

Response to the Consultation on Copyright

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Question 1

The initial impact assessment does capture the costs and benefits of creating a system of enabling the use of individual orphan works. For publicly-funded museums, galleries, libraries and archives, the problem of holding collections of orphan works is particularly acute. The Collections Trust/JISC report *In from the Cold* estimated that there are approximately 50 million orphan works in public collections. Although the institutions are not able to reproduce the works for cultural, academic or commercial use, they nevertheless have a duty of care and preservation of these collections. This uses considerable resource, and this is a particular issue at a time of diminishing public funding, and also means cultural institutions are unable to realise the full potential of objects in their care. Those institutions with collections of personal archives, social history, photographs taken by private (rather than commercial) photographers, unpublished works, books and pamphlets have entire collections which they are unable to use. This includes placing these objects on display. Therefore, although the Imperial War Museums (IWM) may own a copy of a photograph or letter referring to the First or Second World War that it is able to display within the museum, without knowing the identity of the author, reproducing the work further (for example on the museum's website) becomes problematic.

The initial impact assessment is right to draw attention to the need to preserve orphan works which exist in precarious or obsolete media. Larger museums, libraries and archives will all have some collections of audio-visual material. The technology for recording sound and moving images has changed considerably over the past 70 years and therefore some of these collections are deteriorating because copies cannot be made without contacting the rights holder or the museum bears the risk of copyright infringement. The National Portrait Gallery's multi-monitor video portrait of Duncan Goodhew by Marty St James and Anne Wilson ([NPG 6815](#)) had to be transferred to digital media owing not only to deterioration of the video tapes in question but also because the video players were becoming obsolete. Undertaken with excellent consultation with the artists, such 'format shifting' would in fact have been unlawful had this been an orphan work.

As public funding to museums is decreasing, the resource available to conduct diligent searches of orphan works is diminishing. The result of this is that projects are being scaled back to focus on parts of the collections where copyright ownership is clear. This not only restricts the ambition of the public programming and proportion of the collections made available for public research and display, but it also affects some of the commercial operations of the institutions. For example, the IWM has recently launched a Posters app which provides the image, background information and historical context of 30 posters in their collection. There is also a function to purchase a copy of the poster. It was launched in response to the recent popular interest in wartime public information posters. IWM is currently unable to extend the scope of the app to include the large number of orphan work posters due to the risk of infringement and the cost benefit of completing a diligent search for those was prohibitive.

In from the Cold estimated that the average proportion of orphan works in the UK's public collections was somewhere between 5% and 10%, but in certain sectors (particularly archives); the proportion was considerably higher (up to 50%). A recent EU-funded study undertaken as part of the ARROW project found that 43% of books published between 1870 and 2010 were orphan works.

Public museums would like to use individual orphan works in the following ways: for display purposes in temporary exhibitions or as part of the permanent galleries; to digitise them and make digital versions available for public view; for research, as museum collections are important resources for cultural and scientific research; to publish catalogues including them so that the public have a more comprehensive knowledge of the holdings of public museums; for use in teaching; to make copies for preservation; to make material available for third-party use or in collaborative projects. The latter is particularly pertinent because of the use of new digital technologies; and in certain circumstances, an orphan work may be licensed for commercial use (and this is a long-recognised means of public institutions recouping costs of preservation and digitisation).

Cultural organisations would like to be able to reproduce orphan works could be used for private study and research. Given the very restricted use of such works, it would be most sensible to create an exception which allows museums, libraries and archives to make these orphan works available only for this purpose. It would ensure that the collections, which the public pays to be preserved, are used to even some degree. This could be seen as a facet of fair dealing. This proposition is detailed in the British Library's response to this consultation.

Question 2

Based upon a number of different studies – including the British Library's own that have been submitted previously to the IPO¹ and those from Carnegie Mellon University² – the British Library has estimated that over 40% of the British Library's in-copyright collections could be orphan works. There are 420 archival collections within the V&A's Theatre and Performing Arts Collection and of these there are approximately 2500 orphan works (which are largely AV and sound recordings). At present, they are stored alongside other collections in a stable condition. However for long-term preservation the appropriate work and resource is required to safeguard their condition.

At the Museum of Childhood (which is part of the V&A), the proportion of orphan works within the museum's archival holdings could be 15-20%. This is mostly constituted by two large collections, Lines Bros. Ltd and the Paul and Marjorie Abbatt Collection. Together these represent 25% of the estimated total volume of archival material, and each is constituted of approximately 80% of orphan works. However, other parts of the Museum of Childhood collection, such as the Madeleine Biggs scrapbook and collection of catalogues from British and overseas toy manufacturers, also contain as much as 20% orphan works. Therefore, there

¹ Please see evidence as part of submissions from the British Library to the Gowers Review, Copyright the Future as well as the 2011 submission to the Hargreaves Review.

² Troll Covey, Denise (2005). *Acquiring Copyright to Digitize and Provide Open Access to Books*. Washington DC, Digital Library Federation Council on Library and Information Resources.

is not only a comparatively large amount of material which the publicly-funded Museum of Childhood has to care for but cannot make available to the public, but these are culturally significant collections which are left dormant. There is not only a monetary cost attached to caring for the collections, but also a lost opportunity cost.

