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# “Beyond Copyright”

Law, Conflicts and the Quest for Practical Solutions



BEYOND TEXT



Arts & Humanities  
Research Council

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A report for the AHRC [Beyond Text: Performances, Sounds, Images, Objects](#) Programme

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# “Beyond Copyright”

## Law, Conflicts and the Quest for Practical Solutions

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## I. Introduction

In 2005, the Arts and Humanities Research Council, a newly founded entity that had grown out of the Arts and Humanities Research Board (joining the other UK government funded Research Councils), asked its academic communities for ideas about strategic issues and common problems that needed greater investigation. Answers included the need to undertake in-depth research into migration, religion, landscape and the environment, and how art and design could make a difference in the 21<sup>st</sup> century. These all became strategic programmes in their own right. But another, less settled group of ideas emerged at the same time: how did we teach each other things by doing rather than through formal instruction? What happens when we listen to music or watch a performance? How worried should we be about the demise of endangered languages or cultural practices? Why is text dominant when singing, laughing, looking, gossiping, drawing, painting, designing and making in all its contexts are such key but often ephemeral moments in our lives?

From these broad ideas, the AHRC 5.5 million pound strategic programme: Beyond Text: Performances, Sounds, Images, Objects was born. From 2008, when the first research project started, to 2012 when the programme finished, we have funded more than 60 projects which explore how we communicate without, between, and beyond the written or recorded text. We have asked what this type of transmission means for our understanding of the past and for our responsibilities to the future. When the programme was established, copyright was neither a dedicated topic nor a central concern. But it rapidly developed into one of the most important issues for all our investigators. Some were studying copyright for its own intrinsic intellectual challenges; but many Beyond Text researchers who were not working on legal theory had to grapple with the legislation as they tried to determine what they could, or could not, do with the visual and oral materials that they had gathered. Who owned the ephemera that they wanted to preserve for the future?

These practical issues encouraged collaboration and discussion not only within the Beyond Text programme but also with other researchers internationally. Questions of copyright, national heritage and memory were investigated in 2008 through joint work with the National Endowment for the Humanities in the United States. In a series of collaborative workshops in Washington DC and Oxford during 2009, we shared views on 'Picturing the Nation', an NEH programme designed to ensure that all US schools had access to historical and contemporary works of art with an American theme and compared this, in turn, with the UK's own National Catalogue Foundation programme which aims to ensure that all publicly owned works of art in the United Kingdom are made freely accessible.

In 2011, the Beyond Text programme went on to collaborate with colleagues in the Humanities in the European Research Area (HERA) Joint Research Programme to bring together researchers, artists, writers, creative entrepreneurs, legal professionals and representatives from Europe and the UK to discuss European copyright and its issues. These discussions then fed into the AHRC's plans for future funding in this area.

This report, based on interviews undertaken by Maria Mercedes Frabboni with Beyond Text researchers, is designed to bring together the information and recommendations that have emerged over the past four years of work. We hope that this will allow other groups to build on the collective knowledge concerning copyright and its practical challenges that has evolved over the lifetime of the Beyond Text programme.

## II. Terms of reference

The AHRC strategic programme: Beyond Text: Performances, Sounds, Images, Objects was launched in 2007 and finished its work in 2012. In this period it has funded a wide range of projects that have directly or indirectly dealt with questions of copyright and intellectual property. In some cases the relationship has involved a straightforward investigation of changes in IP in music and dance; in many others, the issues have emerged more slowly. For example, projects have asked: how do music festivals encourage crowds to copy and emulate the actors they ask to do site-specific works without infringing the artists’ rights? How can museums balance the need to distribute their publicly funded works freely without damaging the original creators’ intentions and income? What do we do when we do not know who made a particular work – should we keep it off-line or take the risk of making it available? Who owns the rights in a collectively created or curated work of art?

These issues feed directly into the key themes that have characterised the Beyond Text programme which has evolved to cover work in five key areas: Education and Communication across the Generations; the Creative Industries; Heritage and Values; the Digital Economy; Archives and the Ephemeral.

Because preservation of the physical and ephemeral in both digital and physical format lies at the heart of the programme, copyright issues have emerged as a central question for Beyond Text practitioners. The ownership of objects, ideas, actions, speech and sound are both intellectual and practical problems for all those involved in the programme. Beyond Text grant meetings have been fora for the display of creative material which had been produced, acquired, and investigated by the research teams. During these events, a number of recurrent questions and anxieties were raised about rights and what the limitations were on dissemination. Regular questions posed during these AHRC sessions included:

*“Who took these photos?”*

*“How was this sound acquired?”*

*“Did you have to ask permission to post this video interview on the website?”*

These questions demonstrated a shared anxiety concerning issues of permission for the use of material in the context of research projects as well as a broader awareness of the problems that current copyright legislation might pose for the future preservation of crucial materials. Librarians in the eighteenth century did not feel the need to ask permission to send copies of the letters in their holdings to other collectors or to pay rights to do so; they accepted items that were looted and/or of religious significance to others. Today, artists, writers and performers rely on the income that is generated by such permissions and we have a much better sense of the collective rights of communities who created the original objects or knowledge. At the same time, emulation, re-purposing and reformulating sounds, images and performances has become a key part of artistic practice. For the Beyond Text programme and its investigators the question of how we preserve the performances, sounds, images and objects of the past and present for the future has become a central moral and legal issue of increasing complexity.

As indicated by the Programme Director, Evelyn Welch, in the ‘Beyond Text’ Annual Report for 2011:

*“An[... ] important theme to emerge from the programme has been in the area of legal policy with projects on copyright in music and dance and in the key area of ‘Orphan Works’ where failure to identify the original rights holders has meant that institutions such as the British Library are unable to digitise and distribute cultural works. The issues were also important to numerous other projects where questions of ownership, emulation and copying were central to the research.”<sup>1</sup>*

Because of the centrality of this question, ‘Beyond Text’ has become an unanticipated platform for participants to express consensus or highlight areas of conflict. In response, the following events were organised to tackle specific questions on the topic of copyright:

- ‘Beyond Copyright’ workshop, Intellectual Property Institute, Centre for Commercial Law Studies, Queen Mary University of London (8th April 2011) – this was undertaken in conjunction with the Humanities in the European Research Area projects: ‘Fashioning the Early Modern: Creativity and Innovation in Europe, 1500-1800; ‘Of Authorship and Originality’ and CULTIVATE.
- ‘Beyond Copyright: the Visual Dimension’ workshop, St Catherine’s College, Oxford (14-15 September 2011) in which the HERA project CULTIVATE also participated.

