

**© the Future – Developing a
Copyright Agenda for the 21st Century.**

**Response from The
Educational Recording Agency Limited**



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Introduction

The Educational Recording Agency Limited (ERA) is a copyright collecting society. It was set up under the laws of England and Wales in 1989 with a view to operating a copyright licensing scheme for non-commercial educational use of copyright protected material.

Uniquely serving the UK education sector, ERA is one of a range of collecting societies which helps copyright owners and performers derive an income from the licensed use of their works.

However the range of the repertoire represented by ERA is uniquely broad when considered against the types of copyright work and performances involved in the production and broadcasts of television and radio programmes¹.

ERA's certified licence 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 (apart from Open University programmes which are covered by a separate certified licensing scheme). ERA also operates an ERA Plus Licence to facilitate access by distance learners linked to educational establishments.

Only "educational establishments" as defined by the Secretary of State under the Copyright, Designs and Patents Act 1988 (as amended) and ensuing Statutory Instruments, are able to take out an ERA licence. This has been important to distinguish "markets" within which ERA licences apply from wider use of copyright works.

Executive Summary

Technological change has been at the centre of the way in which ERA copyright licences have evolved to provide benefits to both rights owners and educational establishments since 1990.

The copyright framework is generally flexible enough to accommodate technological change.

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.

The "use it or lose it" option for rights owners to license educational off-air recording broadcasts (introduced by the Copyright, Designs and Patents Act 1988) has proved effective in persuading rights owners to come together for administering specified rights.

¹ ¹ 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).

Limiting the scope of ERA licensing to use by or on behalf of “educational establishments” has helped to distinguish licensing through ERA (as opposed to more general “educational use” of material. However the actual definition of what constitutes an “educational establishment” for the purposes of s 174 CDPA is complex and needs review.

Copyright exceptions and limitations should apply :-

- in special cases;
- which do not conflict with the normal exploitation of the work or the subject matter;
- and
- which do not unreasonably prejudice the legitimate interests of the right holder.

(“the three step test”).

The copyright framework must be able to distinguish the subsections of “the public” which might claim the benefits of copyright exceptions and limitations from “the public” who are potential “consumers” or licensed users of copyright works.

In the world of “education” it is important to distinguish:-

- educational use for the purposes of educational establishments; and
- use for the sole purpose of illustration for teaching;
- from
- wider “educational use” – which could just as well be “use by a natural person for private use and for ends that are neither directly nor indirectly commercial”.

Flexible interpretation of the wording used in Article 5 of the Copyright Directive for potential copyright exceptions and limitations has supported:-

- application to rapidly evolving technologies;
- reconciliation with experience under different Member States’ national laws;
- recognition of cultural differences and language differences of benefit to society; and
- lower legislative costs in terms of legal review against the above issues;

whilst also providing flexibility for courts to develop case law taking into account the above issues.

Greater legal certainty, or better protection, for beneficiaries is unlikely to be achieved by making any additional categories of exceptions defined under EU law, mandatory.

In addressing the question of “educational uses” it is important to link any exceptions to activities by, or under the auspices of “educational establishments” (and not to allow extension 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).

Use of copyright works for the purposes of

(a) illustration for teaching

and

(b) scientific research

does not have the same implications for all types of work.

Education and awareness about the scope of available educational licences must continue to be promoted by rights owners as the debate over the scope of educational copyright exceptions and limitations continues.

The positive changes made by rights owners (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.

ERA and others have pushed for changes to the scope of section 35 and paragraph 6, Schedule 2 to the CDPA relevant within the UK, to match the ERA Plus Licence launched back in 2007.

Rights owners are not opposed to change per se. However change within the scope of the three step test needs to be thought through.

Potential markets need to be addressed separately when considering copyright exceptions and limitations. **Nowhere is this more important than within the field of education. It is a field within which the educational market place is the primary one from which rights owners might secure a return for the use of their work.**

Article 5(2) of the Berne Convention significantly supports copyright recognition for all authors without discrimination over status, whether professional, amateur, or a combination of the two.

The Berne Convention enshrines the principle that enjoyment and exercise of copyright shall not be subject to any formality (such as registration as a requirement of recognition).

The issues

Q. Does the current system provide the right balance between commercial activity and the rights of creators and creative artist?

Yes, in general, the system **provides for** the right balance.

ERA welcomed the fact that the Gowers Review gave a qualified “yes” to this same question when charged with considering whether the IP system was fit for purpose in an era of globalisation, digitisation and increasing economic specialisation.

Confidence in the system provides for confidence in creation of new work and investment in innovation.

This should be considered when addressing concerns that arise over the contractual deals which are negotiated against application of “the system”. Just because contracts or deals are made which individuals feel do not provide for a fair commercial balance does not mean that the system against which the deals are negotiated, is at fault.

Are creative artists sufficiently rewarded/protected through their existing rights?

“Sufficient” is a subjective word which needs to be considered as such for the purposes of responding to this question.

However, there are three areas which it remains important for Government to address when considering application of copyright law in the digital age.

These are

- (a) addressing practical difficulties faced by rights owners in enforcing the rights of copyright recognised in law;
- (b) ensuring that the “boundaries” for application of copyright exceptions and limitations are properly understood and applied. The copyright framework must be able to distinguish the subsections of “the public” which might claim the benefits of copyright exceptions and limitations from “the public” who are potential “consumers” or licensed users of copyright works.
- (c) ensuring that fair compensation is both a legal and a practical issue

for providing payment and reward to rights owner, particularly when considering the application of any copyright exceptions or limitations within the scope of the “three step test”. Copyright exceptions and limitations should apply :-
in special cases;
which do not conflict with the normal exploitation of the work or the subject matter;
and
which do not unreasonably prejudice the legitimate interests of the right holder.

Q. Is our current system too complex, in particular in relation to the licensing of rights, rights clearance and copyright exceptions?

The question suggests recognition of the need for a degree of flexibility.

When copyright is applied to individual works or performances, the system is far from complex. There are only a limited number of restricted acts that underpin a vast range of licensing activities.

These licensing activities provide for generation of the 8.2% of UK GDP which the IPO paper recognises as the value of the UK creative industries.

However, a degree of complexity arises from the way in which copyright exceptions and limitations can be applied to different types of copyright work. This results from the way in which exceptions interact differently with what may be described as “normal exploitation” of different types of work and the extent to which exceptions might unreasonably prejudice the legitimate interests of individual rights owners.

