

# BRITISH COPYRIGHT COUNCIL

## Creative Content in a European Digital Single Market: Challenges for the Future Response to the Reflection Document of DG INFSO and DG MARKT

- 1 The British Copyright Council is an association of bodies representing those who create, hold interests or manage rights in literary, dramatic, musical and artistic works, films, sound recordings, broadcasts and other material in which rights of copyright or related rights subsist under the United Kingdom's copyright law (Copyright, Designs and Patents Act 1988 as amended) and those who perform such works.
- 2 The British Copyright Council is an NGO Observer Member of the World Intellectual Property Organisation (WIPO). Our members include professional associations, industry bodies, trade unions and collecting societies, which together represent hundreds of thousands of authors, creators, performers, publishers and producers. These right holders include many sole traders and SMEs as well as larger corporations. Our members operate across all the industries identified by the consultation as being affected and some work in other media/creative based industries that are also affected, or soon will be.
3. The British Copyright Council welcomes the Commission's Reflection Document and supports its objectives, in particular, the creation of a **favourable environment in the digital world for creators and right holders** and the recognition that such an environment depends on **appropriate remuneration** for their creative works. While recognising the need for access for consumers, we believe there should be greater clarity between the need for public access to works and the wishes of commercial users. We also have some concerns about the balance of the reflection document and, in the context of commercial use in particular, we feel a greater emphasis should be given to the rights of creators and other right holders.
4. We have left it to our members to comment in detail on individual issues and have limited our own comments to five of the issues raised in the possible EU actions listed in Section 5 of the reflection paper.

### 5 Possible EU actions for a single market for creative content online – BCC Response

#### 5.1 Extended collective licensing

The British Copyright Council's proposal for the licensing of orphan works (see paper provided to the Commission separately) is itself based on an extended collective licensing system, as is the UK Government's legislative proposal for the licensing of orphan works (Digital Economy Bill, Clause 42). We therefore favour the possible introduction of limited forms of extended collective licence, for example, where it facilitates the use of orphan works on defined terms.

Where such licences apply we believe there are certain important principles to be followed and welcome the Commission's acknowledgement that such schemes should "take into account the adequate protection of the creators' rights and should not prejudice their commercial interests unreasonably". In this context, the issues we see as of greatest importance and which could usefully be addressed at European Level are:

**Diligent search** – particularly important in the case of orphan works. We strongly support the furthering of work carried out by the High Level Working Group on Digital Libraries under the EU's Digital Libraries Initiative.

**Remuneration of individual creators and right holders** - We support the principle that licence fees collected under extended collective licensing schemes should be paid to those individual creators or right holders whose works have been used. Extended collective licensing should not be used as an excuse to reduce the obligation on users to trace right holders, to seek permission from the right holders concerned, or to provide acknowledgement or usage data to collecting societies, which act on behalf of right holders.

Where through circumstances beyond the control of the user, allocation to the individual creator or right holder is not possible, then use of such funds should be determined by the class of right holders concerned. We are opposed to schemes, which return such funds to Government (e.g. a bona vacantia scheme).

**Legal certainty** – essential for both users and for collective licensing organisations operating such schemes.

**Voluntary registers** - We note the work carried out by collecting societies in developing their data bases of right holders and works for the purposes of identification but also note the excellent work the societies do in ensuring that right holders receive remuneration for use of their works. We also support the development of voluntary registers of orphan works such as that being worked on by the ARROW project.

**Representative, Transparent & Conditions of Licence** – Bodies mandated by Member States or by the EU to operate extended collective licensing schemes should be appropriately qualified and genuinely representative of the category of right holder, or of the type of work being offered under the extended collective licence. This is particularly true for the licensing of orphan works. Such bodies should be transparent and should be under an obligation to give all practicable assistance to any thorough searches undertaken by the applicant to confirm that the individual right holder cannot be identified. Right holders of the same category as the orphan works being licensed should also play a role in determining the terms and conditions of any such licence;

**Fair remuneration** – tariffs for commercial uses licensed under an extended collective licensing scheme should be set at market rates and should not undermine (in the case of orphan works) the fees charged by other right holders active in that marketplace. This could only be detrimental, to developing markets and could inhibit the creation of new works.

**Future Orphan Works** - We believe the European Commission has an important role to play investigating ways in which future orphan works can be prevented or at least reduced.

**Out of Print Works** - The authors and publishers of the majority of out of print works are known, so they cannot be treated as orphan works and the rights should be treated separately.

## 5.2 Exceptions and limitations

As already stated (see Extended Collective Licensing above and Appendix A), developments in voluntary collective licensing with legislative support, in the UK, have proved vital in providing for fair remuneration to rights owners within defined areas of educational use. They are promoting access to material in an increasingly digital world. They recognise that educational use of different

types of copyright work may affect the economic value of rights owners of different types of work in different ways.