This report addresses some of the questions emerged in the two ‘Beyond Copyright’ workshops, and during interviews with ‘Beyond Text’ grant holders.<sup>2</sup>

### III. Creative Activities and Copyright

One of the main projects to directly engage with Copyright was ‘Music and Dance: Beyond Copyright Text’ led by Charlotte Waelde and Philip Schlesinger. This project concluded:

*“We need to develop an understanding of creative processes and outputs that is both before and beyond copyright. The creative process prior to fixation is of prime importance and is thus before copyright; and there is much about a performance that defies fixation or is of the kind not recognised by the criteria required for copyright protection, and is thus beyond copyright.”<sup>3</sup>*

Following on from this challenge, the questions and problems listed below illustrate some of attitudes shown towards the framework established under copyright law, especially as far as research activities dealing with non-textual material are concerned. When non-textual objects are analysed, it is apparent that creative processes emerge and develop before and / or beyond the boundaries of what the law identifies as protected works of copyright, or protected performances.

While little of this is new, the programme offered the opportunity to see the challenges in a more rounded manner, bringing academic issues (use of creative materials in higher education settings) together with the challenge posed to both museums and galleries and to the artists themselves. It demonstrated that most people sit on both sides of the copyright fence, desiring freedom and a clear licensing regime as users of intellectual property and, at the same time, wanting a high degree of

<sup>1</sup> E. Welch, “Beyond Text: Performances, Sounds, Images, Objects Annual Report 1st June 2010 – 31st May 2011” (<http://www.beyondtext.ac.uk/documents/Beyond-Text-Programme-Director-Annual-Report-2011-Executive-Summary.pdf>).

<sup>2</sup> Workshops were held under the Chatham House Rule. Information shared during the workshops and obtained in the interviews is not attributed to any of the individual participants.

<sup>3</sup> C. Waelde and P. Schlesinger, “Music and Dance: Beyond Copyright Text?” (2011) 8:3 *SCRIPTed*, p. 291 (<http://script-ed.org/?p=83>).

control and potentially a valuable revenue stream, from their creativity. The following issues emerged on a consistent basis in Beyond Text debates:

### **The locked potential of creativity**

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#### *“Where is the creative space in the copyright regime?”*

The copyright law as defined in the Copyright, Designs and Patents Act 1988 (CDPA 1988) does not reflect the process of making, nor the process of using protected works, both in the commercial and non-commercial spheres.

Formal obstacles (e.g. difficulties imposed by a legal regime such as copyright law) prevent the enjoyment of the full potential embedded in content. This affects all stakeholders involved in the production, dissemination and use of protected works.

### **Inconsistencies of copyright in the field of research and education**

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#### *“Why the copyright regime does not appropriately accommodate the needs of those who contribute to education?”*

Current methods used in the field of education, including teaching in classrooms with the use of PowerPoint presentation or similar electronic tools, conflict with the copyright system. There is no safe harbour for the use of protected material in these contexts.

Should a lecturer carry on using content without specific concern as to its copyright status? Whatever the approach taken by each individual teacher or lecturer, this situation causes a justifiable anxiety.

### **Development of copyright business models**

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#### *“Can successful business models develop alongside existing copyright rules?”*

Questions have emerged on whether, in the presence of conflicts between new business models in the digital age and a dated copyright legal system, there is a way of forming consensus on how to move forward to allow a more desirable use of the resources available in the field of the creative industries.

Following the identification of areas where the existing law is inadequate, would the regular emergence of new business models in the digital sphere be better served by a legislative reform, or by other practice-based forms of regulation that could be adopted by way of agreement among the stakeholders involved?

The following provides practical details that have emerged in the Beyond Text programme of how the concerns expressed over creativity, education and business models in the present copyright system apply to specific categories of individuals and institutions.

## A. Content creation and adaptation

### Researchers and teachers

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Typically, an academic working for a Higher Education Institution would publish the outcome of his/her research in the form of a book, an article, or a report. As the author, he or she is a creator of a publication that will bear his/her name. In the publication, the author might want to include extracts of other people's works, photos, and additional third party material in support of the research. The author would therefore need to seek permission from the copyright holders.

An academic may also offer lectures. He or she would prepare slides to be delivered with the use of a computer. The law contains provisions that apply to 'educational uses' (see s. 32 CDPA 1988, 'Things done for purposes of instruction or examination'). However, if the slides include copyright protected works belonging to third parties, permission may have to be sought.

### Choreographers / Directors

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A choreographer does not work in isolation. In particular, he/she receives the inputs of the dancers. Copyright law traditionally recognises choreographers as the creators.

Choreographers derive inspiration from previous works. From this perspective, they are users of other people's ideas and works. The same reasoning applies, to an extent, to film directors.

### Dancers / Actors

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Dancers and actors may be performing works that belong to choreographers or directors. From the point of view of the law, they have rights with regard to their performance but they are not normally considered as authors.

A question to be addressed is whether there is a case for a clearer identification of the threshold established under the law that would recognise dancers and actors as joint authors of a work.

These examples contribute to illustrate the point that the creative effort of individuals is a process that mixes original contributions and borrowing from previous works and ideas. While copyright law does not protect ideas, but only the expression of such ideas, it seems appropriate to emphasise the difficulty, on the part of creators such as the ones listed above, of making sure that their creation is within the boundaries of the law.

A creator will want to obtain answers *inter alia* to two main questions:

- If I have to borrow material from third parties, how do I do that?
- Is my creation going to be protected in the future?



## B. Dissemination

### Websites and Digital Archives

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Several ‘Beyond Text’ projects aimed at disseminating the research outputs through means such as websites and digital archives. The ability to research third party material does not automatically imply that such material can subsequently be made available on websites or free-to-access digital archives.