A closer look at the Lines Bros. Ltd and Paul and Marjorie Abbatt collections illustrate the scale and peculiarity of the orphan works problem in museums. The Lines Bros. archive is constituted by mostly corporate records, in particular a large number of Lines Bros. catalogues and photographs of the production lines, factories, trade shows and munitions and military equipment produced during the Second World War. The majority of the collection therefore consists of material the copyright ownership of which clearly resides with Lines Bros. Ltd. However, Lines Bros. went bankrupt in 1971, its constituent assets being split and sold to a range of other companies, many of which have since also been sold and divided. To trace the current owners of the original corporate copyright has proved incredibly difficult and, for all practical purposes, this corporate material is considered as orphan. In addition, there is also a large amount of photographic material [10% of the total number of files within the collection] which constitutes orphan works in the traditional sense. The majority of these photographs have no form of identification as to the original photographic studio, and there is also no evidence to indicate the ownership of copyright [i.e. whether it might reside with the originating photographic studio or, if the images were commissioned, with Lines Bros]. A number of the photographs have a studio stamp on the reverse, but in the majority of cases, a search for these studios indicates that they are no longer in operation. Effort has been made to ascertain if they were bought by larger photographic agencies [such as Hulton Getty], but this has only served to rule out ownership by these larger organisations, rather than trace owners. The Paul and Marjorie Abbatt archive is constituted by corporate records of Paul and Marjorie Abbatt Ltd. [PMA Ltd.], as well as the Abbatts' personal papers. As such, the ownership of copyright is clear, but the vast majority of material is rendered orphan due to the difficulty in identifying and contacting the current owners. Both Paul and Marjorie Abbatt died without having children, and the only addresses available for other members of their family mentioned in their will are 25 years out of date and have not yet yielded a response. Although avenues of investigation remain, such as advertisements in newspapers, it is likely that the personal papers in the collection will remain orphan. PMA Ltd. was sold to another company, the Educational Supply Association [ESA]. This has now ceased to trade. As with Lines Bros., to trace the current owners of the original corporate copyright has proved incredibly difficult and, for all practical purposes, this corporate material is considered as orphan.

Question 3

Whilst museums are acutely aware of the restraints on using orphan works, it has very occasionally been necessary to use them in a very restricted way. Some organisations make the public aware that they hold particular material (particularly if that material is over 70 years old), although institutions encourage the public to use alternatives to these materials. There have been occasions when an institution has made the public aware that they hold artwork which they have not been able to attribute to an artist, and this has promoted the rights holder to come forward, identify the archive and provide the approval to use the larger archive. The National Portrait Gallery provides an online index of its orphan artists. There are no examples of antagonistic claims, and rights holders are almost always content to be made aware of where the material is stored. The V&A's National Art Library has used images of orphan works on the web having not been able to source the rights holder. This is only for non-commercial use and to give the public a fuller picture of what is in the collection. The V&A keeps all letters on file and the NAL publishes a standard acknowledgement statement on its webpage. There have been no antagonistic claims. The National Portrait Gallery has made 32 of its orphan works available for reproduction since the beginning of 2010 without claim or consequence.

Question 4

As most major museums operate globally and serve a global audience (particularly with the advance in digital technology), it would be very difficult to ensure orphan works were only used within the UK. The way people experience culture has changed markedly, and so has

the exposure to different forms of cultural exchange. Audiences are no longer passive recipients of museums' programming, and experiencing the cultural output of another country or culture is no longer the preserve of those who can afford to travel to see it. An indication of the global interest in UK museums is demonstrated by the fact that half of the 26 million of the BBC Radio 4/*British Museum A History of the World in 100 Objects* podcast downloads were made outside of the UK. Because of the high profile nature of the UK's cultural institutions and the fact that their collections originated across the world, there is a substantial volume of enquiries from overseas. At IWM, approximately 28% of film licence revenue came from overseas clients in 2010. More and more publishers require worldwide rights; images are published online on a variety of new media devices. Broadcast also usually clear all media worldwide rights and therefore it would be very restrictive to limit the reuse to the UK only.

Question 5

The nature of museums' collections (and their global provenance) could mean that it would be very difficult to ascertain where the work was created and where the creator lived. There may also be complicated reasons as to how an object came to be in a UK collection. The collection of the former Indian Museum (which included the archives from the British India Office) was split between a number of UK institutions. Much of the material in that archive was produced in British-ruled India before Indian independence, and rights owners could be either British or Indian. There would be considerably less expensive confusion if the UK followed the Canadian model and allowed authorisation of an orphan work which may be owned by a foreign national.

The knowledge economy is digital and global. By authorising use outside the UK the chances of identifying the rights holders would be greater and so would be the opportunity for rights holders located outside the UK to benefit from commercial exploitation of their work.