We therefore support licensing solutions as a practical and reasonable alternative to the application of wider exceptions and limitations to the detriment of the exclusive rights of authors and other creators.

We recognise the need for consumer certainty, for example, in the area of private copying. However, the wording of the “three step test” as it appears in the Copyright Directive is a pre-requisite for the development of any exceptions and limitations which are developed to deal with this.

The wording of the three step test is essential in providing for and preserving a degree of flexibility for Member States at national level to support cultural differences, particularly when linked to “public interest” exceptions such as those for education and research.

### **5.3 Commercial Users’ Access**

We are concerned by the suggestion that the “reproduction right” and the separate “making available” right could be combined for the purposes of future online distribution. Whilst the two rights might sensibly be licensed together (subject to the agreement of right holders), any formal merger of the rights in copyright terms is unnecessary and unjustified.

We would also resist the idea of applying exhaustion to the communication to the public right. Any proposal that the communication to the public right is exhausted when a performance is first included in an on demand service would not only severely prejudice the interests of right holders, but would not be in conformity with EC law (see below). Distinguishing the reproduction right, the European Court of Justice has confirmed that an act of communication to the public does not as such involve exhaustion of the right to make such communication (*Coditel SA v Ciné Vog Films SA (No. 1)* [1980] E.C.R. 881; see J.A. L. Sterling, *World Copyright Law*, 3<sup>rd</sup> Edition 2008, para. 26.16).

The market must be allowed to provide for remuneration for exercise of the making available right over the term that the right exists.

### **5.4 A European Copyright Law**

The Commission’s Reflection Paper makes reference to a “European Copyright Law” in the form of an EU Regulation as the route to establishing a truly unified legal framework leading to direct benefits for the coherence of online licensing.

There is already a European Copyright law as represented by the *acquis* and application of the Berne Convention and TRIPS.

It would be difficult to achieve the consensus of all Member States to a single text of European Copyright Law which obliges all Member States as to the way in which harmonisation must be implemented on a national level, without any possibilities for national additions or variations, for instance as regards limitations and exceptions and moral rights and the British Copyright Council urges caution on such an approach. On the other hand, a single text setting out what has already been achieved would be of value and we are studying an initiative concerning the establishment of such a text.

## **5.5 Protection of rightholders**

We agree strongly with the Commission's statement that the adequate protection of right holders is essential for the provision of easier access to creative content.

## **5.6 Financial incentives**

We are unclear why views on these very specifically targeted incentives have been included in this document. In the context of issues for right holders we believe that the protection from piracy, which was addressed in the original Commission Communication is a much more important issue with regard to creating incentive in the market in creative content online.

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## BRITISH COPYRIGHT COUNCIL

### WIPO Standing Committee on Copyright and Related Rights – Nineteenth Session – Geneva – December 14 to 18 2009 Statement from the British Copyright Council

#### Agenda Item 4 – Limitations and Exceptions

The British Copyright Council (BCC) is an association of bodies representing those who create, hold interests or manage rights in literary, dramatic, musical and artistic works, films, sound recordings, broadcasts and other material in which rights of copyright or related rights subsist under the United Kingdom's copyright law (Copyright, Designs and Patents Act 1988 as amended) and those who perform such works.

The British Copyright Council is an NGO Observer Member of the World Intellectual Property Organisation (WIPO).

The Analytical Document on Limitations and Exceptions to be considered by SCCR cross-refers to the Garnett Study (SCCR/14/5) prepared in 2006. Paragraph 7 recognises that information in the Study regarding Spain is no longer up to date, but suggests that the Study remains up to date for the purposes of the United Kingdom.

This statement requests SCCR to note that developments have taken place within the United Kingdom since 2006 in the area of voluntary collective licensing with legislative support.

United Kingdom developments in voluntary collective licensing with legislative support have proved vital in providing for fair remuneration to rights owners within defined areas of educational use. They are promoting access to material in an increasingly digital world. They recognise that educational use of different types of copyright work may affect the economic value of rights owners of different types of work in different ways.

We have asked our representative, Andrew Yeates, General Counsel of the Educational Recording Agency (ERA) to provide, as an example, an outline of the solution provided by the Educational Recording Agency (ERA) both as an exception subject to licence under current legal provisions in force within England, Wales, Scotland and Northern Ireland (See Annex 1) and through the more recent ERA Plus licence scheme which enables educational establishments to authorise the electronic communication of licensed recordings to authorised students, when the students are outside the premises of their educational establishment. However, the Educational Recording Agency (ERA) is not alone in the UK in providing practical licensing solutions. We attach (see

Annex II) a note on the licensing activities of our members the Copyright Licensing Agency (CLA).