The boundaries of copyright law allow for material to be used in the case of ‘research and private study’ (s. 29, CDPA 1988). However, the scope of the provision is debated, also in light of the uncertainties surrounding the definition of what amounts to ‘research for a non-commercial purpose’.

With the aim of clarifying the rules concerning the making available of research material on websites or digital archives, it is appropriate to address the following questions:

- Where is the boundary between commercial and non-commercial exploitation of a work in the field of research?
- Can dissemination of research outputs through websites and digital archives extend beyond national boundaries, in light of the possibility to access material remotely through the internet?

### Licensing academic work

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Academic publishing is one of the routes commonly selected for the dissemination of academic outputs. This trend was confirmed in the context of ‘Beyond Text’, where the analysis of non-textual content still resulted in publications of printed matter as research outputs.

One of the issues faced by investigators relates to the inclusion of multimedia content in the context of publications. Some researchers are faced with the common issue of wanting to discuss video content without the ability to actually refer to the item itself.

Given the demand for dissemination of publication containing multimedia content, the following questions are being put forward:

- What is the attitude of academic publishers towards the inclusion of multimedia items in publications?
- Are Creative Commons licences valid solutions for academic publishing and dissemination of research outputs?

Attempts have been made to simplify the search for practical answers to questions concerning creation and dissemination of content. An example is the ‘IPR [intellectual property rights] toolkit’ produced by the Strategic Content Alliance (SCA)<sup>4</sup>.

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<sup>4</sup> <http://www.jisc.ac.uk/contentalliance>

*“The SCA IPR Toolkit comprises a composite set of resources for use and adaptation to suit specific needs of content creators and content users across the public sector who are responsible for rights management and rights clearances. The tools provided here comprise basic building blocks to enable you to adapt and conduct your own rights management and clearance procedures. What this toolkit will not provide you with is a ready-made IPR and licensing toolkit that is specifically designed for your own requirements.”*

(N. Korn<sup>5</sup>, “IPR Toolkit - Overview, Key Issues and Toolkit Elements”)<sup>6</sup>

## IV. Specific areas of enquiry

### A. The ephemeral and the permanent dimensions of protected works

*“Each performance is a deliberate re-making of the work.  
Each time there is a new recording, a new fixation, a new work”<sup>7</sup>*

#### Fixation

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According to UK law, copyright does not subsist in a literary, dramatic or musical work unless and until it is recorded (s. 3(2), CDPA 1988). This approach does not always reflect the process of creation and subsequent adaptations of a work, which may involve improvisation to a large degree. Performances may be ephemeral and permanent at the same time.

For example, in the field of music:

*“Performance is concerned with the practice of music-making in a wide sense, to include not only matters of production and reception but also the ways in which the skills of performance are taught and learnt. Live gigs, rehearsals, recording sessions and workshops are all examined as part of the process of performance.”*

(Introduction to ‘What is Black British Jazz? Routes, Ownership, Performance’,  
Award Holder: Dr Jason Toynee)<sup>8</sup>

Other types of expression do not hold a strong link with forms of notation which would fulfil the requirement of fixation established under copyright law:

*“The diversity of means by which dance may be notated (including Laban; Benesh; Eshkol-Wachman) was compared with the universal use of musical notation - although not all musicians are able either to notate or read music... and few dancers are skilled in the art of dance notation in any form”.<sup>9</sup>*

*“It is not that you cannot record dance but the way of recording is flat.  
It is not the way the audience experiences it”.<sup>10</sup>*

<sup>5</sup> <http://www.naomikorn.com>

<sup>6</sup> <http://www.jisc.ac.uk/media/documents/publications/scaiprtoolkitoverview.pdf>.

<sup>7</sup> ‘Choreographic Objects: traces and artifacts of physical intelligence’ project.

<sup>8</sup> <http://projects.beyondtext.ac.uk/blackbritishjazz/index.php>

<sup>9</sup> C. Waelde and P. Schlesinger, “Music and Dance: Beyond Copyright Text?” (2011) 8:3 *SCRIPTed*, p. 263 (<http://script-ed.org/?p=83>).

<sup>10</sup> ‘Music and Dance: Beyond Copyright Text?’ project.

## Physical objects and the intellectual property attached to them

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*“Just because you think you own it, it does not mean you do.”*

*“The material was donated to the University.  
We hold the objects but not the intellectual property attached to it.”*

*“Not having the copyright does not prevent us from researching the material.  
That is all we wanted to do, we are in the clear.”*

Ownership of cultural objects is critical to heritage institutions such as museums, libraries and archives. There is a strong link between these institutions and the research performed in the context of ‘Beyond Text’.

Ownership of cultural objects has two dimensions. The first is physical (and sometimes permanent) and relates to the manner in which an object has come into the hands of its custodian. The second dimension, more ephemeral, relates to the intellectual property rights attached to the object. In the trail of transmission of the objects from the hands of its creator to its subsequent custodians, the physical and the ephemeral dimensions may have parted.

Digitisation of collections (of visual art, film footage, and written material such as correspondence between individuals of historical significance) by heritage institutions or universities is considered by some to be the way to best develop the potential of resources which have been donated to them, or which rest in their archives. Digitisation, however, requires rights clearance for both the physical and the ephemeral dimensions.

Rights clearance is problematic in the case for non-attributable or abandoned works. Such works are often referred to as ‘orphan works’.

Orphan works scenarios would arise, for example, in the following circumstances:

*“Origin of orphans:*

- *Inadequate identifying information about ownership, co-authorship or physical location*
- *Inadequate information about copyright ownership due to a change of ownership or to a change in the circumstances of the owner*
- *Copyright owner does not realise that they benefit from copyright ownership*
- *Copyright owner has died and inadequate information on new ownership*
- *Difficulties researching copyright information, especially grey material*
- *Where the copyright owner is a business, the business ceased to exist and it is impossible to find out what happened to the copyright which was one of the business assets*
- *The work was never meant to be commercially exploited in the first place”<sup>11</sup>*

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<sup>11</sup>U. Suthersanen, ‘Who Owns the Orphans? Traditional and Digital Property in Visual Art’, BLACA – IPI seminar, 14 October 2010 (<http://www.whoownstheorphans.org/Events.html>). See also ‘Beyond Text’ page: <http://projects.beyondtext.ac.uk/sg-uma-suthersanen/index.php>.