If managed correctly, this is not a disadvantage. Indeed flexible interpretation of the wording used in Article 5 of the Copyright Directive for potential copyright exceptions and limitations has supported:-

- application to rapidly evolving technologies;
- reconciliation with experience under different Member States’ national laws;
- recognition of cultural differences and language differences of benefit to society; and
- lower legislative costs in terms of legal review against the above issues;

whilst also providing flexibility for courts to develop case law taking into account the above issues.

ERA responded in detail to the recent IPO consultation over possible changes to UK copyright exceptions and limitations in April 2008. A copy of the ERA submission is attached as Appendix 1. A subsequent letter of 28 June 2008 from ERA to Ed Quilty at the IPO is attached as Appendix 2.

In terms of application of the educational copyright exception which gave rise to the launch of ERA, we would reiterate the following principles which we believe must be recognised for any possible changes to the scope of section 35 and paragraph 6 of Schedule 2 to the Copyright, Designs and Patents Act 1988:-

(a) 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.

(b) The “use it or lose it” option for rights owners to license educational off-air recording broadcasts (introduced by the Copyright, Designs and Patents Act 1988) has proved effective in persuading rights owners to come together for administering specified rights.

(c) Limiting the scope of ERA licensing to use by or on behalf of “educational establishments” has helped to distinguish licensing through ERA (as opposed to more general “educational use” of material. However the actual definition of what constitutes an “educational establishment” for the purposes of s 174 CDPA is complex and needs review.

(d) In addressing the question of “educational uses” it is important to link any exceptions to activities by, or under the auspices of “educational establishments” (and not to allow extension 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).

(e) Use of copyright works for the purposes of
(i) illustration for teaching;
and
(ii) scientific research;
does not have the same implications for all types of work.

(f) The positive changes made by rights owners (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.

ERA and others have pushed for changes to the scope of section 35 and paragraph 2, Schedule 2 to the CDPA relevant within the UK to match the ERA Plus Licence launched back in 2007.

The importance of maintaining boundaries between the application of any exceptions linked to educational establishments on the one hand and private research and study on the other meant that ERA members were concerned about the Gowers recommendation to introduce a private copying exception for format shifting into law applicable in the UK, with no accompanying levies being applicable to compensate rights owners.

ERA raised its concerns in the response comprising Appendix 1 to this submission. The concerns remain.

In particular the remedy outlined by the IPO runs in danger of making what is legitimately a complex issue even less satisfactory for both rights owners and consumers.

From the rights owners’ perspective, any format shift exception must take into account the effect of both:-

- (a) the provisions of the three step test; and
- (b) Article 5(2) (b) of the EC Copyright Directive which provides that any “private copying” exceptions may apply ONLY
“in respect of reproductions on any medium made by a natural person
(i) for private use; and
(ii) for ends that are neither directly nor indirectly commercial
on the condition that the rights-holders receive fair compensation which takes into account the application or non-application of technological measures ... to the work or subject matter concerned”.

In trying to accommodate these conditions, the IPO Consultation Paper suggested that, by relying on (debatable) interpretation of recitals in the EC Copyright Directive, a “narrow” exception might mean that prejudice to rights owners is minimal, and therefore no obligation for payment (comprising fair compensation) may arise.

The conditions referred to in the Consultation apply to:-

- (a) format shifting for copies that people have legitimately purchased
- (b) when they keep the original; and
- (c) when they only use copies for their own private use.

Crucially the Consultation Paper also recognised that any exception would not permit any “private copy” to be given away or shared more widely (for example in a file sharing system or on the internet).

But coupling this with a further condition that private copies could not be retained if an individual was no longer in possession of original, did not seem conducive to encouraging legal transparency or an improved ability for rights owners to police use of their work.

Does the legal enforcement framework work in the digital age?

The development of digital technologies has provided new challenges to the licensing of, and enforcement of rights related to, copyright works.

The ability for rights owners to exercise secondary rights through collective licensing is an important part of the development of new licensing models.

In addition ERA welcomed recognition in the Gowers report of the need for a number of steps to be taken to help ensure that the ability of rights owners to enforce copyright and other intellectual property is both practical and proportionate,

In this context ERA welcomed the chance to respond to the IPO Gowers consultation – Taking Forward the Gowers Review of Intellectual Property – Penalties for Copyright Infringement.

The following extract from ERA’s submission highlights an outstanding concern over the alignment of penalties for online and physical copyright infringement.

*“The Gowers Review – Recommendation 36 proposed:
“Match penalties for online and physical copyright infringement by amending section 107 of the CDPA by 2008”.*

*The subsequent report “Creative Britain: New Talents for the New Economy” (published by DCMS, BERR and DIUS in February 2008) rightfully highlighted that
“Copyright infringement is a serious economic crime. It is important that the penalties available are proportionate to the harm caused to UK industries and that they act as an effective deterrent”.*

The disparity in the current maximum penalties available for online copyright offences and physical copyright infringement fails to take account of the commercial damage that flows from both types of offence.

*The Gowers Review proposed that the penalty for online commercial infringement (offence under s 107(2A)(a) CDPA) should be increased to ten years imprisonment (and/or unlimited fine) to bring parity with commercial dealing (but not showing of) pirated works.
It also proposed that the penalty for consumers infringing online (offence under s 107 (2A) (b) CDPA) to an extent that prejudicially affects the rights holder should also be extended to ten years (and/or unlimited fine), again to bring parity with physical infringement.*

The current Consultation, whilst welcome, only picks up on the commitment in the Creative Britain report “to consult on introducing exceptional statutory maxima (above £5,000) in the Magistrates’ Courts for offences of online and physical copyright infringement”.

In addition ERA welcomed the chance to respond to the recent BERR Consultation on legislative options relating to illicit peer-to-peer file sharing. The Digital Britain interim report

goes some way to following up the results of the consultation exercise.

However, concerns remain that the new proposals still leave the balance of convenience in addressing illicit file-sharing with infringers.

Whilst the government has confirmed its intention to require ISP's to collect anonymised information on serious repeat infringers, the onus on rights owners to secure a court order before personal details linked to such information can be disclosed means that the proposed changes may not deliver the economies which were hoped for: following Gowers original proposal to legislate if industry agreement of protocols for sharing of data between ISPs and rights-holders to remove and disbar users engaged in "piracy" did not prove operationally successful.

Q. Does the current copyright system provide the right incentives to sustain investment and support creativity?

Yes.

The negotiating process for the conclusion of International Copyright Treaties is usually long and arduous. However, the results generally provide for a framework which defines the restricted acts which dictate the rights that owners may authorise, whilst leaving valuable flexibility for the application of copyright exceptions and limitations linked to different types of copyright works (albeit within the constraints of the three step test).