Question 6

Museums would very much welcome the application of the Canadian system in the UK. Without a decision on whether an orphan work with unknown copyright status could be used there still would be significant numbers of objects in their own collections which museums would perpetually not be able to use. It will particularly affect works created in the early and mid 20th century such as the collections of private photographs held by the IWM. The problem is presently being brought into sharp focus through the preparations for the Commemoration of the Centenary of the First World War. Museums across the UK hold large collections of materials relating to the First World War – much of it produced by the soldiers themselves and subsequently donated to museums. Substantial proportions of the material, which could be viewed by the public (and whose interest will be piqued during the centenary commemorations) are likely to be orphan works, but could nevertheless be out of copyright. IWM is in the process of digitising a large archive of photographs from the First World War where the rights holder is likely to be difficult to trace for a large percentage of the archive. This project is part of IWM's preparation for the centenary of the beginning of the First World War in 2014. The archive consists of 4,000 collections with over 75% originating from private collectors. The rest consists of official photographs where the Crown copyright has expired. IWM tells the story of the impact of war on people's lives, and has a social history remit rather than a military one; therefore, they would like to reproduce the private photographs alongside the official ones in order to tell the story of the First World War from a personal as well as an official perspective. It is highly likely that the majority of the private photographers will have died before 1941 and therefore the works will be out of copyright. However, to undergo a diligent search for each private photographer when there is so little documentation available will take many hours and therefore we will not be able to reproduce these private photographs without risk of copyright infringement.

Question 7

Museums would wholeheartedly agree that new orphan works measures should include unpublished work. Aside from the difficulty – inherent in the management of such large collections – of knowing certainly whether a work had been broadcast or published at some stage, there are substantial archives and collections of unpublished worked of cultural

significance. These are also collections to which museums have to devote resources to preserving and therefore should be treated just as published orphan works would under the proposals. Museums would also agree with the Consultation on Copyright that as unpublished materials had been offered to a public institution and acquired, there was an intention for these materials to become public (therefore negating the privacy concerns). Nevertheless, if the work was unpublished, restrictions could be applied to exclude personal or sensitive information from the scope. For culturally sensitive content (religious or TCE), the reuse could be strictly restricted to editorial reuses.

Question 8

Museums would support the application of harmonised term conditions – and therefore limiting the term of copyright for unpublished work to the life of the author plus 70 years or 70 years from the date of creation – because it would make more of the publicly-owned collection available to the public. It will also help reduce the amount of orphan works in museums, as substantial amounts of orphan works include unpublished text based works which are still in copyright until the end of 2039, even though they may be hundreds of years old.

Question 9

For the reasons outlined in the consultation document, major museums would agree that once an orphan work has been identified as such, it should be subject to the same use as any other material where the rights ownership is clearer. Museums must be able to re-coup the costs of digitisation, preservation and public display of the collections – and this is particularly pertinent at a time when public funding is reduced and museums are being encouraged to generate income from alternative sources.

In order to ensure a greater proportion of their collection is digitised and therefore available for public view and use, cultural institutions enter into public private partnerships to fund major projects. It would be very difficult to ascertain whether or not this is commercial or non-commercial use, and the resources required to prove one way or another would probably render a project void after a cost-benefit analysis.

Question 10

Museums do not feel that the market will become flooded by enabling the use of orphan works. The material in public collections is, by nature of the fact it was acquired by those organisations, deemed to be considered particularly interesting and able to provide a unique view of a point in history. The advent of an orphan works system is likely to prompt enthusiasm for exploring the value of orphan works in projects and therefore greater use of them (particularly initially). However, steps should be taken to ensure that this content is valued at the market rate and not undervalued.

There is usually an initial enthusiasm for using material for which the term of copyright has expired, although the result is usually the production of new interpretative material rather than a series of projects which directly compete with each other. For example, works by the photographer Herbert Ponting have recently come out of copyright, allowing those public institutions which hold collections of his work, such as the Royal Geographic Society, the Royal Collection and the Royal Museums Greenwich, to utilise these for the first time. Evidence suggests that the appetite for the works to either be viewed by the public, used by academics or utilised for more commercial uses has not been diminished because of the extra volume of works available. The availability of Ponting's work has enabled the Natural History Museum, Scott Polar Institute, the Royal Collection and the Royal Geographic Society to all publicly display material created by him during commemorations of the centenary of Scott's Polar Expedition. These exhibitions have not only been all been very popular (and they are occurring simultaneously) but they have added to the sum of public knowledge about the expedition and allowed each institution to use selected works for commercial purposes. Museums feel a comparable situation would apply with respect to the availability of orphan works.

Question 11

NMDC members believe that the Copyright Tribunal is best placed to be able to make final decisions on whether a work is orphaned. Their status as a public institution, existing responsibility for jurisdiction on licensing, their independence and lack of vested interest in the works' use, all suggest that there is no other body better placed. Museums acknowledge that it would require some change in their existing remit and additional resources.

Nevertheless, museums also acknowledge that collecting societies have already established mechanisms for issuing licences and collecting fees, and therefore it may be sensible to allow collecting societies to manage the process of licensing orphan works. However it is important to separate regulation and licensing, and it would be difficult for the sector to embrace a system where a private organisation such as a collecting society had a regulatory function. However, there are some materials for which there is not a collecting society and these include sound recordings and unpublished works (which represent some of the largest collections of orphan works). In that instance, it may be necessary for a government licence to be sought for their use and the only body which could issue this would be the Copyright Tribunal.