Within a research project, when dealing with material of problematic ownership, a researcher may be facing the dilemma of having to decide whether to use the material without permission from the 'absent' father, or whether avoid using the material to the possible detriment of his research output.

Legislative proposals on how to solve the orphan works issue are currently under discussion in the UK, across Europe and internationally. The ability to provide a regulatory answer to the dilemma of using the intellectual property in orphan works would provide an opportunity for custodians who hold physical objects – including Higher Education Institutions – to fulfil a business potential as well as their institutional remit.

## ***B. Non-commercial v. commercial exploitation of copyright protected works***

### **Public ownership of works**

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Works may be publicly owned. An example of public ownership is offered by the Public Catalogue Foundation (PCF).

*“The United Kingdom holds in its galleries and civic buildings arguably the greatest publicly owned collection of oil paintings in the world. 200,000 publicly owned oil paintings are held in institutions ranging from museums large and small to town halls, universities, hospitals and even fire stations. ...*

*Over the last few years the PCF has been photographing these paintings and collating information about each painting. ...*

*Until recently, the PCF’s main focus was publishing a series of hard copy catalogues. Now its focus is turning to publishing online. Online access allows users to search paintings by various criteria and view larger images, whilst collections will be able to update their painting records. Most importantly, it gives the PCF’s work a much larger and wider audience.”<sup>12</sup>*

Content is accessible through the internet in the form of digital facsimile copies. Nevertheless, the availability of high-resolution digital images is normally administered by the institutions where the works reside. Licensing conditions for the use of digital images would have to be negotiated directly with the institution, whether or not the copyright in the painting has expired.

### **Disinterested rights owners and the interest of custodians**

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Copyright emerges as soon as the work is recorded in any material form. According to one approach, the law, in its neutrality, should not necessarily consider the intention of the author in order to set the boundaries of proprietary entitlements attached to those works.

Individuals may have no interest in retaining or exercising their copyright. Authors may have lost interest in their work, whether such a work is commercially exploited or not. Nevertheless, the law establishes a right that needs to be exercised for the work to be lawfully used by third parties.

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<sup>12</sup>The Public Catalogue Foundation, 'What we do' ([http://www.thepcf.org.uk/what\\_we\\_do/134](http://www.thepcf.org.uk/what_we_do/134)).

*“We tried to trace an author and, after several searches, we could not obtain a response. We had to launch our project without his work. Only a few days later, he contacted us and said he wanted to be included”.<sup>13</sup>*

In terms of copyright policy, would it be enough to ask users to undertake ‘diligent searches’ to trace proprietary entitlements in the case of disinterested or absent rights owners? It is argued that this could be one an effective way of balancing individual copyright interests and the public interest of granting access to resources.

*“Where diligent research has established the status of a portrait as an ‘orphan work’, we are obliged to achieve a balance of conflicting duties:*

- a responsibility to uphold the rights of consent of creators and copyright holders*
- a duty to make works available for visitors and on-line users to see.*

*We have decided, on a case-by-case basis, that showing a number of ‘orphan works’ on our website, and listing the creators’ names on this page, is the most balanced approach to this conflict of duty. If you have a legitimate claim to copyright in any of these works, or have any copyright information you think will be useful to us, please contact [us]”.*

(‘Copyright research and orphan works’, National Portrait Gallery)<sup>14</sup>

This is an efficient method to publicise the existence and availability of works, not only to potential users but also to copyright owners that may have lost track of their property. Creators willing to regain control of their property would benefit from the visibility acquired through digitisation of their work whilst users would be able to access material belonging to ‘absent’ creators.

Custodians also have an interest in the digitisation of material in their collections. While questions have been raised as to whether the expansion of the activity of museums and libraries towards digital exploitation of their collection fulfils the remit of those institutions, two points have been argued: firstly, decisions concerning the expansion of the activities of museums and galleries are not uniquely motivated by commercial considerations and prospective gains; and, secondly, not every collection is a feasible revenue stream.

### **Non-commercial exploitation as a pre-condition for participation**

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Creators, however, may have different attitudes towards the use of their work, especially depending on whether a third party is likely to use their work in a commercial context. Photographs, performances and other types of works used within some of the ‘Beyond Text’ projects were acquired by way of formal and informal agreements between investigators and contributors.<sup>15</sup>

*“Some of the performers involved in our project would have not taken part in the performance if the video obtained from their contribution had been used to make a commercial television documentary.”*

<sup>13</sup> ‘Choreographic Objects: traces and artifacts of physical intelligence’ project.

<sup>14</sup> <http://www.npg.org.uk/about/creators/copyright-research.php>.

<sup>15</sup> This aspect was of particular relevance for projects such as ‘What is Black British Jazz? Routes, Ownership, Performance’, ‘Exploring Festival Performance as a ‘State of Encounter’’, and ‘Choreographic Objects: traces and artifacts of physical intelligence’.

*“Performers who worked with us signed waivers so they do not have claims with regard to their performance. We reassured the performers that their work was not going to be commercially exploited, but was only going to be used for research and educational purposes.”*

*“The photographer who worked with us was a colleague from the department. He is happy for us to use the photographs, even to post them on Flickr, as long as no commercial use of the images is made.”*

*“Photographers in our project were quite clear, they wanted some sort of remuneration”.*

A slightly different attitude emerges in instances of borrowing. For some individuals, it is not important if their work is ‘borrowed’ for non-commercial purposes. The question is often not about whether such borrowing would qualify as a copyright infringement, or whether the borrower could rely on defences to infringement. Some authors or performers agree in principle for their work to be used by others as long as they are appropriately acknowledged. However, if the derivative work is made for commercial purposes, then the author or performer of the original piece tends to claim a share in the revenue subsequently gained.<sup>16</sup>

To a similar extent, creative commons licences work according to this rationale. For example, the ‘Attribution-Non-Commercial-Share-Alike’ licence binds the user to the following conditions:

*“Attribution — You must give the original author credit*

*Non-Commercial — You may not use this work for commercial purposes*

*Share Alike — If you alter, transform, or build upon this work, you may distribute the resulting work only under a licence identical to this one”<sup>17</sup>.*

Overall, it is observed that the dichotomy between non-commercial and commercial use of protected works pertains to the enforcement of copyright as a bundle of economic rights, but also the ability of authors and performers to rely on moral rights, especially the right of attribution and the right of integrity.