Within the European Union flexible interpretation of the wording used in Article 5 of the Copyright Directive for potential copyright exceptions and limitations has supported:-
application to rapidly evolving technologies;
reconciliation with experience under different Member States' national laws;
recognition of cultural differences and language differences of benefit to society; and
lower legislative costs in terms of legal review against the above issues;

whilst also providing flexibility for courts to develop case law taking into account the above issues.

Is it true for both creative artists and commercial rights holders?

Yes the system provides the right incentives. However, there is a danger that rights of copyright are confused with rights granted under contract, to the point that the terms of a contractual deal are seem to be a "fault" of the copyright system.

Education and awareness of the options that copyright ownership affords all creators, is an important challenge for the future.

The recent European Commission Green Paper on Copyright in the Knowledge Economy ask for views on whether a new copyright exception might be considered for what was defined as "user-generated content".

The Green Paper picked up on a definition of "user created content" taken from an OECD Study². This was "content made publicly available over the Internet, which reflects a certain amount of creative effort, and which is created outside of professional routines and practices".

The distinction that the definition appears to draw between "professional" and "amateur" ,(or "creative artists" and "commercial interests") fails to recognise the fundamental purpose of copyright. This is to provide recognition for intellectual property.

² Participative Web and user-Created Content OEC 2007 p9

The interests of creativity and cultural diversity within the UK creative industries will not be served by copyright law making arbitrary assumptions over the value of a new work before it has been created.

All creators of copyright works should be entitled to protection. How creators choose to use or license their own works should help to support innovation and diversity for the benefit of society.

Is it true for physical and online exploitation?

Yes. New licensing models are being developed under the existing copyright framework to cover online exploitation.

ERA licences have evolved to recognise increased online access for students within educational establishments.

Section 35 (1A) Copyright, Designs and Patents Act 1988, introduced by the Copyright and Related Rights Regulations 2003³ is a good example of this.

This extended the previous “use it or lose it” provisions of section 35 to apply to off-air educational recordings being 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 situated outside the premises of that establishment.

In this context, the “use it or lose it” option for rights owners to license educational off-air recording broadcasts (introduced by the Copyright, Designs and Patents Act 1988) continued to prove effective in persuading rights owners to come together for administering specified rights.

Further developments have been under consideration since Gowers made the recommendation to further amend section 35 to cover “distance learning and interactive whiteboards”.

In this context ERA members have asked the IPO to consider a possible enhancement of value for ERA Licences in the future. Details are included in the letter of 26 June 2008 included as Appendix 2 to this submission.

Are those who gain value from content paying for it (on fair and reasonable terms)?

This question needs to be considered in the light of concerns raised by rights owners over the possible introduction of a “private copying” format shift exception into UK law without appropriate back up provisions to ensure that fair compensation is paid to rights owners.

Consideration must be given to identifiable entities who do gain value from content in the new delivery chains established within the world of electronic transmissions (and re-transmissions).

In this context the issue of illicit peer-to-peer file sharing is an on-going concern.

Work is needed to show that the issue of “illicit” file sharing is not simply a “them and us” situation dividing creative industry from service providers or dividing creators and rights owners within different sectors of the creative industries. Illicit file sharing deprives rights owners of reward.

Illicit file sharing can happen to any rights owners and creators. Government has a role to play in ensuring that its creative citizens are aware of, and protected from this abuse.

³ Copyright and Related Rights Regulations 2003 – S.I. 2003/2498 regs 3 and 12(1) (b)

What action, if any, is needed to address issues related to authentication?

In earlier submissions ERA has stressed the importance of distinguishing the role and functions of “technical protection measures” from the role and functions of “rights management information systems” when looking at the effect of application of Digital Rights Management.

In raising the issue of “authentication” the role of rights management information systems must be distinguished from debates over authentication as a form of hurdle, or registration barrier, before copyright is recognised.

Article 5(2) of the Berne Convention makes it clear that the enjoyment and the exercise of authors rights is not to be the subject of any formality (such as registration).

Mandating and licensing rights as an option for the exercise of rights is a different matter.

However, introducing registration requirements for the recognition of rights in the first instance would discriminate against the new creators and innovators who are often put forward as the reason to review current copyright rules.

In considering the rights of creative artists and other rights holders, is there a case for differentiation?

If so, how might we avoid introducing a further complication in an already complicated world?

Long term support for the creative industries, and the promotion of innovation and investment in creativity, will be best served by preserving a strong copyright framework which applies to anyone who creates new work.

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Taking Forward the Gowers Review of Intellectual Property

Proposed Changes to Copyright Exceptions

April 2008

**Response from The
Educational Recording Agency Limited**

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Taking Forward the Gowers Review of Intellectual Property

Proposed changes to copyright exceptions

Response from The Educational Recording Agency Limited

Introduction

The Educational Recording Agency Limited (ERA) is a copyright collecting society. It was set up under the laws of England and Wales in 1989 with a view to operating a copyright licensing scheme for non-commercial educational use of copyright protected material.

Uniquely serving the UK education sector, ERA is one of a range of collecting societies which helps copyright owners and performers derive an income from the licensed use of their works.

However the range of the repertoire represented by ERA is uniquely broad when considered against the types of copyright work and performances involved in the production and broadcasts of television and radio programmes¹.

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 (apart from Open University programmes which are covered by a separate certified licensing scheme).

Only "educational establishments" as defined by the Secretary of State under the Copyright, Designs and Patents Act 1988 (as amended) and ensuing Statutory Instruments, are able to take out an ERA licence.

Extension to educational exception to include distance learning

Recommendation 2

1. What impact would the expansion of the educational exceptions have? What costs or benefits would accrue to right holders and users of copyright?

¹ At present ERA has 16 members each representing a very significant copyright repertoire. They are:

Association De Geston 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).

The type of copyright work, and the most likely audience for its appreciation, must be taken into account to assess the impact of any expansion of educational exceptions.

Costs and benefits must be considered on the basis that permitted educational exceptions apply only to non-commercial use.

Article 5.2 of the EC Copyright Directive² recognises that “Member States may provide for exceptions and limitations to the reproduction right ... (c) in respect of specific acts of reproduction made by publicly accessible educational establishments .. which are not for direct or indirect economic or commercial advantage”.

Limiting any exception to use which is not for direct or indirect economic or commercial advantage is key, and must continue to be recognised under any changes to the laws applicable within the United Kingdom.

However, interpretation of this provision would be simpler if it was easy to identify when an educational establishment was acting in ways that did not involve direct or indirect economic or commercial advantage.

Commercial pressures on those responsible for running educational establishments make this increasingly complex.

