyright, Designs and Patent Act, if copyrighted material is not cleared.

A sensible approach

Having said that, a key aspect of what Institutional Repositories are attempting to do is provide comparable services that an academic library or archive have traditionally provided, but in the 21st century electronic context. For various often contentious and polemic reasons, the law does not appear to cover the institution in distributing academic material that traditionally used *fair dealing* in the course of its creation, and does not cover the repository as a type of electronic library in the same way enjoyed by its analogue counterpart (not least because the possibilities of electronic copy and distribution). However, this is open to interpretation: the Paradigm projects guidelines state that in digital archives, it would be usual for the archivist to,

“Rely on existing Fair Dealing provisions and Library and Archive Privilege to supply material of minor rights holders for private study and make researchers themselves responsible for seeking copyright clearance where they wish to publish from such material.”¹⁹

16 held on 20th October 2008, as part of the Scoping Digital Repository Services for Research Data Management project at the University of Oxford
<http://www.ict.ox.ac.uk/odit/projects/digitalrepository/Workshops-DataServices.xml>

17 http://www.ict.ox.ac.uk/odit/projects/digitalrepository/docs/workshop/Carolyn_McKee-INSRDM1008.ppt

18 http://www.opsi.gov.uk/acts/acts1988/ukpga_19880048_en_2#pt1-ch2-pb2-1g26

19 <http://www.paradigm.ac.uk/workbook/legal-issues/copyright-archives.html>

It is therefore an issue of risk assessment, whereby the institution must weigh up the probability and gravity of potential litigation in the context of their intent and the future economic impact brought by the material. This assessment of risk is best made ultimately by an institutional expert in Intellectual Property, but some level of responsibility should be required of the individual academic or depositor of the material, so that they adhere to the law and to institutional policy.

The Researcher should therefore be made fully aware of all the legal issues (including those pertaining to *fair dealing*), by using the guidelines, flowcharts and scenarios, and supported in seeking clearances and undertaking 'reasonable searches' for orphan works (which may be defined by the Patent Office in due course²⁰). By providing obligatory 'declaration of compliance' and 'agreements to terms and conditions' in the upload procedure, the Institution should be confident that the material posted is lawful and likely to indemnify the Institution should this not be the case.

It remains a fact that until there is a precedent to go by, through the implementation of case law, the rule of the law and how it will be applied is open to somewhat cautious interpretation and conjecture. While many HEIs point to the JISC Legal guidelines, even they step back somewhat from addressing the issue in its entirety. Their guidelines relate to how contents of an e-Repository can or cannot be subsequently used under the *fair dealing* exemptions; they do not address whether or not content can be published in the repository in the first place under the terms of *fair dealing*.

Fair dealing with e-repository contents will be allowed for the purposes of non-commercial research, private study, criticism or review or for reporting current events. The remit of the research and private study exception which is available under s.29 CDPA is restricted to literary, dramatic, musical and artistic works and to the typographical arrangements of published editions (12). Consequently, the provision will prohibit a researcher from copying a sound recording or film from an e-repository for the purpose of private study but at the same time will permit copying of the underlying musical work or film script (13). The CDPA also carves out certain exceptions for libraries, the 'library exceptions' under sections 37 - 44. However, these exceptions apply only to works like literary, dramatic, musical and the typographical arrangement of published editions (14). The CDPA will thus impede preservation of sound or film collections made available in an e-repository.²¹

Recommendations

I therefore recommend that the KULTUR Institutional Repository operate along the following lines:

- a. Have clear guidelines on the Terms of Use, or Acceptable Use Policy for all staff and students, and for how to comply with the CDPA, how to trace and clear rights etc.;
- b. Ensure that all agents of the University are aware of the law relating to the CDPA and *fair dealing*,

²⁰ Recommendation 13 of the Gower report suggests lobbying the European Commission in order to make proper provisions for the use of 'orphan work' in the 2001/29/EC Directive, and subsequently, Recommendation 14a suggests that the Patent Office issue guidelines on what constitutes a 'reasonable search' and under Recommendation 14b holds a voluntary register of copyright.

²¹ <http://www.jisclegal.ac.uk/publications/erepositories.htm#2>

and comply therewith;

- c. Provide 'declarations of compliance' for all depositors which indemnify, in theory, the HEI;
- d. Get assignation of rights or permissions wherever possible, and where not possible make informed and institutionally ratified decisions on potential risk;
- e. Keep comprehensive documentation pertaining to the above;
- f. Obtain blanket copyright licences from the relevant agencies;
- g. Have robust 'take-down' policies in place;
- h. Promote the use of Creative Commons licensing, to facilitate a less cumbersome use of the material in the future;
- i. Keep abreast with current awareness in changes in statutory and Case Law and amend guidelines accordingly (paying particular attention to the forthcoming developments relating to Gower Recommendations 13, 14a & 14b);
- j. Have clear organisational structures in place to deal with all levels of enquiry, both from within and without, pertaining to IP.