
Wellcome Trust response to Copyright in the Knowledge Economy

European Commission: Copyright in the Knowledge Economy

Response by the Wellcome Trust

November 2008

1. The Wellcome Trust is pleased to have this opportunity to comment on the role of copyright in the 'knowledge economy'. The Wellcome Trust is the largest charity in the UK. It funds innovative biomedical research, in the UK and internationally, spending around €700 million each year to support the brightest scientists with the best ideas. The Wellcome Trust supports public debate about biomedical research and its impact on health and wellbeing.
2. The Wellcome Library, part of the Wellcome Trust, is one of the world's major resources for the study of the history of medicine. It holds around 2.5 million items, including 600,000 books and journals, an extensive range of manuscripts, and more than 100,000 paintings, prints and drawings.

General comments

3. The Wellcome Trust considers the current balance within the copyright system to be in favour of rights holders and this is at the expense of the dissemination of information to the wider public. The Wellcome Trust is concerned that the current copyright regime does not support the interests of scientific research, which is based on the premise of ongoing discovery of new knowledge for the purpose of creating significant public benefit.
4. The Green Paper on Copyright in the Knowledge Economy does not address the underlying issues arising from the relationship between contract law and copyright law. Clearly the scope of the exceptions should be examined in light of the current technological developments of the digital age and the Wellcome Trust wholly supports this review. However, this must be considered alongside the impact of contract law on the application of the copyright exceptions.
5. Under English law, as a general rule, a rights holder is able to contractually exclude the application of copyright exceptions which leaves the position where, although there may be no infringement of copyright, the user may be in breach of contract. The present system has created a network of access barriers which have generally prevented free access and re-use rights to articles reporting the results of research. The Wellcome Trust has spent a great deal of time negotiating alternative licensing arrangements with publishers to allow open access to the results of its funded work in order to promote scientific collaboration and the dissemination of information.
6. While it is recognised that publishers make an important contribution to the European economy, it should not be the role of copyright to protect their commercial interests at the expense of knowledge discovery, facilitated by open access to research results, that may provide significant public benefit.

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7. The Wellcome Trust recognises that there is already a growing list of copyright exceptions which cannot be excluded by contract¹ which have already been implemented by the Commission and it is strongly encouraged that the Commission applies this approach to all copyright exceptions. The Wellcome Trust therefore strongly recommends that the Commission should require all copyright exceptions to continue to apply irrespective of contractual arrangements.
 8. The Wellcome Library is involved in various initiatives to digitise its existing collection and has been prevented by the existing copyright regime from satisfying its purpose to disseminate information widely for the purpose of promoting and engaging the public in science. Furthermore, many of the works in the Wellcome Library's possession to which this comment applies are of little or no commercial value and the Commission should take this opportunity to clarify, and where necessary, amend the scope of the copyright exceptions to enable works in possession of the library to be digitised and made available on-line for users. As discussed further in our response, the Commission should take this opportunity to bring the copyright regime into the digital era by ensuring that the copyright exceptions are not limited by the technology available i.e. format or location. This is particularly pertinent as research and education is not restricted by geographical boundaries and a coherent approach across the Member States would be supported.
 9. We have limited our response to the issues that apply to copyright exceptions pertaining to research, private study and library privilege. The Wellcome Trust recognises that the exclusive rights granted by copyright provide important incentives to creators, but it is vital that the copyright exceptions are carefully and clearly defined to ensure that society can access existing information to investigate and build upon that information. The EU copyright exceptions should remove legal barriers to research and education wherever possible, and provide a level playing field for researchers across all Member States.

Introduction of guidelines

Question 1: Should there be encouragement or guidelines for contractual arrangements between right holders and users for the implementation of copyright exceptions?

10. The Wellcome Trust does not consider encouragement or guidelines for contractual arrangements to be appropriate for implementing copyright exceptions. As discussed above, in paragraphs 4 to 7, the Wellcome Trust strongly recommends that any contractual arrangements should not be capable of superceding the copyright exceptions.
11. The Wellcome Trust considers the primary function of copyright exceptions is to balance interest of rights holders with the promotion of education and research by enabling the public to access knowledge and information through the public domain. This balance is currently being undermined by rights holders entering into contractual arrangements which override the copyright exceptions. This is currently impacting on the availability of information accessible in electronic formats, as these works are typically licensed under contracts and digital rights management systems which restrict the application of the copyright exceptions.