### **Educational Recording Agency (ERA)**

**The Educational Recording Agency (ERA) is a member of the BCC. ERA is a copyright collecting society. It was set up under the laws of England and Wales in 1989 as a result of s 35 Copyright, Designs and Patents Act 1988. S 35 provides for certain educational copyright exceptions to apply unless rights owners establish a copyright licensing scheme (certified under UK law) for non-commercial educational use of copyright protected material to cover licensing within the scope envisaged by the section<sup>1</sup>.**

**The provisions in s 35 have resulted in the range of repertoire represented by ERA becoming uniquely broad when considered against the types of copyright work and performances involved in the production and broadcasts of television and radio programmes<sup>2</sup>. A focal point for licensing has been created for rights owners to license specified educational use.**

**The certified scheme operates to enable educational establishments to record for (non- commercial) educational purposes any radio or television broadcast output of ERA members within the United Kingdom. The scheme also applies to the full extent that such broadcast output includes works or performances represented by ERA members.**

**The scheme was extended to cover storage of licensed recordings and their communication to the public within the premises of educational establishments following implementation of Copyright and Related Rights Regulations 2003 (SI 2003/2498).**

**Since 2007, ERA has offered a new licence scheme called ERA Plus. This extends the rights granted under an ERA Licence to enable licensed educational recordings to be electronically communicated to authorised students and teachers online when they are outside their educational**

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<sup>1</sup> The Annex to this Statement includes s 35 (relevant to copyright works) and the parallel provision relevant to performers rights in paragraph 6 Schedule 2 to the Act.

<sup>2</sup> At present ERA has 16 members each representing a very significant copyright repertoire. They are:

Association De Gestion Internationale Collective Des Oeuvres Audiovisuelles , Authors' Licensing and Collecting Society Limited, BBC Worldwide Limited, BPI (British Recorded Music Industry) Limited, Channel Four Television Corporation, Channel 5 Broadcasting Limited, Design and Artists Copyright Society Limited, Directors UK Limited, Equity, The Incorporated Society of Musicians, ITV Network Limited, Mechanical Copyright Protection Society, Musicians' Union, The Performing Right Society Limited, Phonographic Performance Limited and Sianel Pedwar Cymru (S4C).

establishment, at home or working elsewhere across the United Kingdom. Full details can be found at <http://www.era.org.uk>

Proposals for possible change to the scope of both section 35 and paragraph 6 of Schedule 2 to the Copyright, Designs and Patents Act 1998 have been put forward by ERA with the agreement of ERA members and in the light of consultation with representatives of educational establishments, to reflect the new ERA Plus licence. Since 2006, The UK Intellectual Property Office has consulted with stakeholders on a number of occasions concerning the proposals. A further consultation including new draft Regulations is to be published in the next few weeks.

Limiting the scope of ERA licensing to use by or on behalf of “educational establishments” has helped to distinguish voluntary licensing supported by legislation through ERA (as opposed to more general “educational use” of material).

In addressing the question of “educational uses”, linking exceptions to activities by, or under the auspices of, “educational establishments” has assisted in enabling fair market definition (avoiding extension of the possible economic effect of the exception to wider “educational” concepts that would be impossible to define in the context of the “special cases” to which the Three Step Test might apply).

The British Copyright Council supports the principle of licensing rather than general mandatory exceptions. The positive changes made by rights owners (in this case acting through ERA) in licensing to accommodate increased on-line use and distance learning within education are examples of rights owners looking to the future and working to anticipate the needs of users.

9<sup>th</sup> December 2009  
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**ANNEX 1** to Statement from British Copyright Council for WIPO Standing Committee on Copyright and Related Rights  
**Educational Recording Agency (ERA) from UK Copyright, Designs and Patents Act 1988 (as amended)**

35 Recording by educational establishments of broadcasts

(1) A recording of a broadcast , or a copy of such a recording, may be made by or on behalf of an educational establishment for the educational purposes of that establishment without thereby infringing the copyright in the broadcast, or in any work included in it, provided that it is accompanied by a sufficient acknowledgement of the broadcast and that the educational purposes are non-commercial.

(1A) Copyright is not infringed where a recording of a broadcast or a copy of such a recording, whose making was by virtue of subsection (1) not an infringement of copyright, is communicated to the public by a person situated within the premises of an educational establishment provided that the communication cannot be received by any person outside the premises of that establishment.

(2) This section does not apply if or to the extent that there is a licensing scheme certified for the purposes of this section under section 143 providing for the grant of licences.

(3) Where a copy which would otherwise be an infringing copy is made in accordance with this section but is subsequently dealt with, it shall be treated as an infringing copy for the purposes of that dealing, and if that dealing infringes copyright for all subsequent purposes.

For this purpose “dealt with” means sold or let for hire or offered or exposed for sale or hire, or communicated from within the premises of an educational establishment to any person situated outside those premises.

