

# **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 another one of our members The Copyright Licensing Agency Ltd.(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 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).**

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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).

**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 (acting through ERA and CLA in the examples given in this paper) 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 local 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 legislative 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  
7th December 2009