¹ Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs and Directive 96/9/EC of the European Parliament and of the Council of March 1996 on the legal protection of databases, OJ L 77, 27.3.1996

12. The Wellcome Trust has been involved in negotiations to encourage publishers to licence content in ways which:

- i) provides free access to the research papers; and
- ii) allows the world at large to re-use this content for non-commercial purposes.

Though the Trust has been successful in getting those publishers who offer an author-pays model to adopt this type of licence, other publishers typically restrict the way in which research papers can be re-used. Until all research papers can be freely accessed and exposed to text and data-mining technologies, the full benefits of the research we fund will not be realised. See also Question 19 and our response in paragraph 29.

Question 2: Should there be encouragement, guidelines or model licenses for contractual arrangements between right holders and users on other aspects not covered by copyright exceptions?

13. The Wellcome Trust supports additional guidelines for contractual arrangements covering aspects not covered by copyright exceptions that are developed in a transparent way, in consultation with rights holders and users.
14. We would however suggest that the development of model licences on aspects not covered by copyright exceptions may be better developed at national level or by the relevant industry sector. This would enable the model licences to reflect the arrangements and issues specific to the relevant industry sectors which should in turn increase the likelihood of those model licences being used and applied by the rights holders and users within the relevant industry sector. Again, these model contractual arrangements should be available as guidance and should be drafted in consultation with the appropriate stakeholders.

Non-mandatory exceptions

Question 3: Is an approach based on a list of non-mandatory exceptions adequate in the light of evolving Internet technologies and the prevalent economic and social expectations?

Question 4: Should certain categories of exceptions be made mandatory to ensure more legal certainty and better protection of beneficiaries of exceptions?

Question 5: If so, which ones?

15. The Wellcome Trust considers that copyright exceptions should be made mandatory for all Member States. The research community is on the whole not limited by geographical boundaries and the current regime for copyright law would best serve the research community by harmonising the copyright exceptions across Member States. The only way to ensure that harmonisation is achieved is to make copyright exceptions mandatory. This issue is of growing importance in the light of evolving internet technologies, which have played a crucial role in the increasingly international and global nature of research.
16. The Trust is predominantly UK-focused, and therefore hopes that some of the non-mandatory EU exceptions not currently implemented in the UK will come into force in the future. Examples of such exceptions include:

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1. Articles 5(2)(a) and (b) of the EU Directive permit general exceptions and limitations to the reproduction right in Article 2 for photocopying or for general copying for private and non-commercial use, provided that rights-holders receive fair compensation. These exceptions/limitations have not been implemented in the UK.
 2. Article 5(3)(j) permits use for the purpose of advertising the public exhibition or sale of artistic works, to the extent necessary to promote the event excluding any other commercial use. The UK exception permits the copying of a work and the issuing of copies to the public for the purpose of advertising the sale of work, but does not extend to exhibiting copies of the work.
 3. Article 5(3)(n) permits use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of publicly accessible libraries, educational establishments, museums or by archives of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections. The UK exception for fair dealing specifically limits the range of works covered by the exception to literary, dramatic, musical or artistic works.

Libraries and Archives

Question 6: Should the exception for libraries and archives remain unchanged because publishers themselves will develop online access to their catalogues?

17. The Wellcome Trust recommends that the exception for libraries and archives should not remain unchanged on the basis of behaviour and/or actions of publishers. In the Wellcome Trust's experience, publishers are only likely to make available online the catalogues that are commercially viable and it cannot be assumed that access to these catalogues would be made freely available for research and private study purposes.

Question 7: In order to increase access to works, should publicly accessible libraries, educational establishments, museums and archives enter into licensing schemes with the publishers? Are there examples of successful licensing schemes for online access to library collections?

18. The Wellcome Trust supports the aim of increasing access to works, although licensing schemes with publishers may not always be the best way to achieve this. The Wellcome Trust would not support a situation where the only method of increasing access to its works was to enter into a compulsory licensing scheme (and pay any associated fees) with the publisher to achieve this aim.
19. Examples where such licensing schemes are working well, include:
 - JISC – Licenses products on behalf of the Higher Education community, and provides other access management and e-learning services².
 - The National Health Service (NHS) licensed Cochrane database - a collection of databases in medicine and other healthcare specialties. It is a subscription-based database, that has in many countries (including the UK) been made available free to all residents by national provision³.