SCHEDULE 2 RIGHTS IN PERFORMANCES: PERMITTED ACTS

*Recording of broadcasts by educational establishments*

6 (1) A recording of a broadcast , or a copy of such a recording, may be made by or on behalf of an educational establishment for the educational purposes of that establishment without thereby infringing any of the rights conferred by this Chapter in relation to any performance or recording included in it, provided that the educational purposes are non-commercial.

(1A) The rights conferred by this Chapter are not infringed where a recording of a broadcast or a copy of such a recording, whose making was by virtue of sub-paragraph (1) not an infringement of such rights, is communicated to the public by a person situated within the premises of an educational establishment provided that the communication cannot be received by a person situated outside the premises of that establishment.

(1B) This paragraph does not apply if or to the extent that there is a licensing scheme certified for the purposes of this paragraph under paragraph 16 of Schedule 2A providing for the grant of licences.

(2) Where a recording which would otherwise be an illicit recording is made in accordance with this paragraph but is subsequently dealt with, it shall be treated as an



illicit recording for the purposes of that dealing, and if that dealing infringes any right conferred by this Chapter for all subsequent purposes.

For this purpose “dealt with” means sold or let for hire, or offered or exposed for sale or hire, or communicated from within the premises of an educational establishment to any person situated outside those premises.

(3) Expressions used in this paragraph have the same meaning as in section 35 and any provision made under section 174(2) with respect to the application of that section also applies for the

**ANNEX 2** to Statement from British Copyright Council for WIPO Standing Committee on Copyright and Related Rights

**Copyright Licensing Agency (CLA) Statement**

1. The Copyright Licensing Agency Ltd (CLA) is a not-for-profit company, limited by guarantee. It was founded in 1983 by the Authors' Licensing Collecting Society Ltd and The Publishers Licensing Society Ltd who themselves represent, directly or indirectly, authors and publishers of most of the books, journals, magazines and other periodicals published in the UK. CLA has an agency agreement with the Design and Artist Copyright Society Ltd (DACS) which covers artistic works such as photographs, illustrations and drawings appearing within books, journals and magazines. CLA is a member of the BCC.

2. CLA issues licences to reproduce extracts from published works in which copyright exists to avoid the need for users to obtain individual transactional clearances. CLA licences cover a range of sectors in the UK including businesses and the professions, central and government departments and other public administration organisations and educational establishments such as higher education institutions, further education colleges, and schools. CLA is a "licensing body" for the purposes of the Copyright, Design and Patent Act 1988 and is thus subject to the jurisdiction of the Copyright Tribunal.

3. Although CLA issues some transactional licences (e.g. for document supply activities and press cuttings services), its main licences are of the "blanket" type whereby, on payment of an annual fee, a licensee may copy extracts (within licence limits) from any works featured within CLA's repertoire. CLA's repertoire includes all works published in the UK, subject to a comparatively small number of exclusions by the relevant author, artist or publisher. CLA's international rights exchange agreements means that the CLA licence repertoire includes an extensive number of titles published outside the UK.

4. CLA educational licences not only include the right to photocopy, but also to make digital copies from original print editions by scanning therefore allowing educational institutions to transmit the copies electronically to their pupils. The licences also allow the delivery of digital copies to distance learning students, generally through the medium of virtual learning environments or other similarly password protected intranets. CLA has recently extended its higher education licence to include specified digital material, -that is to say works first published in an electronic format - where opted in by the rights holders, in addition to the photocopying and scanning elements of the licence. CLA is proposing to launch a similar extension for its schools licences next year.

5. CLA's education licences demonstrate the benefits of voluntary licensing solutions as opposed to statutory exceptions or limitations. Whilst UK law contains certain provisions specific to education, most notably s. 36 of the

CDPA 1988 which allows a limited amount of copying by an educational institution up to 1% per quarter of a work (provided no licensing scheme exists) these generally do not provide users with the range of rights and the flexibility they require.

CLA's voluntary licences:

- a. can deliver solutions more quickly than is generally possible with legislation. CLA's schools scanning licences were introduced in April 2008 barely 14 months after the Gower Review in the UK had suggested that s.36 be extended to cover electronic copying to distance learners, a proposal still being debated;
- b. can deliver licences tailored to the users' needs, often following detailed negotiation with user groups;
- c. contain rights beyond what can be provided by statute;
- d. respect the rights of copyright owners in compliance with EU law and international treaty obligations and the Berne 3 Step Test in a way that statutory exceptions cannot match;
- e. support the creative industries and encourage the continuing flow of high quality works, both those created and distributed digitally and in hard copy format. Statutory exceptions by contrast tend to inhibit the development of new products and endanger the continuance of a viable publishing industry;
- f. also include the right to make accessible copies for those suffering from some form of visual or other reading impairment.

MTD/CLA  
for British Copyright Council  
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