BRITISH COPYRIGHT COUNCIL

Taking forward the Gowers Review of Intellectual Property: Second Stage Consultation on Copyright Exceptions

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.

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.

BCC Member organisations:

Assocation of Authors' Agents . Association of Illustrators . Association of Learned & Professional Society Publishers . Association of Photographers . Authors' Licensing & Collecting Society . BPI . British Academy of Songwriters, Composers and Authors . British Association of Picture Libraries & Agencies . British Computer Society . British Institute of Professional Photography Broadcast Entertainment Cinematograph & Theatre Union . Chartered Institute of Journalists . Copyright Licensing Agency . Design & Artists' Copyright Society . Directors UK . Educational Recording Agency . Equity . Music Managers' Forum . Music Publishers Association . Musicians' Union . National Union of Journalists . Periodical Publishers' Association . PPL . PRS for Music . Publishers Association . Publishers' Licensing Society . Royal Photographic Society . Society of Authors . Writers' Guild of Great Britain .

We have participated at every stage of the Gowers Review process and congratulate Government on achieving a balance between interests in the way in which this consultation takes forward the relevant Recommendations. However, we do have some doubts as to whether secondary legislation is an appropriate route for amending existing exceptions. As our member, the Copyright Licensing Agency (CLA), points out, section 2.2 of the European Communities Act is limited to implementing those changes which are necessary to comply with EU Directives. We do not see that that this can be stretched to allow significant changes to leglisation to widen UK law affecting the rights of copyright owners where this is not directly required by, in this case, the Copyright Directive.

GENERAL

While we recognise why the Government does not currently consider it appropriate to introduce a narrow UK-only format shifting exception, it is our view that the issues raised by the proposed widening of CDPA Section 29 on Research and Private Study should be addressed as part of the **wider European debate on format shifting**. There should be no introduction of private copying in the UK without **fair compensation**.

In any review of exceptions and limitations, it is essential that the **pre-eminence of exclusive rights** is fully recognised. Following on from that, where licensing arrangements are already in place and work well, they should not be interfered with.

Where exceptions or limitations on exclusive rights are necessary, we strongly support the principle of exceptions being displaced by the existence of a licensing scheme i.e. **exception subject to licence**. Such

schemes are a UK success story in the context of educational use in: a) recording of broadcasts licensed by the Educational Recording Agency (ERA) (S.35), and b) reprographic copying of passages from published works licensed by the Copyright Licensing Agency (CLA) (S.36). We welcome the UK Government's continuing support for this model as exemplified by this consultation. We suggest that this approach should be **promoted at European and International level**, most immediately in the context of the current questionnaire, collecting evidence of effective interpretation of copyright exceptions and limitations, being carried out on behalf of WIPO's Standing Committee on Copyright and Related Rights. However, with regard to European Union work on possible harmonisation of exceptions at Member State level, it is important that changes do not interfere with existing exceptions, or licensing arrangements, at national level where they already work well and it is vital that such work takes into account cultural differences and market conditions.

Work on exceptions and limitations to exclusive rights must, in every case, take full account of the three step test and we continue to emphasise how many problems could be avoided by the **explicit incorporation of the three step test into UK legislation** (which could, in some cases, be met by subjecting relevant exceptions to the existence of licensing schemes).

We support the principles behind extending S.35 and S.36 to cover **distance learning**. Nevertheless, we recognise the concern expressed by our member, the Copyright Licensing Agency, about extending such access to students based outside the UK.

POTENTIAL OVERLAP

While supporting the Government's aim, we believe there is a **dangerous and confusing overlap** between the proposals for Research and Private Study (s 29), those for Educational Exceptions subject to license (s 35 and s 36) and the existing exception for the purpose of Time Shifting (s 70).

More thought is needed on the way in which the legislation, as currently drafted, risks creating confusing overlaps and has the potential to drive a coach and horses through the original aim of the legislation.

RESEARCH AND PRIVATE STUDY – SECTION 29

At the present time, we do not support the changes to s 29 envisaged in Regulations 3 and 4 of the proposed Statutory Instrument (see our comment on the wider European context above). In our view, the proposed changes to s 29 will be impossible to police.

1. Section 29(3) will apply equally to the additional works (sound recordings, films and broadcasts) as to the works originally covered by this exception.

a. Are there any consequences which make this impractical?