One way to help identify this “non-commercial activity” is to distinguish the copyright exceptions that are linked to more core curricular educational activities when assessing how application of educational copyright exceptions, and licensing schemes linked to them, operate in practice. The certified licensing scheme operated by ERA under the existing provisions of section 35 and paragraph 6 of Schedule 2 CDPA³ is good example⁴.

In addition to retaining the non-commercial aspect of use falling within any exception, it is important to assess how the use affects the commercial licensing opportunities that exist for different types of copyright works.

Copyright works include:-

- (a) works which have a commercial existence and use entirely independent of use by or within any form of educational establishment;
- (b) works which are created for people working in, or connected to, education, where use within an educational establishment is likely to be the main area through which the creators of the work can charge for the use of their material, or exploit the material in any realistic commercial form;
- (c) works which are created by people working in or connected to education; and

² Directive of the European Parliament and the Council of the European Union of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (2001/29/EC)

³ CDPA – Copyright, Designs and Patents Act 1988 (as amended)

⁴ See 2007 and 2008 Statutory Instruments set out in Annex 1.

- (d) works which have a commercial existence that is enhanced as a result of the educational nature of the work or the context within which the work is used.

The above distinctions are important when considering the impact of any educational exception against the Three Step Test.

Changes to the scope of sections 35 and 36 will have differing impacts on the “normal exploitation” of the different types of work described above.

It is therefore important that any extensions reflect the careful balance recognised within International Treaties between the rights of copyright owners and facilitating access to works for the purposes of education and teaching.

This balance reflects Article 10 of the WIPO Copyright Treaty 1996⁵. It also recognises that similar provision is made within Article 16 of the WIPO Performances and Phonograms Treaty⁶. These provisions were in turn reflected in the provisions relating to permitted copyright exceptions and limitations set out in Article 5 of EC Directive 2001/21 concerning harmonisation of certain aspects of copyright and related rights in the information society⁷.

As under the WIPO Treaties, the provisions of Article 5(5) of the EC Copyright Directive must be taken into account, namely:-

“The exceptions and limitations provided for in paragraphs 1,2,3 and 4 (of Article 5) shall only be applied in special cases which do not conflict with the normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder”.

It is helpful to note recognition in the consultation paper that, if the impact of any changes does not satisfy each of the three parts of the three step test, the changes should be rejected.

If changes can be shown to satisfy each of the three parts of the three step test, only then can the costs or benefits to rights holders and users of copyright be properly considered.

It is on this basis that ERA puts forward suggestions for changing the scope of section 35 CPDA in this response.

Costs or benefits to right holders if the changes satisfy the Three Step Test.

Extension of the exceptions under sections 35 and 36 CDPA may result in potential costs for rights owners, to the extent that they will be required to assert rights which currently fall within the scope of rights for which owners are entitled to grant or withhold licences to users.

⁵ WIPO Copyright Treaty 1996 – Article 10 (1)

Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights of authors of literary and artistic works under this treaty **in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author**”.

⁶ WIPO Performances and Phonograms Treaty 1996 – Article 16(1)

Contracting Parties may, in their national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of performers and producers of phonograms as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works.

⁷ See Annex 2

However, in the case of ERA, application of narrow exceptions against the provisions of section 35 and paragraph 6 Schedule 2 CDPA has encouraged collecting societies and representatives of rights owners with considerable individual repertoires to co-operate and participate in ERA, on the understanding that licences granted by ERA work in a complimentary way to other licensing activities linked to the rights that they represent.

ERA members are therefore able to take account of their own existing infrastructure to assist in the receipt of distributions from ERA, whilst ensuring that the funds received from ERA are allocated and used in the interests of their own members/individual rights owners and performers.

Licensing efficiencies

Under its certified licence scheme, ERA provides for the licensing of around 36,500 educational establishments in England, Scotland, Wales and Northern Ireland, each year.

To reduce bureaucracy, ERA has developed a system of blanket licensing for groups of educational establishments whenever representative bodies are willing to take on the responsibility for collective licensing.

This has been particularly true for the 36,000 primary and secondary schools in England and Wales whose licensing requirements cover around 4.5 million primary school students⁸ and 3.4 million secondary school students⁹ each year.

To cover this wide range of licensing, ERA issued blanket licences to 170 of the 174 Local Education Authorities in England and Wales in 2007. These licences covered all the primary and secondary schools within a licensed LEA area. LEA's were given a significant discount against full licence fee rates to recognise the bureaucratic savings made as a result of the blanket licence arrangements.

The remaining 4 LEA's elected to require schools in their area to take our individual ERA Licences. As a result of this ERA issued 60 individual licences to state schools in Lambeth, 58 licences to individual state schools in Harringey, 158 licences to individual state schools in Liverpool and 32 licences to individual state schools in Reading. Schools licensed individually were required to pay licence fees calculated at the full tariff rate.

32 blanket licences were issued to COSLA covering all primary and secondary schools in Scotland.

One blanket licence was issued to the Association of Education and Library Boards covering all primary and secondary schools in Northern Ireland.

In addition, last year ERA issued:

166 licences to Universities/Colleges of Higher Education;
441 licences to colleges of Further Education;
1,322 licences to Independent Schools;
208 licences to language and nursing colleges; and
186 licences to cover other educational establishments, including independent universities, the Offenders Learning and Skills unit, the Fire Service and Police Training Colleges.

⁸ 4,480,220 primary students

⁹ 3,479,673 secondary students

The total number of licences (including blanket licences) operated by ERA last year was below 3,000, but these provided the benefits of copyright licenses for several million individuals across all aspects of education within the United Kingdom.

ERA's work with Local Education Authorities has been important in:-

- (a) keeping the bureaucracy for licensing all schools within an LEA to a minimum; whilst
- (b) enabling LEA's to secure a discount against the fees that would be payable if schools within their area were required to take out individual licences.

It is to be hoped that this cooperative work with LEA's will be encouraged and permitted to continue under funding regulations for schools, should licensing opportunities against the background of section 35 and paragraph 6 of Schedule 2 be extended¹⁰.

Costs or benefits to users of copyright if the changes satisfy the Three Step Test.

Since responding to the initial consultation within the Gowers Review¹¹ ERA has consulted with its licensees and launched an "add on" licence available for educational establishments who wish to allow licensed ERA Recordings to be made available to authorised students when they are not physically within an educational establishment. This licence is called the ERA Plus Licence. Details are set out in Annex 4.

If the rights licensed under the ERA Plus Licence were brought within the scope of section 35 CDPA (and paragraph 6 Schedule 2), the possibilities for merging the ERA and the ERA Plus licence would be increased. Bureaucratic savings would result for licensees who chose to take out both types of licence.

