

Taking Forward the Gowers Review of Intellectual Property, Second Stage Consultation on Exceptions: A Response from the Digital Preservation Coalition

Introduction

1. The **Digital Preservation Coalition (DPC)** is a not-for-profit membership organisation whose primary objective is to raise awareness of the importance of the preservation of digital material and the attendant strategic, cultural and technological issues. Its vision is to make **our digital memory accessible tomorrow**.
2. We **note and welcome the progress** the IPO has made to facilitate digital preservation with proposed reform of preservation exceptions to copyright. Our response is particularly focussed on these proposals (described in sections 256-293). We recognise that increasing the number of preservation copies need not increase public transmission.
3. The infrastructure and techniques used to preserve material objects are not commensurate with the challenges of preserving digital objects so it is hardly surprising that changes are needed to the legal and regulatory environment of preservation. It is our settled view that, **without appropriate preservation, access and exploitation of intellectual property will be inhibited**. Therefore we ask that the IPO remain committed to meeting the challenge of digital preservation.
4. In summary, we warmly **welcome the proposal to permit multiple copies** to be created for preservation purposes. We note and **welcome the proposal to broaden the types of content** that can qualify for this exception and we **welcome the proposal that extends this exception to a wider range of institutions**.
5. We seek a number of clarifications to ensure that perfectly reasonable preservation actions are not inadvertently inhibited. For example we want to ensure that institutions are not prevented from collaborative preservation and we are concerned that attempting to restrict preservation copying to an institution's permanent collection may interfere with perfectly laudable and reasonable **rescue and appraisal efforts**.
6. The membership of the DPC includes museums, libraries, data centres and archives in a variety of sectors; public sector agencies that fund content development; rights holders; professional bodies; and researchers. This response has benefitted from discussion amongst this diverse community.
7. **We offer our support** in communicating these changes to a growing community of practice which is hungry for solutions. Although your proposals will have the net effect of alleviating misplaced fears, we are concerned that the message could be lost in the wider discussion of your proposals. We would hope to assist you in disseminating information about changes to the preservation exceptions as they pertain to digital objects.

Preservation exemptions

8. **You asked (10) whether the intention to avoid setting numerical limits on the number of copies of an item which may be made for preservation but rather to specify scenarios where preservation copying was appropriate was the right approach.**
9. Yes, we believe this is the right approach: it is an axiom of digital preservation that 'lots of copies keeps stuff safe'. Nonetheless we seek clarification on the details of your proposal.
10. The definitions (42,4) imply that institutions may only transmit material between themselves in the circumstance that the receiving institution already holds that data as part of its permanent collection. This is at odds with modern ways of working in digital preservation. Emerging good practice underlines the prudence of retaining multiple copies and for those copies to be distributed among a network of institutions. The distributed replication of dark archives protects against failures of many kinds. It is the premise underlying a technology adopted widely in the US and increasingly so in the UK called 'LOCKSS', in which multiple – preservation only – copies of high value digital objects are automatically replicated across a network with nodes in several institutions. This and similar processes mean that an institution's 'dark archive' is likely to contain preservation copies on behalf another institution irrespective of the receiving institution's permanent collection. It is not clear whether this would be permitted under the proposal. Constraining this reasonable course of action in the new regulations could greatly increase the costs or risks of digital preservation and information risk management.
11. We believe that, appropriately managed, a federated network of repositories holding preservation only copies of digital objects offers considerable advantage for digital continuity and provides economies of scale in storage. We further believe this implies no damage to the interests of rights holders and that it is congruent with the principles underpinning your proposals. Consequently we seek clarification to ensure that collaborative and co-operative action is not inadvertently constrained.
12. **You asked (11a & b) whether libraries, archives, museums and galleries be treated as mutually exclusive for the purposes of the amendment and whether the conditions should be the same for each of these.**
13. We welcome the proposed extension of the exception to include a wider range of agencies.
14. We are not aware that the law currently offers a definition of a library so question whether it is worth trying to do so at this time. It is difficult to prescribe or anticipate the administrative arrangements that support museums, libraries, archives and galleries. For example, many museums and galleries also act as archives (of essential support

documentation) and hold small library collections of published material relevant to the study of their collections. The collections of many archives and libraries include considerable amounts of art and other material culture. Moreover, digital objects are routinely held by all of these institutions. So we conclude that for the purposes of the copyright exceptions these institutions should not be treated differently.

15. We therefore also conclude that the most effective approach will be to treat these institutions equally and that the prescribed conditions be the same.

16. We also seek clarification on how and whether this extension would apply to digital repositories. It is not uncommon for preservation to be undertaken by data centres or digital repositories with no organisational association with an archive, gallery, museum or library. Such data centres may describe themselves as libraries or archives for the purposes of the legislation. If such self-description not permitted then perfectly sensible and laudable preservation actions will be constrained, the costs and risks of digital preservation and information risk management will increase, and no advantage or protection will accrue to rights holders or the public. It would therefore be judicious to provide a mechanism to enable digital repositories to exploit this exception, either through an explicit extension for data centres, or through clarification of self description.