However, public collections will have already had to conduct some sort of diligent search to establish whether or not they feel a work is orphaned and therefore it would be unfair to expect these institutions to then have to pay for the collecting society to conduct a second diligent search. This would make the use of orphan works more expensive than works in copyright and would be a demonstrable waste of public resources. Therefore, museums would like to propose a system of graded charges which acknowledges whether a diligent search has been undertaken already and that museums have had to invest some public funding in the preservation and care of the material. This is particularly important at a time of declining public funding.

Question 12

Although diligent searches may differ according to the material, most diligent searches include the following:

- Online and Google search
- Peer-to-peer advice
- Approaches to relevant collecting or representative societies, and publishers or commercial organisations.

Museums agree that the introduction of a digital copyright exchange would form an important part of a diligent search, and would certainly make the searches less resource intensive. A clear set of guidelines would be useful as a basis for how to proceed, and a clear marker of when sufficient work and resources have been invested would be extremely helpful. In the absence of an authoritative set of steps, there is always concern that not enough has been done and the resources involved can be disproportionate to the end use. The cost of the diligent search can often outweigh the economic or cultural benefit of using the orphan work.

Question 13

There may be instances where a collecting society could offer to complete a diligent search for an applicant. However, as explained in Question 11, public collections will have had to conduct a diligent search before they felt that the work was an orphan. For material in public collections, the expertise about that material frequently lies within the curatorial departments and if a public collection had to pay for a collecting society to do the diligent search, they may find themselves in the position of paying for their own staff (whom they are already paying) to do the search. A diligent search usually involves work with peers in other organisations and utilises curatorial networks or organisations such as the Public Catalogue Foundation or the WATCH File (<https://norman.hrc.utexas.edu/watch/>).

Question 14

It may cause some confusion if there was a system where no diligent search could take place. Furthermore, as explained in Question 13, museums have to conduct some sort of diligent search before they consider a work to be orphaned (and therefore available for inclusion in such an online register).

NMDC strongly advocates that museums should benefit from a Fair Dealing exception for non-commercial use of an individual orphan work where a diligent search would not be necessary. This proposition is detailed in the British Library's response to this consultation.

Question 15

Museums would welcome cross-border use of diligent searches and agree that it would reduce costs. As explained, the UK's public collections are drawn from across the world and a system which allowed cross-border use would help enormously. Museums also feel that once a work has undergone a diligent search then that search should stand. It is very rare that a second diligent search reveals rights owners, and circumstances can change in an intervening period. Providing a centrally held register was updated, for example if rights owners come forward once a work has been used, then there should not be the need for multiple searches.

Question 16

NMDC members agree with the consultation that market rates should apply. Once a work has been assessed as an orphan, the same licensing fee structure should be maintained in order to prevent market distortion. However, the assigning of a market rate to a type of material where there had previously been no market, for example unpublished written works or sound recordings, would need to be carefully and sensitively considered. Certain types of works which are orphaned were not produced for commercial purposes, and the use of them for any commercial gain may be seen as problematic. It would be difficult to assign a market rate to recordings of interviews with survivors of the Holocaust or the recording of religious music, for example. There is a clear role here for an independent body, such as the Copyright Tribunal, to develop a government licence which will allow use of these more sensitive orphaned works but guard against unsavoury exploitation of their content.

Question 17

NMDC members feel that the Copyright Tribunal is best positioned – for the same reasons it is best placed to be the regulator – to determine what a market rate for the use of an orphan work is. They will of course need to seek advice from museums and collecting societies to ensure that the rates reflect users' expectations, but the Tribunal's independence and lack of vested interest puts them in the best position to make a definitive decision.

Question 18

NMDC members would favour a delayed payment system. There are a number of operational difficulties with an escrow account – and the expense of managing it (and who would bear those costs) is chief amongst those. Museums would find themselves in the position of devoting resources which, in all likelihood would only be returned to the Crown or Treasury (particularly if the 7-year Treasury rule was applied). Unless museums would be guaranteed the return of the fee they have paid (given they are continuing to maintain and preserve the works), they would in practice be unduly paying too much to use orphan works. It would restrict the amount of material which was made available for public view, as a cost benefit analysis may conclude that the continued payment of upfront fees would make use of orphan works too expensive. The decision on whether an escrow account is appropriate needs to be considered amongst evidence of how many rights claimants for orphan works would come forward. Where museums have taken the decision to make the public aware of the orphan works in their collections which are over 70 years old, no claimants have come forward.

Question 19

Proper attribution should be respected where possible in the use of orphan works – the works themselves should not be used differently to copyright works where possible. There should be a standard recognised line used, such as "rights holder unknown". The publishing norm is to state that "*All effort has been to contact rights holders, please contact ** if you believe you own the copyright*" and this should be attributed to the use of orphan works too.

Question 20

Rights holders' moral rights must be respected and upheld, and this is indeed part of a public collection's responsibility to see that works in their collection are used in this way. Orphan works would be covered by the same terms and conditions of use as works where the rights holders are known. NMDC members support the moral right of attribution to be automatic rather than rely on the need for assertion. NMDC feels that this could also reduce the number of orphan works.