SECTION 35 (RECORDING BY EDUCATIONAL ESTABLISHMENTS OF BROADCASTS)

2. Should section 35 be extended to allow educational establishments to record on-demand communications in addition to traditional broadcasts?

No.

In general, if services are available on-demand, then it should be possible for the material to be accessed and viewed or listened to in an educational establishment "on-demand".

As such, access may be available without the need for the establishment to make recordings and act as an intermediary between the service provider and the users (albeit in an educational context).

Some "on-demand services" are "made available" to the public (and to educational establishments) on terms and conditions that permit users both to access the material electronically transmitted by the service and record/reproduce the material for further use.

¹⁰ The School Finance (England) Regulations (SI 2006 No 468) (formerly permitted under SI 2004 No 3131 - The LEA Budget, Schools Budget and Individual Schools Budget (England) Regulations 2004) recognise under Schedule 2 clause 29 that one of the classes of expenditure that can be deducted from the Schools Budget of a Local Education Authority is "Expenditure on licence fees or subscriptions paid on behalf of schools".

¹¹ ERA response to Gowers Review of Intellectual Property is attached as Annex 3

In these cases, any exception under section 35 would be unnecessary, to the extent that the terms and conditions for accessing the on-demand service already license or permit the activities that might otherwise have been relevant to the exception.

However, when the licence terms do not permit recording or further use, the balance of interests for rights owners is very different.

It is a fundamental part of the value of the “making available right” for copyright owners that they are able to license the rights on terms and conditions which dictate the ways in which material accessed may be used. This right is absolutely central to the way in which choice and diversity are being provided through new online business models.

Because of this, if a rights owner chooses to apply terms and conditions that allow educational establishments to access material for viewing, but not recording, it is hard to see how making educational establishments the beneficiary of an exception that allows them to “override” the terms and conditions on which the on demand service is provided, will not “unreasonably prejudice the legitimate interests of the rights holder”.

The Gowers Review agreed with the view presented by the Open University in its submission that educational exceptions should be “defined by intent, category of use and activity and not by media or location”. But it also recognised that any exceptions have to comply with the Three Step Test.

The provision of an “on-demand service” involves the “communication to the public” of copyright works. In particular, when individuals access material provided through an electronically transmitted service “on-demand” the “communication to the public right” involved will be “making available to the public” works by electronic transmission in such a way that members of the public may access them from a place and at a time individually chosen by them” (as recognised by section 20(2) (b) CDPA and Article 3 EC Copyright Directive).

This response has previously picked up on the importance of curricular educational use and the non-commercial nature of use being fundamental to the application of educational copyright exceptions involving the reproduction right. To that extent the “intent” and “activity” elements in the Open University statement seem uncontroversial.

But the Consultation Paper also recognised how any educational copyright exception must comply with the Three Step Test and apply only in special cases, which do not conflict with the normal exploitation of the work or subject matter and which do not unreasonably prejudice the legitimate interests of the rights holder.

It is hard to see how the owners of copyright works that are licensed to be “made available on-demand” within a specified service will not be prejudiced if, rather than being required to access material on demand in line with terms and conditions applied for access to the service, educational establishments can override these terms and reproduce and store the material for subsequent use.

Section 46 of the consultation paper recognises:-

“Section 35 is currently defined by media and is limited to traditional style “broadcasts. It does not apply to the newer and increasingly popular web-based communication technologies.”

It is important to note that, whilst section 35 applies to the recording broadcasts off-air, the subsequent use permitted under section 35 covers both reproduction and non-commercial communication to the public of the recordings within the premises of an educational establishment.

In other words, section 35 (and certified licence schemes operating as a result of it) do apply to the use of new technologies by educational establishments in so far recordings of broadcasts are “communicated to the public by a person situated within the premises of an educational establishment provided that the communication cannot be received outside the premises of the establishments”.

Section 46 of the Consultation Paper then goes on to state:-

“Indications are that traditional broadcasters and others are increasingly making their content available on the Internet as a major distribution platform.”

This is accepted, but it is submitted that such activities are in fact increasing the range of materials that are available for use in an educational context, whilst also allowing rights owners to develop new business models by shaping “on-demand” services to suit the needs of interested customers.

The ERA members have given particularly careful consideration to the way in which any ERA Licence might enable educational establishments who hold an ERA licence but who “miss” recording a broadcast off-air to have access to a recording for non-commercial educational purposes.

Some have suggested that, where programmes are made available on demand via “Free catch-up TV services” within a few days of the original broadcast (such as programmes made available through the BBC iPlayer or Channel 4’s free video on demand services) educational establishments should be permitted to circumvent the DRM terms that apply to access of these services for the purposes of retaining copies for educational use.

However, the commercial impact that such arrangements would have on the provision of services to users other than educational establishments, and the increased threats from illegal use mean that rights holders believe that such circumvention would “unreasonably prejudice the legitimate interests of rights holders” and therefore fail the Three Step Test.

Nevertheless ERA members have also worked to establish voluntary arrangements within the scope of the ERA Licence which it is believed enable educational establishments to access recordings of broadcasts in most cases where they “miss” making an off-air recording themselves.

The voluntary arrangements flow from the provisions of clause 9(c) of the Schedule to the ERA Licence¹².

These enable off-air recordings of broadcasts to be made “on behalf of an educational establishment ... (c) at the premises of a third party authorised by the Licensee to make recordings or copies on behalf of the Licensee under written contractual terms and conditions which prevent the retention or use of any recordings or copies by that third party or other third party unless ERA shall have expressly agreed that a specific third party may retain any recordings or copies for subsequent use only by authorised Licensees of ERA in accordance with the provisions of the Licensing Scheme”.

As a result of this, ERA has entered into agreements with a number of “authorised third parties” (including the British Universities Video Council) under which copies of off-air recordings may be supplied to ERA Licensees on a non-commercial basis.

ERA members are happy to keep these voluntary arrangements under review to encourage the effective use of licensed off-air recording rights linked to broadcasts.

Subject to this, unlike debate over the possible “format shift” exception, excluding “on demand” services from the scope of section 35 is particularly important for rights owners because of potential application of section 296ZE and Schedule 5A CDPA to services relevant to the exceptions.

Paragraph 79 of the Consultation Paper recognises :-

“If changes are made to sections 35 and 36 it is proposed that the existing remedy (which applies where technological protection measures prevent the acts permitted by these sections) should also apply to the amended section 35 and 36”.