As we have already stated, we believe that the failure to include any provision for "fair compensation" for right holders for "private study" is in conflict with the Copyright Directive. As stated below, we also believe there is the need for further work to identify the need for academics or students to make further copies of sound recordings or films, which they legitimately own, or from copies lent by libraries or other legitimate sources, for the purpose of research or private study.

The extension of s 29(3) to include sound recordings and films is impractical because of the way in which the changes to s 29 seek to bring in a "two tier" system for defining people who may benefit from the research and private study fair dealing exception (depending upon the type of copyright work used). That said, fair dealing with sound recordings and films for the purpose of

research and private study must only relate to the technical copying involved in viewing or accessing the recording or film. The distribution of copies cannot amount to a "fair dealing" under any circumstances. Where the need for access to multiple copies arises then educational establishments should purchase copies under license as they would with books and other publications.

2. We propose that the law clarifies that legitimately copied extracts of sound recordings, films or broadcasts, if subsequently dealt with, would be infringing copies. We believe that the same should also be made explicit with regard to extracts already covered by section 29.

a. Are there any practical consequences of this that make this change unduly restrictive? If so, please state what they are.

We support the proposal that copies of works already covered by s 29, should, if subsequently dealt with, be infringing copies and we agree that it should be made explicit with regard to extracts already covered by s 29.

b. Would this interfere with the normal things done by academics with their research and by students in the course of their studies? If so, please outline.

Our main concern is not with the infringing copy aspect of this proposal. We cannot see that this would conflict or interfere with normal use by academics or students.

In summary it is difficult to see how the changes proposed to s 29 will actually improve access and use of sound recordings and films particularly in view of the beneficiaries being limited to "members of educational establishments".

Our concern is that existing s 29 already provides for the needs of members of educational establishments involved in research and private study in a practical way linked only to literary, dramatic and musical works. We see no need to widen s 29[1]. For example, if a student owns a copy of a sound recording or film (which has been lawfully accessed), or has borrowed a copy from a library (or otherwise lawfully accessed copy), that student can play and watch that copy in a private capacity (as opposed to copying under instruction).

We would suggest, therefore, that there is a need for further work to be carried out to identify the need for members of educational establishments to make further copies (beyond the technical copies automatically created in the course of lawful access) of sound recordings and films already in their ownership "for research or private study".

Furthermore, there is unnecessary duplication between fair dealing with a broadcast for the purpose of research and private study and new s 35 [1B] which permits further copying of copies communicated under this section. A clear distinction between educational exceptions and private study outside of educational use should be maintained. As an educational exception "shoehorned" into fair dealing for research and private study, this proposal to amend s 29 could confuse users.

As far as broadcasts are concerned, s 70 already applies for the purpose of time shifting and s 35 provides access to copies within educational establishments and for educational purposes. Therefore, access to broadcasts for the purpose of research and private study is already provided for in legislation.

There is a risk that this exception will be misinterpreted and will be treated as a private copying exception with no remuneration for right holders of films, sound recordings and broadcasts. Furthermore, there is a risk that online infringers will take advantage of the confusion over this exception for their own ends.

3. **Section 29(1) specifically includes members of educational establishments who may not necessarily be on the teaching staff, but who are nevertheless carrying out research authorised by that establishment.**

   a. **Are there any practical consequences of this that make this an unreasonable approach? If so, please state what they are.**

It is our view that this question must be addressed across all the educational exceptions subject to license linked to s 35 and s 36 CDPA and not just in relation to s 29(1).

There is a real need to dovetail the definitions which are used to determine the beneficiaries. S 29[1E] refers to a "member" of an educational establishment for the purpose of fair dealing for research and s 29[1D] introduces the concept of a "pupil". S 35 defines "authorised persons" differently to the proposed definition of "member" of an educational establishment under new s 29 (1E) proposed by the draft Regulations.

As far as ss 35 and 36 are concerned, "members" of an educational establishment are limited to pupils "who receive instruction". There is no need for the person carrying out the copying to be included in these definitions as ss 35(1) and 36(1) permit copies to be made on behalf of the education establishments and so in practice include technicians. Both ERA and CLA licensing schemes also apply "teachers" as including other staff. It is also worth noting that in the case of both ERA and CLA, "pupil" has a specific meaning as a unit of value for determining the tariff charged to each educational establishment under its licensing arrangements. . Furthermore, we note that our member, ERA, which is experienced at dealing with these terms states that the differences in terminology "raises both legal and practical implications".