Question 21

The length of time for which a work is used is usually determined by the life of the product or service. They are rarely used in perpetuity because museums update their permanent displays and published material about the collection as a matter of course, and printed material has a finite print run. Other activities are time limited, such as the commercial use of an image, a research project or temporary exhibition. It may be therefore sensible to limit the use, should a rights holder be identified and disagree with the use of the work, to the reasonable life of the service or product in which is being used.

Question 44

MCPS and PPL have a blanket agreement in place which is more cost and time effective. It removes the need to contact each rights holder individually.

Any collecting society which provides a reliable service and fast response provides a welcome service that is beneficial when working on projects which are time-sensitive e.g. product development ranges.

Those working with collecting societies appreciate their support in instances where tracing a rights holder is difficult. For example, the V&A made attempts to contact an artist for 2 months whereas DACS were able to make contact within 10 days. Collecting societies are convenient, but they can be expensive.

Question 45

Some collecting societies have set rates which do not always reflect the type of use required. Museums and galleries would appreciate a more flexible licensing model which makes a distinction between non-commercial and commercial use.

However, a major issue is that collecting societies represent the right of the artist (moral rights) but most of the time don't own the 'support' or photography of the 'support'. This means that in most cases, two layers of rights will apply on the content: the copyright on the photography and the third party rights. Clearance has to be done through two different entities.

Collecting societies don't offer an online platform to view and price the content, which is frequently licensed by another entity. For instance, the British Museum held an exhibition of works by Picasso. In that case the British Museum would have to contact DACS to:

- o Photograph and exhibit the work – non commercial as it is part of their public mission;
- o If they want to license the photograph of the work of art to third party for commercial reuse, they have to pay a fee to DACS to have the right to make the photograph available on the licensing website;
- o If a third party wants to license the photo of the work, they will have to pay a reproduction right for the photograph to the Museum and the third party rights to the collecting society.

Collecting societies could invest in digitising the collections of the artists they represent and making them searchable so they could license both the photograph and the moral rights.

In the case of orphan works held in museums, the museum owns the support and is responsible for its diffusion and digitisation. When digitised they also own the copyright on the photograph. This complex range of rights will need to be considered for extended licences.

Question 72

The preservation exception should be extended to include more types of work, to allow multiple copies to be made and to apply it to more types of organisations (particularly museums). Museums are presently unable to make any copies of material in their collections for preservation purposes and yet their function as a body to care for collections is no different to the core function of libraries and archives. Museums' collections are varied, and frequently include very similar material to that traditionally held in archives and libraries. It seems extremely odd that a potentially culturally valuable work may only survive by quirk of the sort of organisation in which it is held. However, because museums currently have no exception, preserving work can be very expensive.

NMDC members would also agree with the proposals to extend the preservation exception to include more types of work, and particularly film and sound recordings. These can be quite vulnerable works within a collection, and with the content recorded on now obsolete formats. To be able to make copies of film archives – such as the large film and video archive held by IWM - without embarking on a very expensive rights clearance process, would allow museums to preserve and therefore make available for future generations culturally significant material. IWM's audiovisual archive includes footage of the First and Second World Wars. Not only is there a popular interest in this material, but the forthcoming commemoration of the First World War will increase the demand by the public for this material. If it isn't possible to copy this material for preservation purposes without the risk of copyright infringement, it could seriously restrict what is available for use.

Sound recordings and audiovisual holdings make up approximately 5% of the V&A's Theatre and Performance Collections. As the collections represent such a specialist area, the cultural value of the content is high. At present, material is stored on unstable carriers which have a limited life span. This together with elderly equipment can endanger collection items. Tapes also get sticky as part of the degradation process, so if they have not been played for a while they are more likely to tear. An extension to the exception would allow the V&A to safeguard this unique material.

The V&A also has a number of audiovisual recordings relating to fashion events and interviews. Of approximately 300 recordings, they are only in a position to preserve about 10% as the rest is in copyright. The V&A has over 230 different types of AV featuring documentary material of early 1980s/1990s US computer generated art. Use of this content would be hugely complimentary to the rest of the museum's collections, and represents the cultural, scientific, technical and artistic importance of this emerging art form. They would like to migrate the content to a server that can support all the different types of formats before the material degrades.

In the case of sound recordings, film and artistic works, libraries and archives must wait until their copyright expires before backup copies can be made which dramatically increases the cost of preservation. For example, the cost of transferring extant formats such as a CD is low – at approximately £19 per hour – while transferring 78 rpms costs approximately £490 per hour – and even relatively modern carriers such as Vinyl LPs cost around £211. This is because expertise, techniques, the availability of hardware etc becomes rarer and therefore more costly as time progresses. As some music mediums are notoriously fragile – such as LPs – and others degrade from the day of creation – cellulose nitrate discs – current legislation is impeding institutions' ability to preserve audio material. Hardware formats also become obsolete, meaning that copying of the original recording is required to ensure access to members of the public. For instance, Nelson Mandela's 'Rivonia' trial speech was recorded in 1964 on dictabelt, which has fallen from use and the hardware is no longer available. The proposal set out in the consultation document appears to be a simple and straight forward method of achieving the extension of the preservation exception.