*“Dancers wanted control not in terms of economic return but on the way they were to be portrayed.”*

### C. Rights management

#### Facilitating transaction

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*“We had to negotiate licences for the use of music in one of our works. We approached composers who would gladly give us permission. However, we realised that the copyright in their composition rested with a music publisher. That raised a completely different set of issues, and costs that were not comparable to what we envisaged”.<sup>18</sup>*

<sup>16</sup>C. Waelde and P. Schlesinger, “Music and Dance: Beyond Copyright Text?” (2011) 8:3 *SCRIPTed*, p. 284 (<http://script-ed.org/?p=83>).

<sup>17</sup><http://creativecommons.org/licenses/by-nc-sa/2.0/uk/>.

<sup>18</sup> ‘Choreographic Objects: traces and artifacts of physical intelligence’ project.



The music industry is often taken as an example of a successful cohesive representation of the interests of those contributing, either financially or with their creativity, to the production, exchange and enjoyment of protected works. Authors, performers and copyright owners working in that field can appoint agencies, also known as collecting societies, which authorise uses of works to third parties, monitor users of protected works, collect royalties for the use of such works, and finally return remuneration to rights holders.

Agencies representing rights holders in the music field are generally responsible for authorising ‘secondary uses’, namely uses of music in public places, in radio and television broadcasts and, more recently, through the internet. However, direct or primary uses, such as uses of music in as soundtracks for large film productions, pose different problems.

Answers are required to questions such as the following:

- What are collecting societies?
- How many are they?
- Do they genuinely serve their members and, if so, what do we do where societies do not exist for long-standing or emerging performance groups?

*“For dancers, it was suggested that a strong representative organisation would help to develop lobbying capacity and at least some economic clout.”<sup>19</sup>*

Not all creative industries can rely on working mechanisms that are similar to those adopted in the music industry. Different types of investment reflect different industry-specific interests, and influence the rules of the relevant markets. The field of education is a particularly difficult one, even when specific licensing schemes are available from agencies such as the Educational Recording Agency (ERA)<sup>20</sup> for the use of recordings of broadcasts as teaching resources, and the Copyright Licensing Agency (CLA)<sup>21</sup> for licences that allow educational institutions to copy and re-use extracts from print and digital publications.

Organisations representing rights holders in a cohesive manner could provide bargaining and economic power to categories of creators who might currently suffer from being under-represented, and from being unable to licence their work through effective business practices and mechanisms.

However, an opposite concern should also be addressed. While the emergence of institutional representatives for authors and rights holders in fields other than music appears to be desirable, the proliferation of such institutions may not successfully respond to the call from users for easily identifiable and accessible hotspots for rights clearance.

### **A ‘third party’ broker**

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Collecting societies may often reduce the transaction costs associated to rights clearance, and therefore provide increased income for rights holders as well as a means for users to make lawful

<sup>19</sup>C. Waelde and P. Schlesinger, “Music and Dance: Beyond Copyright Text?” (2011) 8:3 *SCRIPTed*, p. 290 (<http://script-ed.org/?p=83>).

<sup>20</sup> <http://www.era.org.uk/>.

<sup>21</sup> <http://www.cla.co.uk/>.

use of a protected work. Nevertheless, negotiations with collecting societies may break down, just like any other type of commercial negotiation.

*“Do we need a third party broker?”<sup>22</sup>*

The Hargreaves Review of Intellectual Property has planned to establish a ‘Digital Copyright Exchange’.

*“Building the Digital Copyright Exchange*

*The aim is to establish a network of interoperable databases to provide a common platform for licensing transactions.”<sup>23</sup>*

Details of the remit and working mechanism of the ‘Digital Copyright Exchange’ are still to be unveiled. However, the necessary condition for the success of a hub responsible for the availability and administration of information on copyright ownership is participation of a critical mass. More specifically, participation of agencies holding information on ownership of copyright and related rights in different industries is key for the achievement of the goals set out by policy makers and their advisors.

#### **D. Risk management**

##### **Seeking legal advice**

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When addressing the areas of the Arts and Humanities, the issues faced by researchers seeking advice in relation to intellectual property matters are varied. Copyright is one of the legal aspects that might emerge. The information shared by grant holders within ‘Beyond Text’ is illustrative of this point.

*“Interviewees or investigators may not have had expertise in the field of copyright but are aware of its existence.”*

*“[For this project], I had to learn copyright. To begin with, I thought it would be simple to make an archive. I thought we could build a website. If only I knew...”*

*“I did some research [on copyright] but that confused me even more.”*

*“I had reasonably good knowledge of copyright issues, but in practical terms it is a minefield and it is very hard to negotiate.”*

From the experience of investigators working on their specific project, it emerged that knowledge of copyright was often obtained either by requesting formal legal advice or by personal research undertaken by the individual researcher.

Advice from legal teams within colleges and universities was also a frequent port of call for general legal issues. These legal teams did not always have the tools (e.g. time and / or expertise) to deal with specific copyright issues. Depending on budgetary considerations and on the basis of risk

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<sup>22</sup> ‘Beyond Copyright: the Visual Dimension’ workshop, St Catherine’s College, Oxford.

<sup>23</sup> Hargreaves, *Digital Opportunity: a Review of Intellectual Property and Growth* (May 2011), p. 33.



management evaluations, research teams may have decided to rely on the legal advice sought from internal legal teams, or may have opted for external legal advice.