EDUCATIONAL EXCEPTIONS – SECTIONS 35 AND 36

Section 35

We support the detailed submission by our member, the Educational Recording Agency, which is responsible for licensing under s 35, to which we would add the following:

4. **Section 35(1A) currently refers to "communication to the public" on the premises of the educational establishment, but it does not contain any restriction on the identity of the persons who may receive the communication. In considering how to ensure that there is some degree of control over who should receive 'communications to the public' outside the premises, the proposed amendments include the requirement that it should be to "authorised persons", which are defined as teachers and pupils. This restriction would apply to both communications which are received on the school premises and those which are received by distance learners off the premises, and so would restrict the scope of the current exception in this respect.**

Restriction of access to an agreed definition of "authorised persons" should apply

5. **We believe that "communication to the public" would cover, for example, using a computer to show a recording of a broadcast to a group of people in a lecture hall which may engage Section 34 in addition to Section 35. Section 34(2) provides an exception in relation to the playing or**

showing of a sound recording or film which is already limited to an audience of teachers and pupils for the purposes of instruction.

We have therefore taken the view that there may already be circumstances in which the current exception in Section 35 is limited to teachers and pupils, and therefore believe this proposed wording is unlikely to have a significant impact on educational establishments which communicate recordings of broadcasts to persons situated within the school premises.

a. Do you feel this is an appropriate approach to take?

If draft Regulations 3 and 4 are dropped, there may be a case for treating researchers who are undertaking research in conjunction with an educational establishment as being "enrolled" or "connected to" an educational establishment for the purposes of s 174 (5) CDPA.

b. What are the practical implications of this proposal?

Please see our earlier comments.

6. **In relation to the 'communication to the public' right, we have used the term "receive" as opposed to the term "access". We are aware that "receive" implies a passive act, for example, a pupil watching a communication as part of a class on a screen, whereas "access" is a more active term that could imply the pupil taking an active role in obtaining the material to view on computer at a suitable time.**

a. Do you believe that the term "receive" is sufficient for the needs of this exception?

Article 3 of the EC Copyright Directive defines the rights relevant to the Article by reference to making available works "in such a way that members of the public may access them from a place and at a time individually chosen by them".

Continuity in the use of the word "access" would therefore be helpful.

b. Should the term "access" or should the terms "receive" and "access" both be used?

Use of the word "access" would be helpful to avoid unnecessary judicial review of a "distinction without a difference" further down the line.

7. **We have taken the view that educational establishments should be responsible for ensuring the communication of material is only to certain authorised recipients, but we accept that, provided they have taken appropriate precautions, they may have no control over the viewing of the material on a terminal once it has been accessed. To enable an appropriate degree of control, we believe the definition of "authorised person" only needs to cover teachers/pupils who will "access" the material.**

Whilst we believe this is sufficient to enable assistance to be given to the authorised persons who have already accessed the material, we recognise that there may be circumstances in which a student, perhaps through disability, requires help in accessing material in the first place.

a. Is this a reasonable assumption? How do educational establishments currently deal with this situation?

The Consultation helpfully recognises the way in which teaching assistants and support staff are to be regarded as "teachers" for the purposes of s 174(5). This is welcome and should help to avoid any individual student having difficulties in accessing material as an "authorised person" themselves.

In terms of access in the home, the password approach taken for identifying "authorised persons" under educational licenses is not completely secure. However, it is thought to be the most practical way of linking "authorised users" with an educational establishment.

Provided that the "access" is triggered for the genuine educational benefit of an "authorised user", the fact that a third party physically assists in securing the access is not a commercial concern to rights owners.

b. What approach could be taken so that the law adequately reflects access by those assisting "authorised persons" whilst ensuring that this does not widen access to those who do not require it?

Please see answer to (a) above.

8. The proposed wording of Section 35(1B) allows a pupil to make a copy of a communication solely to assist in their study, for example by making a hard copy of the material. Whilst Section 35 is directed at what educational establishments may do, we consider that, as a consequence of the extension to Section 35, it is also appropriate for the provision to directly address the activities which a pupil may lawfully undertaken. Any copy which a pupil may make or communication to the public, such as by posting material on a website, which does not fall within this authorisation, will fall subject to the general provisions of the CDPA, and hence will be infringing activities.

a. Does this approach strike a reasonable balance between activities which a pupil should legitimately be able to do to carry out the relevant studies and ensuring material is adequately protected from further dissemination? If not, please indicate what your concerns are and how you believe that they should be tackled.