Question 73

Museums would welcome any simplification of the designation process which is part of Section 75. The present system seems overly bureaucratic and not fit for purpose (and the fact that the official list of designated bodies has not altered since 2003 is evidence to support that). Museums would support either of the two solutions proposed.

Question 74

It would be helpful if the exemptions were format neutral. This would allow museums (and libraries and archives) to preserve more of their collections and future-proof the changes to Copyright legislation. Museums are acquiring works in ever-changing formats and composed of a mixture of formats, for example art works created on tablets. Similarly, it may be sensible to copy a work in a different format which preserves the content but is in a format which is currently in use. This would allow museums, archives and galleries to make copies for preservation of art works, allowing them to preserve the content even where the original is vulnerable.

Question 75

NMDC members believe that extending the copyright exemption for research and private study to include sound recordings, film and broadcast would help achieve the aims set out in the consultation. It is clearly inequitable that some areas of non-commercial research and private study cost more because of the media required for study. A major function of a public museum's collection is to be able to make that collection available for private study and research, and to use the rich resource that is the UK's major museums to contribute to human knowledge. At present, the prohibitive costs of allowing private research of some areas of the collection means public museums are unable to properly execute their public access and education missions. To ensure this doesn't offer an opportunity for abuse, it is important to also define 'non-commercial' and communicate clearly to user what is allowed under this exception.

At present, the V&A's Theatre & Performance collections restrict access to almost all sound and audio visual recordings held in the special and archive collections. This is unique material – placed for that very reason in the care of the V&A. However, it is not possible to make the vast majority of the sound and AV collections available. Particularly with regard to the discipline of Performing Arts, sound and film are crucial for research purposes, and the recordings of productions are a very common research tool. Not being able to make this material available runs counter to the V&A's wish to be transparent about their collections. As they are unable to preserve AV content, they cannot make one copy available to the public. Museums have a public duty to provide the best collection care to works they hold, and AV is equally as important as a more traditional art form.

It is essential to make an exception 'work-neutral'. A quick analysis of the users of material held at the V&A shows that they range from academics to designers and producers who wish to use the collections for inspiration.

If an exception was made for preserving AV and sound recordings, a low-cost and achievable model would be to digitise material when requested. A response time could be similar to a Freedom of Information request, and therefore 20 days. This would allow for a digital copy to be made, stored on the digital asset system and then offered to a researcher as a viewing DVD or streamed on site at a public computer. The benefits for even such a small scale programme would be immediate.

Question 76

It would be very helpful to adopt the exemption permitting electronic communication for research and private study within certain establishments. There are a number of reasons why this would be beneficial to museums, libraries and archives. Although some research requires the student to see the original object, much does not – particularly if the student is interested in the content, rather than the composition, of the material. Repeated handling of some material may hasten deterioration and mean that the work requires more conservation. There is an added cost of staff time – usually a curator or librarian (and therefore a more senior member of staff) – as someone has to bring the material out of storage and prepare the

correct environment for study. Not all museum collections are stored on the same site as the study centre or main museum building, and therefore there may be an additional staff cost of removing the object or member of staff from one location to another. For example, the V&A and the British Museum share a storage facility (Blythe House) at Olympia. When someone requests an object, it either has to be moved from Blythe House to Bloomsbury or Kensington, or the curator of that particular collection has to travel to Blythe House to supervise its study.

Although museums will always want to be able to make objects available for study where possible, they would be keen to encourage digital study within the building where possible. With larger scale digitisation projects, a greater proportion of the collection has been electronically recorded, and the standard is such that research from the electronic copy is possible. The popularity of studying digitised archive records where the interest is in the content – such as newspaper archives or census returns - shows that students are content with viewing electronic copies. It would also allow multiple use of material at once providing a better service to the public.

Question 77

That text and data mining currently falls foul of UK copyright law is an accident of the expression of the law rather than by the intention of the law makers. Although in 1988 the idea that computers would have the power to analyse vast quantities of content in the ways that they can in 2012 would have seemed farfetched, one might suggest that the existing Permitted Act (CDPA, 28A) for the making of temporary copies captures the spirit of the balances in the law which are now required for text and data mining. This was inserted into the law in 2003 to keep pace with the necessary copying which takes place as part of technological processes but that are not in themselves in conflict with the normal exploitation of the work. The relevant text is as follows:

Copyright in a literary work, other than a computer program or a database, or in a dramatic, musical or artistic work, the typographical arrangement of a published edition, a sound recording or a film, is not infringed by the making of a temporary copy which is transient or incidental, which is an integral and essential part of a technological process and the sole purpose of which is to enable—(a) a transmission of the work in a network between third parties by an intermediary; or (b) a lawful use of the work; and which has no independent economic significance.

CDPA Section 28A

The proposal outlined in the consultation regarding text and data mining provides an opportunity to remedy this problem. Such an exception would only be of value if private contracts were not able to override copyright exceptions (see question 103).