*“I have obtained permission to use a photograph from a museum for publication.  
That cost me a pretty penny but it was budgeted for.  
Now I have discovered that I can only use it lawfully for publication in the United Kingdom.”*

*“When we realised that ownership was not just with [that author], we found a media and copyright expert who did some pro-bono work for us.”*

*“I had talked to the people at the university for a variety of contractual issues: for example, in relation to contracts with other universities. It occurs to me that probably, in most cases, external advice is more expensive.”*

*“Universities have to deal with patents and so on.  
I am surprised that they are not equipped to deal with copyright in the same way.  
We need to have some kind of procedure whereby we can get  
prompt, reliable and reasonable advice.”*

### Attitude towards risk

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Legal advice and risk management are tied together. Increased legal certainty may free the use of content, but might also produce the opposite effect of decreased tolerance towards risk.

Accordingly, the following was observed:

*“Academic institutions may produce large amounts of film and musical material.  
To an extent, academic institutions are publishing houses ...  
In terms of rights clearance, the fact that expertise exists  
also produces the effect of institutions being less willing to take risk  
and exercising much closer control.”*

## V. Possible solutions and paths for development

*“If we forget what has gone before, how would we handle these issues ‘from scratch?’”<sup>24</sup>*

### Consensus from conflict

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Activities grouped under the umbrella denomination of ‘Beyond Copyright’ have highlighted common concerns among stakeholders on the actual relevance and reliability of copyright law as an instrument influencing the creation, exchange and enjoyment of creative contents.

‘Beyond Text’ is representative of a variety of interests of individuals, private and public institutions, different countries and traditions. Often, their answers to copyright issues differ. One of

<sup>24</sup> ‘Beyond Copyright: the Visual Dimension’ workshop, St Catherine’s College, Oxford.

the aims of this report is to consider whether a 'harmony of the opposites' scenario is a plausible development, and could lead to the identification of research paths and guidelines for future investigation.

### A. New definitions and practices

*"Copyright is a moving target."*

#### Value considerations

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*"The value of the copyright industries is different from the value of copyright per se."*

The 'Beyond Text' experience does not lead to definitive answers as to the usefulness and value of copyright law. Most of the Principal Investigators and their partners would agree that creativity exists before the emergence of rights. The value of creativity cannot be identified with the value that copyright law and enforcement may attribute to creative efforts and products.

**Recommendation 1:** If a positive correlation exists between the subsistence of copyright and the flourishing of the creative industries, this should be clearly identified. Such positive correlation should not be hindered by the excessive complexities of the copyright systems, which is understandable to legal experts but often too difficult to approach for individuals who are not trained in the legal discipline.<sup>25</sup>

#### Duration

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The discussion on duration of copyright protection (or term of protection) is a recurrent theme of copyright reforms and consultations – most PIs wanted to know when they could reproduce something legally without having to negotiate with rights holders. Term of protection is one of the aspects of copyright law that appears to increase the uncertainty of the system. Long terms of protection increase the likelihood of proprietary information to be misplaced or lost. This is relevant to researchers who come across historical documents of uncertain copyright origin and status. When an author cannot be identified, duration of copyright for works belonging to that author would be difficult to determine.

**Recommendation 2:** Creators and users would find it useful to receive clarification, from an authoritative source, as to the duration of protection for their works and performances, as well as for the works and performances created by their collaborators.<sup>26</sup>

Another matter that should be up for discussion is the suitability of current terms of protection.

The Gowers Review of Intellectual Property (2006) addressed the issue of duration of rights in sound recording and performers and recommended against extensions of the term of protection:

*"The European Commission should retain the length of protection on sound recordings and performers' rights at 50 years."*<sup>27</sup>

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<sup>25</sup> 'Beyond Copyright' workshop, Intellectual Property Institute, Centre for Commercial Law Studies, Queen Mary University of London.

<sup>26</sup> 'Beyond Copyright: the Visual Dimension' workshop, St Catherine's College, Oxford.

Nationally, this recommendation was subsequently discarded and, at the European level, a Directive was adopted to extend the said term of protection across Member States.

The implementation of new terms of protection necessarily produces uncertainties, especially with regards to works the protection of which has expired but might be ‘revived’ by way of transitory measures.

More recently, the Hargreaves Review of Intellectual Property addressed the issue of duration in the following terms:

*“A prominent and persistent example of the lobbying problem concerns the duration of copyright protection, which has been periodically extended in recent decades. In spite of clear evidence that this cannot be justified in terms of the core IP argument that copyright exists to provide economic incentives to creators to produce new works.”*<sup>28</sup>

**Recommendation 3:** It would be useful to acquire access to the evidence submitted for both the Gowers Review and the Hargreaves Review, to be given the opportunity to observe, in realistic terms, the effects of the extension of protection for copyright and related rights in the industries involved.<sup>29</sup>

### Evidence-based approach

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This report has illustrated how creation, exchange, exploitation and dissemination of works relies on a practical approach in the way legal questions in general – copyright questions in particular – are addressed and answered. Approaches may be inspired by codes of practice of a certain industries, or driven by common sense.

In the quest for legal and business-sound solutions for the stakeholders involved, it is believed that studies based on empirical evidence and market analysis may contribute to superior results that allow the exploitation of the full potential of protected works.

Nevertheless,

*“frankly, what does ‘evidence based’ research mean?”*

In the Hargreaves Review of Intellectual Property, the following evidence was submitted:

*“[t]he Review takes an evidence-based approach to its policy analysis and has supplemented internal analysis by commissioning external experts to examine the economic impact of changes to the length of copyright term on sound recordings, and the question of orphan works.”*<sup>30</sup>

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<sup>27</sup> A. Gowers, *Gowers Review of Intellectual Property (December 2006)*, p. 56.

<sup>28</sup> I. Hargreaves, *Digital Opportunity: a Review of Intellectual Property and Growth* (May 2011), p. 93.

<sup>29</sup> ‘Beyond Copyright’ workshop, Intellectual Property Institute, Centre for Commercial Law Studies, Queen Mary University of London.

<sup>30</sup> I. Hargreaves, *Digital Opportunity: a Review of Intellectual Property and Growth* (May 2011), p. 5.