It should be made clear that "pupils" who are beneficiaries of licensing schemes operated through educational establishments under s 35 are only able to make copies "for the purposes of enabling them to be viewed or listened to at a more convenient time". This would have the benefit of linking with the wording used in the "time shift" exception under s 70 CDPA.

Section 36

We support the more detailed views on this section put forward by our member, the Copyright Licensing Agency, which is responsible for licensing under s 36.

We are aware that our members ERA and CLA have raised the question of whether it might be more appropriate, in practical terms, for the educational use of extracts from sound recordings and films to be licensed under CDPA s 35 rather than under s 36 as currently envisaged.

9. We have taken the view that the term "reprographic copy" (as defined in Section 178 CDPA) seems to be too narrow to accommodate the types of digital technology employed by educational establishments, which may include remote and on-site access via computers, and the use of whiteboards. We therefore propose to remove the reference to "reprographic" in section 36 which will therefore permit any type of copying of passages of extracts of the named

works. We are however aware that there are various references to "reprographic" copies throughout the CDPA which may need to be examined depending on the context in which the expression is used. We have not, therefore included in the attached draft SI any consequential provisions which may result from this amendment pending the outcome of this consultation.

a. What are the implications of replacing the specific term "reprographic copying" with "copy"?

We believe there is merit in the argument put forward by the CLA that the current definition of a "reprographic copy" already deals with electronic copies and that its replacement with the word "copy", while understandable for clarity, especially as regards sound recordings and films, does not provide sufficient protection that the copies so permitted must be identical (c.f "facsimile") copies.

b. How do we ensure that this section of the act is sufficient to permit reasonable acts of copying extracts which reflect available technologies whilst preventing inappropriate copying?

We agree that it is not appropriate to widen the permitted extent of copying beyond 1% per work, per quarter. However, we doubt whether the use of percentages to define the permitted extent of copying is relevant in the case of sound recordings or films.

We would suggest that the revised wording proposed under Regulation 14 (2) (b) and 15 (5) may be too restrictive and that the words "by a person situated within the premises of an" should be replaced with " from a place within the premises or under the control of the educational establishment by or for whom the copy was made".

Communication to the public should only be permitted for access by authorised persons.

We note the decision to continue with the exclusion of artistic works from s 36 and understand the logic of this. However, artistic works are frequently included in films and we wonder how the copying under s 36 of extracts from films which contain artistic works will be dealt with.

PRESERVATION BY LIBRARIES, ARCHIVES, ETC – SECTION 42

We agree with the view, expressed by our member the National Union of Journalists, that the secure archiving of cultural works (including works of journalism) is a very positive objective. We believe that these proposals, which are limited strictly to the preservation of works, will help support that objective.

In contrast to the approach of some Member States, the amendments to Section 42 are not intended to place numerical limits on the number of copies of an item which may be made for preservation purposes. Instead, the focus is on specifying the scenarios under which preservation copies can be made, which are given in subsection 2 of section 42. This will not permit institutions to make copies for administrative convenience, for example, but will give them a certain degree of latitude in identifying the particular circumstances under which copying for preservation purposes is appropriate. Is this the right approach?

As increasing amounts of copied material are held on central servers in such institutions and shared between departments, we would emphasise the need for clear demarcation of materials held for preservation purposes. Collections must recognise that a digital copy made for the purpose of preservation, as envisaged under these recommendations should be quite distinct and separate from the rights of libraries to "make and supply" copies of works under the various library privilege

sections. Any further use and dissemination of such materials must remain subject to license by the right holders concerned.

There are four ways in which the term "library" might be understood:

i. An institution (i.e. a body running a library)
ii. A place (i.e. a building containing a library)
iii. The library itself (i.e. a collection of the things that a library can contain)
iv. The library being an undertaking of some kind (see e.g. references in section 3 of the 1989 Regulations relating to 'conducted for profit')

There may be difficulties if a library is treated as an institution: if the institution does anything other than running a library should it be treated for the purposes of the exception as a library in relation to everything which it has? If a library is treated as a collection of things which a library can contain, and the same applies to archives, museums and galleries, then it would be possible to treat libraries, archives, museums and galleries as not being mutually exclusive: a library could, for example, include documents which could also be included in an archive or it might include illuminated manuscripts which could also be included in a museum.

a. Should libraries, archives, museums and galleries be treated as mutually exclusive for the purposes of the amended section 42 exception?

b. If libraries, archives, museums and galleries are not treated as being mutually exclusive, what is the impact of this approach on the prescribing of conditions for the purpose of section 42? Does this approach only work if the prescribed conditions are the same for libraries, archives, museums and galleries?