The Natural History Museum's science mission is to explore the diversity of the natural world and the processes that generate this diversity. They aim to use the knowledge gained to promote responsible interaction with the natural world. Fundamental to this mission is taxonomy - the theory and practice of naming, describing and classifying organisms. Over 300 scientists work at the NHM, and considerable investment is made by supporting their work through e-journal and online database subscriptions and providing access to other published scientific information. To have to then negotiate additional licences in order to perform data mining techniques on this digital content (which the museum has already purchased) is not an efficient or effective use of the public funding used to finance their research.

An exception for text and data mining would significantly support this work and ensure public funds and staff resources are used for the NHM's core work rather than in identifying right holders and clearing permissions.

Museum scientists have access to an almost overwhelming volume of information. Within existing (and expected future) resources, it would be impossible to process and analyse all this data manually. A technological solution exists to this problem. The world wide web was invented to facilitate the transmission of information and documents and a few years later UK

copyright law was amended to ensure that the incidental copying involved in such a process should not be considered an infringement of copyright. Therefore, this provides the precedence to apply a similar application of logic to the issue of text and data mining. This copying does not conflict with the legitimate interests of the rights owner because the material has already been purchased and is being accessed only by those for whom the purchase was intended. It is the facts and relationship between the facts which are of interest to scientific researchers, both of which are not in themselves protected by copyright. Indeed the potential public good in facilitating and accelerating the discovery of new knowledge and scientific and medical discovery has the potential to benefit humankind.

Question 82

The exception of parody should be restricted for Traditional Cultural Expressions and religious content - especially when a museum is guardian of the support. This would allow museums to handle culturally sensitive material.

Question 88

It would be very beneficial to the educational mission of the public museums and galleries to see the educational exception extended to these institutions. Publicly-funded museums and galleries have a remit to provide formal and informal learning opportunities, and the value of this was recently endorsed by Government in the *Henley Review of Cultural Education* (published February 2012). The educational purpose of museums has long been recognised by funders, including HMG through the recent DfE/DCMS Strategic Commissioning Programme. All major museums offer formal learning programmes for school-age children and all will have education facilities, such as the Sackler Centre for Arts Education at the V&A, and therefore use of the existing and proposed education exemptions would be demonstrably useful. Furthermore, museums and galleries are classified as educational establishments for a number of other purposes, most notably by HEFCE in relation to undergraduate, and particularly postgraduate, teaching and research. Major UK museums are engaged in a huge variety of Higher Education programmes. These include delivering modules of courses on site, providing placements, supervising doctorates and collaborative doctoral awards.

Question 94

The NMDC would support the amendment of this exception as long as it was clear that quotations could be used for fair dealing purposes which did not prejudice normal commercial exploitation. For example, the IWM issue the majority of their licences for short extracts of films or film clips (this makes up 60-75% of all film licensing). A wide ranging amendment to this exception to include extracts of works would be detrimental to income from licensing and our film sales would suffer a 50% loss in income.

Question 95

NMDC members would welcome further clarification on the meaning of reporting current events. IWM has had disputes with customers wanting to use film footage to report anniversaries, such as the anniversary of Dambusters, without a licence and they claim fair dealing for the purpose of reporting a current event. This clarification will be increasingly needed by IWM (and a number of other cultural institutions) in the run up to the centenary of the First World War in 2014. The 60th anniversary of the Normandy Landings generated income of around £12,000 from news programmes (and this is approximately 1.5% of film licensing income for that year).

Question 98

As public bodies, museums would agree with the proposal to update the exception for the use of works for public administration and reporting to include the sharing of those works online or electronically. Most administrators may be unaware of the copyright law as it stands, and therefore a change to this exemption may bring the law in line with common practice. It is also common practice in museums to photograph the collections for

documentation purposes, and it is unlikely that this very sensible measure for recording what a museum holds complies with existing copyright law.

Museums would like to propose an “internal administration” exception for cultural sector bodies along the lines introduced into the Australian Copyright Act in 2006. This would result in meaningful cost savings and a reduction in overheads, as it would facilitate the use of web based materials for cataloguing purposes for example. Library catalogues are not only a key tool to discover knowledge, but also as an increasingly important tool in providing the bedrock for rights clearance systems such as ARROW, and the proposed Digital Copyright Exchange.

Question 101

Under the current legislation, the exceptions permit commercial auction-houses to reproduce, for example in catalogues, copyright works, for the purposes of advertising their sale. It is an anomaly, that publicly-funded museums and galleries may not do the same, for the purposes of advertising the exhibition of works in public ownership, or even to illustrate an online catalogue of these works. Given that our institutions are now under a directive to provide access to their collections, via such online catalogues, the anomaly, that they are not permitted to do so via an exception, seems perverse. The result is that they are locked in to the administrative costs of researching and clearing rights in this content, in order to deliver on their public service remit – activity which does not adversely affect the commercial or moral interests of the creators and other rights-holders.