This appears to provide for the possibility that new subscription on-line services targeted specifically at the educational community and provided “on-demand” to consumers, could be made economically unviable if brought within the scope of any extended section 35.

If brought within section 35, the following scenario could then apply :-

- (a) A broadcaster or publisher invests £100,000 to launch new subscription service to support a specialist training course, intending to recoup investment from subscriptions.
- (b) The new service is launched and made available on-demand to subscribers.
- (c) Educational establishments want to make the course available to their students but claim the subscription DRM prevents them accessing the on demand service for recording and making available under a section 35 exception.

¹² The Copyright (Certification of Licensing Scheme for Educational Recording of Broadcasts) (Educational Recording Agency Limited) Order 2007 – Schedule – clause 9 (c).

(d) Educational establishments make a complaint to the Secretary of State under section 296ZE, and argue that the exception should allow them to circumvent the subscription DRM.

Clearly such steps would prevent the service provider from effectively collecting legitimate subscriptions to their service. As such, the actions of any complainants under section 296ZE would both “conflict with the normal exploitation” of works included in the subscription on-demand service and “unreasonably prejudice the rights holders” as a result.

In summary, ERA believes that :-

(a) the rapid growth in the number of broadcast radio and television services available in the UK under licence from Ofcom provides a vast array of choice in the broadcast material that may already be recorded off-air from broadcasts. In May 2007 Ofcom reported¹³ that 891 television broadcast licences and 79 radio broadcasting licences were in existence.

(b) the voluntary arrangements that ERA has in place to allow licensees to access non-commercial “back up “ off-air recordings of broadcasts should reduce any demand from licensees who wish to keep copies of material accessed through Free Catch up TV on-demand services over and above the extent permitted by the terms and conditions (DRM) applicable to that service.

(c) Permitting educational establishments to circumvent DRM applied to on-demand services would unreasonably prejudice the legitimate interests of rights holders, as they look to license the making available right in their works in ways that will provide choice and diversity of service in the world of electronic communications.

3. If so, should the recording of an on-demand service be permitted only where the work in question was subject to an original broadcast? Would this restriction be practical?

We have outlined in answer to question 2 why we believe it would not be right to extend the scope of section 35 to cover the recording of on-demand services.

We have also outlined how the ERA voluntary “third party” arrangements are intended to help ensure that ERA Licensees are able to access an off-air recording under their licence, in circumstances when they have overlooked recording the broadcast itself.

Over and above this, we do not believe that permitting recording of works included in an on-demand service only when the works have also been the subject of an original broadcast would be practical. Instead it is likely to be harmful to rights owners and confusing and bureaucratic for educational establishments.

¹³ http://www.ofcom.org.uk/tv/ifi/tv_licensing/ and http://www.ofcom.org.uk/research/cm/cm06/cm06_print/radio.pdf

The right to authorise the broadcast of a work is a separate right from the right to authorise making available on demand. The effect of secondary use of a broadcast (and therefore the way in which the Three Step Test can be applied for linking copyright exceptions to the act of broadcasting) is different to secondary use involving circumvention of the terms and conditions and DRM applied for access to on-demand services. When and how a work was broadcast before being made available through a subsequent transmission in an on-demand service “eligible” for recording with the scope of section 35, would be extremely difficult and cumbersome to police.

This is particularly true when the number of on-demand services that are made available in ways which permit recording or reproduction in secondary ways within the “licence” terms and conditions applicable to the service, are taken into account.

Further concerns arise because the range of services that might fall within the description of an “on-demand service” is extremely broad. The IPO suggests the following definition for “on-demand transmission” in Annex D of the Consultation Paper :-

“A transmission which can be accessed as required and at a time determined by the consumer”.

However, this wording does not define the nature of “the transmission” for copyright purposes.

As section 35 stands, it is clear that a “transmission” has to be a “broadcast” to attract the benefit of the exception. This in turn means that the transmission has to be a “broadcast” as the expression is defined in section 6 Copyright, Designs and Patents Act 1988¹⁴.

This has in turn linked the section 35 exception relating to the “reproduction right” to recording of “transmissions” that amounted to broadcasts only.

The exception in section 35 relating to works included in the “broadcast” could therefore all be related to this for the purposes of interpreting Article 2 and Article 5.2 of the Copyright Directive.

If “transmissions” which are not “broadcasts” for the purposes of section 6 CDPA are to be made relevant to section 35 (1) it is submitted that they will have to be clearly defined as another subset of “electronic transmissions” which amount to “communication to the public” for the purposes of section 20(2) CDPA.

¹⁴ S6 “broadcast” means an electronic transmission of visual images sounds or information which

- (a) is transmitted for simultaneous reception by members of the public and is capable of being lawfully received by them, or
- (b) is transmitted as a time determined solely by the person making the transmission for presentation to members of the public,

and which is not excepted by section (1A); and references to broadcasting shall be construed accordingly.

(1A) Excepted from the definition of “broadcast” is any internet transmission unless it is

- (a) a transmission taking place simultaneously on the internet and by other means;
- (b) a concurrent transmission of a live event, or
- (c) a transmission of recorded moving images or sounds forming part of a service offered by the person responsible for making the transmission, being a service in which programmes are transmitted at scheduled times determined by the broadcaster”.

Section 20(2) provides that “References to communication to the public are to communication to the public by electronic transmission, and in relation to a work include:

- (a) the broadcasting of the work;
- (b) the making available to the public of a work by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them.

For the reasons previously outlined, it is submitted that seeking to apply section 35(1) to all “communications to the public” which do not amount to “broadcasts” is far too broad a definition to be able to reconcile with application of the Three Step Test.

Likewise the suggestion that the recording of an on-demand transmission might only be permitted where the work in question was the subject of an original broadcast raises practical questions of defining when a relevant “broadcast” had taken place, which it is believed would be both impractical to police and impossible to reconcile with the scope of permitted exceptions and limitations within the provisions of Articles 5.2 and 5.3 Copyright Directive.

SECURE ENVIRONMENTS

4. Do you agree that access should be subject to security measures, such as the requirement to enter a secure password in order to access a recording? What other security measures might be appropriate?

Yes, access should be subject to security measures.

Security measures are needed to ensure that access is limited to users authorised by the educational establishments within the scope of licence terms (or in default of licences being unavailable within the scope of section 35).

Password requirements are an obvious precaution, already in place and used by many educational establishments.

Overburdening educational establishments with licence terms that require them to incur costs specifically linked to copyright licence compliance could act as a deterrent to licence take up.

However, it may be that simple password protection systems could be easily open to abuse. Instead, linking the security arrangements necessary to identify licensed copyright users with other security arrangements that an educational establishment has to put in place in any event, to protect personal data of students or other legal requirements (such as protection of minors or Criminal Records checks), will provide for the development of pragmatic but reasonable levels of security.