It has been suggested that despite the efforts involved the evidence connected with the Review is not satisfactory.<sup>31</sup>

**Recommendation 4:** In the absence of a reliable source of information for the acquisition of valid evidence to investigate copyright related questions, it would be beneficial for an agreed methodology to emerge, and for studies to be commissioned on the basis of such methodology in the independent context of Higher Education Institutions.<sup>32</sup>

*“‘Beyond Copyright’ research should also mean ‘Beyond Copyright’ scholarship”*

**Recommendation 5:** Studies aimed at answering the questions that emerged within ‘Beyond Text’ should maintain a practical focus, for individuals and organisations to operate effectively in their markets.<sup>33</sup>

Emerging legal and business solutions should fit a wide section of the population, and provide a suitable framework for both successful and emerging forms of creation. This would maximise the potential value of creation and use of content, as it would also correspond to a reduction of circumvention of the copyright system.

## **B. New involvement**

### **Expertise within the university**

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On a practical level, researchers and teachers find themselves at the crossroads of copyright law, because they have balanced and possibly conflicting interests towards the protection of works via copyright. It is observed that, in certain cases, researchers and teachers working for universities are appropriately advised. Moreover, they are encouraged to follow guidelines offered by their institutions and seek advice from trained librarians.<sup>34</sup> Reduced uncertainty would be one of the benefits of establishing a strong *modus operandi*.

**Recommendation 6:** Researchers and teachers would find it useful to receive clear guidelines from their universities on what they can or cannot use in the context of their research and when providing instructions to their students. Education imparted to researchers and teachers would improve their ability to disseminate research outputs and teaching material.<sup>35</sup>

In their role as investigators within internally or externally funded research projects, researchers also require legal advice from experts able to deal with contractual matters, including intellectual property matters, in order to regulate their relationship with partner institutions.

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<sup>31</sup> ‘Beyond Copyright’ workshop, Intellectual Property Institute, Centre for Commercial Law Studies, Queen Mary University of London.

<sup>32</sup> ‘Beyond Copyright: the Visual Dimension’ workshop, St Catherine’s College, Oxford.

<sup>33</sup> ‘Beyond Copyright: the Visual Dimension’ workshop, St Catherine’s College, Oxford.

<sup>34</sup> See for example, <http://www.brookes.ac.uk/library/copyright/copyright.html>.

<sup>35</sup> ‘Beyond Copyright: the Visual Dimension’ workshop, St Catherine’s College, Oxford.

**Recommendation 7:** Researchers would prefer to seek legal advice from their own institution. Efforts should be made for universities to be in the position of delivering general and reliable legal advice on the administration of internally and externally funded research projects. Copyright law is one of the areas of expertise that is likely to be in demand.<sup>36</sup>

### Educating creators about intellectual property

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*“As an art historian, I have not received an education about intellectual property. Yet, images are my bread and butter.”*

A demand exists for an increased awareness of matters related to intellectual property and copyright law in particular, not only in terms of availability of legal advice, but also in terms of education of new generations of authors, performers, and users.

*“In the same way that computer literacy is supported throughout the education system, so should ‘information literacy’, i.e. literacy concerning the use of information.”*

Often, legal principles of intellectual property are not part of school or higher education for younger members of society who, though familiarity with digital technology, are likely to be heavy users as well as spontaneous creators of copyright protected content.

**Recommendation 8:** Courses in Intellectual property ‘literacy’ should start from school and accompany individuals throughout the different steps of their education.<sup>37</sup>

**Recommendation 9:** In the context of Higher Education, specific programmes should include the training of undergraduate, master and PhD students in dealing with copyright issues for the publications they may produce in the future. For example, intellectual property could be a compulsory element of methodology courses delivered to graduate and postgraduate students.<sup>38</sup>

On this matter, it would be beneficial to monitor institutional initiatives such as the one of the European Patent Office (EPO Academy), where resources are dedicated to write roadmaps to introduce intellectual property in a wide array of curricula.<sup>39</sup> However, any attempt to introduce intellectual property courses in education should avoid the risk of programmes being unduly influenced by vested and inevitably partial interests of certain rights holders, users or any other institutions.

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<sup>36</sup> This emerged during the ‘Beyond Copyright: the Visual Dimension’ workshop, St Catherine’s College, Oxford, and in interviews with researchers working on projects such as ‘Choreographic Objects: traces and artifacts of physical intelligence’, ‘The Use of Audiovisual Resources in Jazz Historiography and Scholarship: Performance, Embodiment and Mediatized Representations’, and ‘What is Black British Jazz? Routes, Ownership, Performance’.

<sup>37</sup> ‘Beyond Copyright: the Visual Dimension’ workshop, St Catherine’s College, Oxford.

<sup>38</sup> This aspect was particularly emphasised by scholars teaching in art faculties during the ‘Beyond Copyright: the Visual Dimension’ workshop, St Catherine’s College, Oxford.

<sup>39</sup> <http://www.epo.org/about-us/office/academy.html>.

## Engagement

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Examples contained in this report illustrate how often rights holders and users consider copyright law as inappropriate for the activities they engage in, or for the businesses they run. It is not rare to encounter submissions such as the following:

*“Copyright should be eliminated altogether.”*

Therefore, on a general level:

*“Should Higher Education Institutions have a forum where to seek advice and discuss issues related to copyright law?”*

*“What can the arts and humanities contribute to the debate around copyright in the 21st century?”*

**Recommendation 10:** A question to be addressed in the context of future projects on copyright law for the field of the Arts and Humanities is whether Higher Education Institutions should have an active role in the development of copyright rules both at the national, regional and international level.<sup>40</sup>

Individuals working in Higher Education and organisations working in partnership with Higher Education Institutions are in the position of observing and engaging in all aspects of creation, dissemination and use of creative content. It is therefore believed that there should be room for those individuals and organisation to be able to illustrate their priorities and submit their proposals.

## The ‘fair dealing’ issue

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It is argued that it would be beneficial for researchers to be involved in investigations concerning the scope of the fair dealing provisions as they currently appear in the CDPA 1988.