² For further information see: <http://www.jisc.ac.uk/>

³ For further information see: <http://www3.interscience.wiley.com/cgi-bin/mrwhome/106568753/HOME>

Question 8: Should the scope of the exception for publicly accessible libraries, educational establishments, museums and archives be clarified with respect to:

a) Format shifting?

b) The number of copies that can be made under the exception?

c) The scanning of entire collections held by libraries?

- 20. Format shifting:** We strongly support the application of copyright exceptions for sound, film, broadcasts and on-demand communications. Copyright law should be format-independent and should not discriminate between different modes of presenting information. A failure to extend copyright exceptions to accommodate the technological developments of the digital world will prejudice the original balance of copyright between the interests of rights holders and users by impeding the dissemination of information on-line.
21. An illustration of the need for format shifting exceptions in research are medical studies in disciplines such as neuroscience, psychology, audiology and other disciplines investigating human perception. In the course of these studies, it is sometimes necessary to expose study participants to audio or visual stimuli taken from copyright material. In most cases, such material could be purchased commercially, but researchers might need to copy it into a different format in order to present it to study participants (e.g., a short clip from a DVD may need to be copied onto a computer hard drive so its display can be synchronised with the recording of a participant's response). If a study were examining participants' reactions to particular features of a stimulus, the work might need to be analysed by a computer programme, which could also result in all or parts of it being copied – albeit fleetingly.
22. Another illustration of the need for format shifting exceptions in research is the Trust-funded projects that use virtual reality simulations to study memory and brain activity as people navigate large-scale spaces, such as cities. MRI techniques require subjects to lie in a brain scanner, so virtual reality simulation is the only way to investigate many research questions in this context. Simulations may require naturalistic settings including copyrighted work – for example, background music. A recording would need to be copied into a different format to incorporate it into the virtual reality environment.
- 23. The number of copies that can be made:** Libraries, archives and museums must have the freedom under copyright law to make multiple copies of all works in their possession for archiving and preservation. This should include the freedom to make digital copies of all classes of works and, where necessary, the ability to format shift and circumvent any technical protection measures.
24. We cannot predict how many times format standards will change in the future, and therefore how many times materials will need to be copied to new formats to preserve their accessibility. Likewise, it is difficult to make a general statement about how many simultaneous digital copies of a work should be held, given advances in best practice and electronic storage technology.
25. To implement a research and private study exception that covers sound recordings, films and other materials, library staff must be able to make copies of these materials on behalf of researchers. Researchers could not normally operate the necessary equipment themselves. The involvement of trained library staff would also add an extra layer of protection for rights holders.
- 26. Scanning entire collections:** The Wellcome Trust supports the recommendation that the exception for publicly accessible libraries, educational establishments, museums and archives should include scanning of entire collections. This would enable those institutions within the Member States, such as the Wellcome Library, to provide services

such as those currently offered by the Google Library Project and make certain that Europe is at the forefront of building a sustainable knowledge economy.

27. It is important to note that digital preservation is not the same as providing an access copy. The Commission should ensure that any rights to scan entire collections should be complemented by rights to access those collections by the public through electronic means, including the internet. As libraries have previously noted, rights holders themselves will benefit from the preservation of their work digitally, in perpetuity.

Question 9: Should the law be clarified with respect to whether the scanning of works held in libraries for the purpose of making their content searchable on the Internet goes beyond the scope of the current exceptions to copyright?

28. The Commission needs to seriously address the issue of whether the scanning of works held in libraries for the purpose of making their content searchable on the Internet goes beyond the scope of current copyright exceptions. As mentioned in paragraphs 26 and 27 above, the Wellcome Trust recommends that scanning entire collections and making their content searchable on the internet should fall within the current exceptions of copyright. This is particularly significant with the developments of initiatives such as the Google Library Project in the US. If the Commission is to “promote free movement of knowledge and innovation”, it is vital that this issue is addressed.

29. The Commission should in particular clarify whether there all of the following activities fall within the current exceptions of copyright: text-mining, digitising enough content to enable a search, and digitising enough content to enable full online access to the items searched for.

Question 19: Should the scientific and research community enter into licensing schemes with publishers in order to increase access to works for teaching or research purposes? Are there examples of successful licensing schemes enabling online use of works for teaching or research purposes?