If UK Government were to extend the current exceptions to explicitly permit our cultural heritage institutions to copy, reproduce and make available to the public images of works which have been formally accessioned into their collections, within the execution of their educational and other public-service duties, this would significantly streamline their operations. In addition to the benefit of general streamlining, such an exception would significantly scale down orphan works issues for these institutions. If institutions' non-commercial uses were to be permitted under an exception, rights clearances would only be required for their commercial and other specialist activities. Their engagement in the supplementary routes of extended collective licensing and a dedicated orphan works licensing system (which would still require museums to administer and finance diligent searches), would be warranted in respect of commercial activities, upon which the institutions could be expected to enjoy some financial return.

For a forthcoming exhibition at the V&A, the museum sought to source a number of objects from outside the collections and to borrow these from other institutions (common practice in UK museums, and particularly important in the curating of major temporary exhibitions). For the use of one image on the V&A's marketing material, they were charged £7,500. This is a comparatively large bill within a temporary exhibition budget. It would be cost effective to be able to use images of collection works in accompanying exhibition material without having to clear rights.

The British Association of Picture Libraries and Agencies ('BAPLA') – the national trade association for the image licensing industry – has expressed its endorsement for such an exception, in respect of 'stills' images, within its response to Question 1 of this consultation.

Question 103

If contracts continue to override elements of copyright law, then the carefully considered set of exemptions outlined in this consultation will be largely pointless.

Licence contracts, rather than contracts of sale, are emerging as the key transaction method in many of the new business models being developed by the creative industries. Many of these licences deliver lower-level access and copying rights than would have been available under fair-dealing within copyright law. Many of these licences emanate from overseas publishers. It is of concern that, unchecked, this trend will drastically undermine public good access in the longer term, thus significantly shifting the balance to rights holders.

It is now estimated that between 80% - 90% of all journals published in this country are available electronically. The British Library, British Museum, Natural History Museum and many other collections-based institutions subscribe to online journals but make them available to users within the building. However, the contracts governing the use of online journals vary enormously, and the administration cost of ensuring that use does not contravene the terms of the contracts is ever increasing. Therefore, for example, each contract may have a different view on limiting the extent the material can be copied. Of licences the British Library has to abide by, one licence stated "misuse includes ... reproducing in any way copyright materials", whilst others limited the extent to no more than "one percent", or in the case of one agreement not limited by substantiality that "inclusion of the text or images in any publication ... will result in copyright infringement." While most licences do allow for some limited copying, although in many cases this is less than is allowed under existing legislation, very few allow for the copying of the whole material. In addition to preventing meaningful archiving, this also undermines UK statute relating to the visually impaired. In fact not one licence allows for the wholesale copying of the work by the visually impaired. By signing these licences not only are libraries and museums potentially falling foul of the Disability Discrimination Act 1995, but are also preventing the visually impaired exercising their rights to make a copy in line with the Copyright (Visually Impaired Persons) Act 2002.

Whereas the supply of these publications in paper form, where they exist, is under the framework of UK copyright law, their electronic versions in the main come with a licensing agreement. Given that contract law supersedes, and effectively "trumps", copyright law in this country, NMDC members are concerned that contracts are materially undermining the balance that exists at the heart of our copyright regime. The traditional trade-off between the award of monopolistic rights to the copyright owner in return for limited exceptions during the copyright period of the work, is being undermined by contracts which exclude or modify the copyright exceptions provided for by statute.

Given the thousands³ of electronic resources that museums and libraries acquire each year, and the limited resource available to negotiate these licences (many, for example, will be simply shrink-wrap licences on off-line digital media etc), combined with the fact that the offering of electronic resources is now one of the main *raison d'être* of a library (and some areas of a museum service), practically, only a small handful of these licences can be actively negotiated. In addition to the sheer volume of material, and the cost associated with negotiating contracts, it is also important to understand that the majority of electronic content acquired is material pre-packaged for a global market and many differing vertical markets. This inevitably means that the institutions are signing up to terms and conditions that take little or no account of UK law, and also take little account of the functions of libraries as many are not published for the library market in the first place. For instance, business databases in the British Library Business and Intellectual Property Centre are created and licensed with internal business use in mind and not use by readers in the context of a publicly accessible reading room.

It is important for Government to understand that subscription to electronic data for research purposes is becoming the norm, and that by 2020 the British Library estimates that 80% of all published material will be available in electronic form – 40% exclusively so. Much of this material is not ingested by the university library but comes off the publisher's website, or may sit on a CD or DVD-Rom. As other jurisdictions have recognised, it would seem inappropriate that, in spite of the tens of millions of pounds paid by universities and other academic institutions each year to subscribe to this material, they should not be allowed to exercise their statutory rights relatively fairly and easily.

Question 104

Advice and guidance from the IPO would be very helpful; however the issuing of formal notices for the courts may not be the best means of achieving this. This may trespass on the

³ Assessing the extent of British Library holdings for digital holdings is complex. One database alone contains 7000 titles which relates to circa 7 million digital objects.

functions of Parliament and the courts, and therefore not be the most appropriate use of the IPO's resources. Nevertheless there is a role for the IPO in guiding organisations through complex areas of Copyright law, particularly as the IPO already performs a similar function for patents.

Appendices:

- ***Orphan Works Principles from the Education, Cultural, Research and Information Sectors* by Benjamin White and Naomi Korn, March 2012**
- ***Copyright in the Cultural Sector* by Tim Padfield (The National Archives),**