It is accepted that authors of academic publications have the responsibility of producing works in compliance with the rules of copyright. Publishers explicitly request compliance with the ‘fair dealing rule’. However, the scope of such rule is highly uncertain.

*“The interpretation of the CDPA 1988 is done with deference.*

*The side of the copyright owners is often taken, instead of asserting the fair dealing exceptions.”*

Often, authors are reluctant to rely on a fair dealing provision if that bears a real risk of legal consequences following a possible infringement of copyright.

Given the use that academics make of works from third parties in the context of research, it is observed that:

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<sup>40</sup> ‘Beyond Copyright’ workshop, Intellectual Property Institute, Centre for Commercial Law Studies, Queen Mary University of London.

*“the research community could easily get together and try to put some pressure on universities to raise the issue of copyright and start asserting fair dealing. There is the policy level, particularly with regard to the Hargreaves Review of Intellectual Property. However, there is also another level where universities could be braver. This is an important lesson to be taken from ‘Beyond Text’. A lot can be done in the existing space of the [current] law.”*

**Recommendation 11:** Further discussion should be encouraged with the goal of assessing the desirability of a scoping study on the role of research communities in the definition of limitation and exceptions, for specific categories of protected works and for uses that are directly relevant to research activities.<sup>41</sup>

### C. New tools

#### ‘Soft’ law

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Changes and updates to the copyright system are advocated often without an appropriate consideration of the possible consequences and costs that a reform would involve. UK copyright law is necessarily intertwined with EU legislation, bilateral agreements among countries and international treaties. The ‘opening’ of primary act such as the Copyright, Designs and Patents Act 1988 for the purpose of updating and simplifying the copyright system is bound to take time. While this is not to be discouraged in principle, other interim measures may contribute to reduce the distance between the law and the individuals affected by the law.

It is submitted that codes of conducts have the advantage of being more flexible forms of regulation. However, they may present the disadvantage of being scarcely enforceable in absence of a critical mass that voluntarily adopts and fully adheres to them.

**Recommendation 12:** Codes of conduct and acceptable business practices could be elaborated through negotiations between stakeholders’ representatives. This approach would accommodate the needs expressed in specific fields (e.g. dance, visual art) and would facilitate new business models to merge with existing ones.

## VI. Further questions to be addressed

### Policy making

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#### *“Who orientates future codification?”*

Discussions with Beyond Text Principal Investigators has demonstrated a consensus concerning the need for some form of codification, by way of legislative intervention or in the form of negotiation of industry-specific codes of practices.

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<sup>41</sup> ‘Beyond Copyright: the Visual Dimension’ workshop, St Catherine’s College, Oxford.



The two recent Reviews of Intellectual Property have highlighted areas in which updates in regulation and new codification would be beneficial. It remains uncertain, however, whether non-lawyers should express their priorities to legal experts who would be in charge of translating them into the law, or whether legal experts should formulate questions to be submitted to the scrutiny of non-lawyers actively operating in the creative industries.<sup>42</sup> While collaboration in policy making is required, a solid methodology in this respect should be formulated with more clarity.

### Centre for Copyright and New Business Models

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In the years to come, the Arts and Humanities Research Council will fund a Centre for Copyright and New Business Models in the Creative Economy. Within 'Beyond Text', opinions have been exchanged on how the work of such a Centre could successfully address the issues detailed in this report.

*“A Copyright Centre should be a physical space as well as a network where knowledge is shared.”<sup>43</sup>*

*“A Copyright Centre should operate as a support body as well as an advisory group. So that people know where to go.”<sup>44</sup>*

According to the Call for Expressions of Interest, the Arts and Humanities Research Council indicates that:

*“[the Centre] should aim to encompass research into copyright, business models, creative industries and digital technologies...”*

*It will:*

- *Investigate the challenges presented by existing and emerging copyright frameworks;*
- *Contribute to the understanding of the economics of the creative industries, including the impact of digital technology on the behaviour of consumers, individual creators, creative and cultural organisations and businesses;*
- *Explore new frameworks for the relationship between the creator, the exploiter and the consumer;*
- *Open routes to impact and influence in creative and cultural activities;*
- *Explore legal, regulatory, ethical, cultural, historical and public responsibility issues;*

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<sup>42</sup> 'Beyond Copyright: the Visual Dimension' workshop, St Catherine's College, Oxford.

<sup>43</sup> 'Beyond Copyright' workshop, Intellectual Property Institute, Centre for Commercial Law Studies, Queen Mary University of London.

<sup>44</sup> 'Beyond Copyright' workshop, Intellectual Property Institute, Centre for Commercial Law Studies, Queen Mary University of London.



- *Research the business potential of new digital technologies, such as new forms of high-speed internet connectivity, smart phone technologies or cloud computing systems, and their relationship to copyright;*
- *Deliver impact to the public and private sectors, influencing policy and strategy;*
- *Include the use of novel digital technologies and their development in a real world context, to ensure challenges arising from disruptive digital technology are considered and copyright issue consideration can be embedded in underpinning Digital Economy research;*
- *Become a focal point for research excellence, synthesising all 4 critical aspects of the centre – i.e. copyright, business models, the creative economy and digital technology. The centre will be independent and impartial and driven by public and business needs. It will be hosted by an HEI, but may involve partnerships which enable it to draw on relevant expertise across the academic, business and public sectors.*<sup>45</sup>

Many if not all these aims have been discussed at different stages during the development of 'Beyond Text' projects.

As a strategic programme, 'Beyond Text' has worked as a spontaneously established think-tank to raise practical questions on the role of copyright law for the creation, exchange and enjoyment of creative content. It also offered a favourable environment to discuss problematic areas of copyright policy. It is hoped that this report could serve as a record of 'Beyond Text' copyright discussions, as well as a reference tool for further research and policy initiatives as the new Centre develops.

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<sup>45</sup> Arts and Humanities Research Council, "Centre for Copyright and New Business Models in the Creative Economy - Call for Expressions of Interest" (<http://www.ahrc.ac.uk/FundingOpportunities/Documents/Copyrightand%20new%20businessmodelsEoI.pdf>).