Linking secure authentication to activities undertaken “by or with the authority of” a licensed educational establishment, will be important.

In addition, requiring that the authentication system operates “in a manner consistent with current best practice” will help ensure that developments in security protocols and software (such as Shibboleth used for “trust management”) which are picked up by sectors within the educational world, will actually also help to improve the security arrangements in place to support observance of copyright licences (because establishments will tend to find it economic for security systems to apply across all their activities – rather than applying security developments on a piecemeal basis).

5. (a) Who should be able to view recordings made by an educational establishment in a VLE?

Subject to appropriate security and authentication systems, only individuals who are connected to an educational establishment and who wish to view licensed ERA Recordings for the non-commercial educational purposes of the establishment should be able to view licensed off-air recordings for educational purposes. However these individuals should be permitted to do this via electronic transmission whether they are on the site of the educational establishment or elsewhere in the United Kingdom.

The way that “Authorised Users” have been defined in existing ERA and CLA licences can provide guidance to help define the scope of this audience.

The definition currently used in the ERA Plus licence provides that “Authorised Users” covers individuals who are (during the term of the licence) either enrolled to study at a licensed educational establishment or who are members of the academic, research or teaching staff at a licensed educational establishment (whether on a permanent temporary or contract basis) and who are authorised by an officer of a licensed educational establishment to access a “relevant network” by means of “secure authentication”.

The definition was prepared with a view to defining a group within the general public whose interests could be clearly linked to the non-commercial educational purposes of an educational establishment.

It was also thought important to distinguish when Authorised Users are acting in a capacity which is linked to an educational establishment and when they are not. This distinction is also significant when the activities of individuals undertaking “private study” or “research” are considered. It is important for rights owners and members of the public to understand when educational use of material may have the benefit of a licence granted to an educational establishment with which they are connected, and when use falls outside this scope.

In its response to the initial consultation issued by the Gowers Review of Intellectual Property¹⁵ ERA outlined how it was looking to launch a licence scheme outside the scope of section 35 (2) and paragraph 6(1B) for the first time. Since that time ERA has consulted with representatives of educational establishments and launched a new ERA Plus Licence¹⁶ in order to address the issue referred to as “The Problem” in the Evidence Base example set out on pages 44 and 45 of the latest consultation paper.

The ERA Plus Licence has been launched to enable educational establishments to permit “Authorised Users” to access licensed ERA Recordings whether they are on the premises of an educational establishment or at home or working elsewhere within the United Kingdom, to the full extent that ERA Recordings include works owned by or administered by ERA members.

This wider scope of the ERA Plus Licence supports educational establishments providing wider communication to the public of licensed ERA Recordings to Authorised Users reflecting increased use of online communication services by educational establishments.

However, as previously submitted by ERA, although an enormously broad range of rights are covered by the ERA Plus Licence, there is currently a risk that there may be some rights included in the broadcasts of programmes from which ERA off-air recordings are made, which have not been “cleared” for the uses envisaged under the ERA and the ERA Plus Licences.

¹⁵ See Annex 1

¹⁶ See Annex 4

Where section 35 (2) and paragraph 6 (1B) of Schedule 2 apply, ERA has been able to advise its licensees that they do not need to worry about any “missing” rights unless a separate certified scheme existed. In practice the only other section 35 certified scheme has been the scheme relevant to Open University programmes, which are easily identifiable.

ERA can give no such assurances as regards the “remote access” rights now being licensed in ERA members’ repertoire under the ERA Plus Licence. It remains true that, to the extent there are any “missing” rights relevant to the ERA Plus Licence, they are probably inextricably embedded in an unidentified number of the wide range of broadcast programmes potentially available for educational copying under the main ERA licences.

It is also likely that, if rights owners have chosen not to seek to assert their rights under a certified licence scheme linked to section 35 and paragraph 6 Schedule 2 CDPA for the purposes of the off-air recording activities of educational establishments and communication of the recordings within the establishments, they will be unlikely to seek to enforce their rights by picking up on the add-on communication now being facilitated through the ERA Plus Licence.

On the other hand, whilst the risks to licensees over the “missing rights” clearances are likely to be low, because of the broad spectrum of ERA representation, the risk is there.

The ERA Plus terms therefore currently have to place this risk with licensees. Risk such as this exists in virtually all areas where blanket licences from collecting societies are relied upon.

In the wider copyright licensing context the ERA Plus Licence has a significant value to licensees. ERA’s consultation with current licensees addressed this value in the light of broadband roll-out and increased use of on line and wireless technology in the education sector. As a result of this, the licence fees for the ERA Plus Licence set out in Annex 4 were announced. Since launch a considerable number of HE and FE educational establishments have taken out an ERA Plus Licence.

In addition, over 20 LEA’s in England and Wales have extended their blanket ERA licence arrangements to cover either all schools (both primary and secondary) in their area, or all secondary schools in their area.

The main reason for establishments not taking up an ERA Plus Licence immediately appears to be the lack of bandwidth availability for schools to stream very significant amounts of data to Authorised Users when off the site or campus of the school or HE or FE establishment.

ERA would therefore propose that, for the purposes of section 35 and paragraph 6 Schedule 2 CPDA, only “authorised users” defined by ERA Plus Licence scheme should be able to view off-air recordings made for educational purposes.

Such authorised users should be distinguished from the general public by ensuring that they are entitled to access the licensed off-air recordings available within a VLE through secure authentication.

Secure authentication should only be permitted for those who are:-

- (a) enrolled to study at the educational establishment; or
- (b) members of the academic, research or teaching staff of the educational establishment (whether on a permanent, temporary or contract basis;

and who are (in either case) authorised by an officer of the educational establishment to have access to the VLE by means of appropriate password and other appropriate secure authentication in a manner consistent with best practice for educational establishments.

Such best practice will include precautions to protect children and young persons from

inappropriate content or offensive material.

5.(b) Is the reference to “teachers and pupils at an educational establishment and other persons directly connected with the activities of the establishment” in section 34 sufficient or too widely cast?

Yes. Difficulties arise from use of the words “persons directly connected to **the activities** of the establishment”.

Not all activities within an educational establishment are of an “educational nature”.

It is important that licences linked to any licence scheme(s) operating under sections 35 and 36 can be related to the educational purposes of an educational establishment.

Reference to persons “directly connected with an educational establishment” may not recognise this important link with “educational purposes”. For example, it might be argued that parents or guardians of a pupil are “directly connected to an establishment”. However, to bring such persons within the scope of copyright exceptions covering the use of copyright material for educational purposes could hardly be called a “special case” for the purposes of the first of the tests under the Three Step Test.