Teaching, research and private study

30. The teaching and research exception is applicable only to “non-commercial activities”. It should be noted that it is not always easy to classify biomedical research in commercial and non-commercial terms. Economic impact is now a valid consideration of the research communities in many member states, and the sustainability of research institutions is being helped by innovative research models involving public-private partnerships. These developments should not exclude researchers from applying the research copyright exception.
31. The Wellcome Trust supports the aim of increasing access to works, although licensing schemes with publishers may not always be the best way to achieve this as highlighted below. Licences should be sufficiently flexible to enable cross-border distribution so that distance learning resources can be distributed through the European Union via the internet. As outlined in paragraph 18 above, the scope of copyright exceptions (including those for teaching and research) should not be limited by the potential to enter licensing schemes. If this were the case, the research community or the state would need to pay fees for entering licensing schemes where they currently fall within copyright exceptions, and therefore allowing them to do certain acts without infringing copyright.
32. The Wellcome Trust has been working with publishers for four years to establish a licensing regime to ensure that our funded researchers and the world at large may both a) read; and b) re-use published content to which our funding has contributed. A key

example of this is the work we have done with Elsevier⁴. We regard it as vital that researchers and the public should be able to read and gain full access to the work we have funded in order that they may fully examine, re-use and text-mine the content to facilitate the discovery of new knowledge. The present system instead creates a network of access barriers that prevent such re-use, and the Wellcome Trust would urge the Commission to establish a framework that embraces the goals of open access, i.e. that the fruits of research be freely available to access and re-use for the benefit of mankind. The Wellcome Trust would be pleased to discuss potential ways of achieving this, and recommends that the Commission engages key stakeholders directly on this matter.

33. Another example of a licensing scheme for teaching and research is SCOAP³ (Sponsoring Consortium for Open Access Publishing in Particle Physics)⁵. In this model, High Energy Physics funding agencies and libraries, which today purchase journal subscriptions to implicitly support the peer-review service, federate to explicitly cover the cost, while publishers make the electronic versions of their journals free to read. Authors are not directly charged to publish their articles in Open Access format.

Question 20: Should the teaching and research exception be clarified so as to accommodate modern forms of distance learning?

Question 21: Should there be a clarification that the teaching and research exception covers not only material used in classrooms or educational facilities, but also use of works at home for study?

34. The Trust recommends clarification of the research and teaching exceptions to accommodate modern forms of distance learning and supports the UK Gower Report's recommendations that copyright exceptions should reflect the character and intent of the activity, rather than where it takes place or the type of media. It is crucial that copyright law embraces the technological developments that have occurred and most importantly does not discriminate against users who are only able to undertake their education through distance learning. Harmonisation of exceptions to copyright would encourage the development of more European-wide resources and enable distance learning resources to be distributed through the European Union via the internet.
35. The Trust recommends that the teaching and research exception covers materials used in the classrooms or educational facilities and works at home for study. Whether an activity is eligible for the research and private study exception should depend upon the character and intent of the activity, rather than where it takes place or affiliations of the researcher. The Trust is concerned that by limiting the benefit of the teaching and research exception to researchers and students registered with an academic institution, this could lead to a situation where important research taking place in other contexts is not covered by the teaching and research exception. For example, medical researchers may have affiliations with independent research institutions or the National Health Service, rather than academic institutions. Without further clarification, these researchers would not benefit from the teaching and research exception on the basis that the material used was not within the context of a classroom or education facility.

Question 22: Should there be mandatory minimum rules as to the length of the

⁴ For more information see

<http://www.elsevier.com/wps/find/authorsview.authors/supplementalterms1.0>

⁵ For more information of SCOAP, see: <http://scoap3.org/index.html>

excerpts from works which can be reproduced or made available for teaching and research purposes?

36. The Trust does not agree that it is necessary for the Commission to provide mandatory minimum rules as to length of excerpts for these purposes. The sufficiency of excerpt length for teaching and research purposes is a subjective and qualitative issue that is highly variable and dependent on a number of considerations. This is consistent with the UK approach to establishing infringement of copyright where primarily a qualitative approach is taken to establishing infringement. It would therefore be inappropriate to impose mandatory rules on reproducible excerpt length.

Question 23: Should there be a mandatory minimum requirement that the exception covers both teaching and research?

37. Any mandatory minimum requirements should consistently apply to both teaching and research as there is no clear distinction between both these activities. Research works can be quite unique and therefore it is important that they be made available. However, as set out in paragraph 36 above, the Wellcome Trust does not recommend that the Commission provides mandatory minimum rules as to length of excerpts for these purposes.