17. **You asked (12a, b & c) ‘What is a permanent collection?’ what tests might be appropriate, does digital preservation change concepts like permanent collection and does the word ‘deposit’ describe all the ways in which an object enters a collection.**

18. An institution’s permanent collection is not as easy to define as might appear. The concept of the permanent collection was introduced to copyright provisions to prevent institutions copying items that had been provided under inter-library loan agreements. Although perfectly sensible for the paper environment, this does not seem helpful in defining the boundaries of the preservation exceptions for digital content, and as we shall explain (see paragraph 20) it is likely to present unforeseen difficulties. Efforts to define the permanent collection are problematic. For example, the purpose of a collection is likely to change through time and may not be clear even at the outset. In the analogue domain, although record keeping is clearly important in defining a permanent collection, it is not unusual for there to be a backlog of material which has not been completely documented. Accession registers contain errors and lacunae, and therefore cannot always be relied on to provide a comprehensive account of an institution’s holdings.

19. More importantly the digital estate is growing rapidly and often sits awkwardly within the collecting policies of institutions. Research shows that many institutions have not yet embedded policy for the management of digital resources (Angevaere 2009, Boyle et al 2008, Van der Hoeven et al 2009, Waller and Sharpe 2006) and are therefore unable to specify clearly whether an item is part of their permanent digital estate or not. Therefore

many digital resources of lasting value are currently held by institutions outside of core collection management. Consequently by restricting preservation copying to the 'permanent collection' we may inadvertently constrain perfectly reasonable actions to safeguard an institution's digital estate.

20. The term 'deposit' does not adequately describe the process that objects enter permanent collections. In museums and galleries it is not unusual for an item to enter the permanent collection only after an extended period of loan; and it is not unusual for the significance of items in a support collection to be identified only after a long time has passed. Therefore the mechanism by which an item may enter a permanent collection is slower and more complex than the word 'deposit' implies. The term 'accession' probably describes this more accurately.

21. Perhaps most importantly, by restricting the exception to a permanent collection, the proposal inadvertently jeopardises perfectly reasonable interventions aimed at appraisal and rescue. It is not unusual for a digital archive or forensic laboratory to be asked to retrieve data from obsolete or technically challenging media. Copying and reformatting – that is retrieval from the physical carrier – is an integral step in the appraisal of the digital object. In many cases the copyright owner will not be known before this appraisal is completed and it may be that appraisal leads the archive to decide that it does not want to accession the digital object in any case. So, if the exception only applies to a permanent collection then the archive will have infringed the law before it can create a permanent collection. Consequently it will be next to impossible for a collecting archive to create a permanent digital collection lawfully.

22. Finally, we note again the need to clarify the exception with respect to collaborative action between institutions to reduce and mitigate risk of catastrophic loss (see 9-11 above). In these circumstances, institution would invoke the preservation exception in order that they might copy items from another institution's permanent collection. It is not clear whether this would be permitted.

23. Consequently, we believe the proposals need to be clarified in respect of the permanent collection. We believe that linking the exception to the nebulous concept of a permanent collection may hinder perfectly reasonable efforts to rescue digital collections. It may be advisable to add an additional exception for the express purpose of appraisal and it should be clear that collaborative preservation, appropriately monitored, should not be inadvertently prevented.

24. You asked: (13) should a lawfully made copy become an infringing copy if dealt with improperly?

25. Our understanding is that the law is already clear that preservation copying has to be for preservation purposes. As such it enables long term access but does not alter the

underlying access provisions. We also understand that an excepted preservation action carried out on an illegitimate copy does not render it legitimate.

26. You asked (14 a & b) if the terms object, item and work were sufficiently clear to permit the effective preservation of digital objects, or if some lack of clarity might inadvertently inhibit this.

27. Our understanding of the law is that copyright subsists in the work not the carrier. We see no reason to change this, though seek clarification of your intentions here. For example the preservation exception ought to apply equally to published and unpublished works.

28. You asked (15) if the proposed amendments were clear in permitting refreshment of media.

29. Yes, we believe this is clear. Note that a preservation copy itself may in time need to be migrated and that it is reasonable for an archive to hold copies on a variety of media through several generations of migration.

30. You asked (16) if the proposed amendment of the term publication to include film and sound recordings have any undesirable consequences.

31. We welcome this amendment but we believe that clarification is needed on two points.

32. The detail of the act pertaining to how sound recordings are released to the public is unclear. Specifically the amendment seems to imply that publication of 'any part' of a sound recording means that the whole of the recording is then deemed to have been published. This is likely to lead to confusion and unhelpful debate on what constitutes a sound recording. This lack of clarity is exacerbated because a sound recording has the potential to embed any number of works under copyright. In any case, it is our view that the preservation exception should apply to published and unpublished work equally.

33. It will assist the presentation of these proposals to illustrate the extent of the exception in terms of the types of data that are now encompassed by the regulations.

References

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March 2010**

About this document

Version 1	Document initiated	24/03/2010	WK
Version 2	Circulated to board and updated after comments	28/03/2010	Board
Version 3	Submitted	31/03/2010	WK