We agree with the view expressed by our member, the Periodical Publishers Association, that the proposal to extend "preservation" to museums, galleries and archives is of concern if the institutions that are the beneficiaries of the exceptions are not clear legal entities.

In addition, distinctions do need to be made between the genuine "preservation" activities of an institution and the "licensing" or other activities linked to an institution (when the contractual terms upon which an institution secures a commercial copy of a work for subsequent use should be seen as distinct from "preservation" activities). Again, we agree with our member the PPA, that a commitment from government to review the operation regularly would be welcomed, to avoid abuse of the "preservation provisions".

What is a 'permanent collection'? A permanent collection could be regarded as the items included for whatever purpose the collection was formed, whereas other items, such as records about the institution or its staff, may merely be ancillary to it. Over time, it is possible that an ancillary item may become part of the permanent collection. For example, the personnel records of current staff would presumably not count as a 'library' or 'archive', but old records from the time an institution was founded may do.

a. Is this kind of test appropriate? If such a test is adopted, should it be objective i.e. for what purposes was the collection in fact formed and what is in fact ancillary to the collection? Or should it be subjective i.e. what does the body running the library/archive, etc consider the purpose of the collection to be and what is considered ancillary to that purpose?

b. Does ability to preserve by electronic means have any bearing on the answers to the questions about permanent collections? If so, how?

c. Does the word "deposit" in the revised draft encompass all of the ways in which an item may enter a permanent collection? If not, please elaborate.

See our comments under 11. above.

Should there be restrictions on subsequent use of copies lawfully made under section 42? For example, should a lawfully made copy become an infringing copy if dealt with improperly?

Yes, a copy lawfully made under s 42 should become an infringing copy if dealt with improperly.

The language of section 42 distinguishes between the objects or items to be preserved and the copyright work that may be included within such an item or object. Whilst this may not be an issue in many contexts, it could have practical implications in relation to electronic items. For example, it is often likely to be the case that the original format of an electronic item itself is of little interest, and that therefore the focus of preservation activities is actually the content which that electronic item records.

a. In such a case, what are the practical implications of the distinction in section 42 between items and the work which the item records?

We have no comments.

b. Are there any other exceptions in the CDPA which make a similar distinction, where the language may unintentionally limit the possible use of the exception, particularly as regards works recorded in electronic items?

We have no comments.

The wording of the proposed amendments to section 42 are intended to cover content which may be lost because e.g. the medium in which it is recorded has or will become obsolete. Do the proposed amendments achieve this objective?

We support the extension of library privileges to cover all classes of work for archival purposes and for the purpose of preservation and to format shift archival copies to ensure records do not become obsolete and the amendments to s 42 achieve that objective. However, we urge caution, for example, in relation to lawfully made copies dealt with improperly which must be treated as infringing copies. The risks in practice are otherwise too great.

We have amended the definition of "publication" in section 175 to add some further definition in relation to films and sound recordings for the purposes of new sections 39A and 43A of the Act. Does the proposed amendment of the definition have any undesirable consequences, when read in conjunction with other provisions of the Act which rely on it?

Whilst the new provision is directed at links with copying by libraries of sound recordings and films, it does seem potentially complex to ignore the existing provisions for whether a film or sound recording has been "published" for the purposes of defining the duration of copyright in a sound recording or film under s 13A and s 13B CDPA. These provisions already exist and should also be used to dictate whether a work is "unpublished" (and therefore open to copying in whole by

libraries as opposed to only copying "in part" following recognition of "publication" under s 175CDPA) for the purpose of s 39A and 43A CDPA.

It would seem preferable to have a single test for "publication" linked to both fixing duration of copyright and "publication" for any subsequent library use.

GENERAL

Are there any specific transitional arrangements which need to be considered?

We are not aware of any. However, our members CLA and ERA will, no doubt, have comments to make on this.

The British Copyright Council welcomes this opportunity to respond to this consultation and would be pleased to participate in further stakeholder discussions on the subject.

31st March 2009

British Copyright Council
29-33 Berners Street
London W1T 3AB
T: 00 44 1986788122
M: 00 44 7788413807
E: janet@britishcopyright.org
www.britishcopyright.org