It is therefore suggested that reference to “individuals who are either enrolled to study at an educational establishment (as defined) or who are members of the academic, research or teaching staff of the educational establishment and who are authorised by the educational establishment to have access to the benefit of the licence” would be a better definition providing for the relevant “educational” nexus.

6. What level of responsibility should an educational establishment have for maintaining the security of a password protected VLE?

As copyright licensees, educational establishments must take on responsibility for compliance with the licence terms.

That said, if the system acknowledged as applicable for “Secure Authentication” under copyright licences is also the system used to preserve personal data etc, it is submitted that the burden of ensuring compliance then falls against wider business and educational interests of an educational establishment. The burden of compliance is not then just “a copyright licence” issue.

These wider business interests will include precautions to ensure that children and young persons are protected against access to viewing inappropriate or offensive material.

The possible harm to children and young people if schools fail to put in place secure authentication systems against viewing inappropriate or offensive material within a school VLE will be an increasingly important business issue for schools.

The protection of personal data about pupils, students and staff within FE and HE establishments held within VLE’s under the control of the establishment will become increasingly important, reflecting increased use of distance learning and delivery of documents and course work online linked to assessments and examinations.

All these issues suggest that “Secure Authentication” systems will be a much larger issue for educational establishments than the extent to which they need to be applied for copyright licence compliance.

They do need to be applied for copyright licence compliance. However, in view of the wider issues involved, linking the copyright licence requirements to applying secure authentication “in a manner consistent with best practice” will hopefully mean that copyright licence compliance can be served without additional security costs being imposed on educational establishments.

7. How should onward communication beyond a secure environment be prevented?

Primarily, licence terms agreed by the educational establishment should govern restrictions on onward communication.

This should be supported by appropriate application of section 35(3) and paragraph 6(2) Schedule 2 CDPA (as amended) and by the use by educational establishments of geo id software when permitting authorised users to access VLE's.

(a) Section 35(3) and Paragraph 6(2) Schedule 2 CDPA

Section 35 (3) (and the corresponding provision in paragraph 6(2) Schedule 2) helpfully provide: “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”.

It is important that these provisions continue to underpin both the scope of certified licence schemes and any direct application of section 35 and paragraph 6 Schedule 2 to use not covered by a licence scheme.

However, if the scope of the section is broadened to facilitate the wider communication to the public envisaged by the ERA Plus Licence, the final paragraph both section 35 (3) and paragraph 6 (2) Schedule 2 will need amending to recognise that “dealt with” prohibited by the sections covers any communication to the public from within the premises of an educational establishment other than to “connected persons” (rather than to any person outside the premises of the establishment).

The definition of “connected persons” might then reflect that suggested for “authorised users” in answer to question 5 (a) above.

(b) ERA Licence terms

Licensees/ educational establishments will be expected to apply terms and conditions set out in ERA Licences to any authorised user accessing material. Clause 3 of the ERA Plus Licence (see Annex 4) expressly states that the Licence does not authorise any “Dealing” with licensed off-air recordings over and above rights granted by the Licence. In addition discussions with users led to the development of a list of agreed descriptions of what “Dealing” means in this context. These provisions are set out in paragraph 3.2 of the Schedule to the ERA Plus Licence.

It is hoped that terms and conditions reflecting the limits on the scope of the ERA and ERA Plus Licences will be clearly acknowledged and accepted by users as part of any access/authentication process.

(c) Application of geo id software

Geo id software is available to ensure that only individuals seeking online access from domain addresses registered within the UK can comprise “Authorised Users” for the purposes of ERA licences.

In its consultations with users, a number of universities have sought to argue that ERA licences should extend to cover access by students based outside the UK, but registered to undertake distance learning courses with the university.

ERA has not been able to agree to such access for a number of reasons. These include:-

- (a) ERA's mandates from its members have been linked to the territory to which section 35 and paragraph 6 Schedule 2 CDPA have had direct application.
- (b) The business and/or commercial nature of the way that universities market courses for overseas students who do not come to the UK for the courses on offer.
- (c) The local copyright jurisdictions which apply to students based in countries such as China and India where students may wish to access copyright information linked to educational courses.
- (d) The different ways in which copyright exceptions applicable to educational use and individuals using copyright works for the purposes of private study apply (or have been applied) in different territories of the world.

Additional Questions

If section 35 is extended, should corresponding provisions of the CDPA relating to performer rights be amended?

Having consulted with its members, all the current members of ERA would support any appropriate changes that are agreed to section 35 being matched with corresponding changes to paragraphs 6 (1) and 6(1A) Schedule 2 CDPA.

However, this anticipates that section 35 is only extended to cover the communication to the public of licensed ERA Recordings to the extent already envisaged under the ERA Plus Licence. This would enable licensed ERA Recordings to be communicated to students and teachers online within secure networks whether they were on the premises of their educational establishment, or at home or elsewhere in the United Kingdom.

Can the possible extension to the scope of section 35 and paragraph 6 Schedule 2 CDPA to cover the areas of communication to the public linked to the ERA Plus Licence be reconciled with the scope of exceptions permitted under Article 5 of the EC Copyright Directive?

The copyright exceptions and limitations which support the current ERA scheme must reflect the exceptions and limitations permitted:-

- (a) to the reproduction right in the cases described in Article 5 (2) of the Copyright Directive; and
- (b) to the reproduction right and the communication to the public and making available to the public rights in the cases described in Article 5 (3) of the Copyright Directive;

Section 35 takes advantage of Article 5 (2) (c) which permits copyright exceptions or limitations:-

“in respect of specific acts of reproduction made byeducational establishments which are not for direct or indirect economic or commercial advantage”.

In addition Article 5 (2) (e) permits copyright exceptions or limitations

“in respect of reproductions of broadcasts made by social institutions pursuing non-commercial purposes.....**on the condition that rights holders receive fair compensation**”.

In terms of communication to the public Article 5 (3) (a) permits exceptions and limitations covering:-

“use **for the sole purposes of** illustration for teachingas long as the source, including the author’s name is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purposes to be achieved”.

It is submitted that this last provision highlights the importance of any exception under section 35 and paragraph 6 Schedule 2 relating only to off-air recordings of broadcasts being communicated to authorised users as illustrative materials within “educational purposes” and not as the base for new (potentially commercial) course materials compiled, developed and promoted by educational establishments as a means of helping to attract students to undertake courses with a particular educational establishment.

SECTION 36 (REPROGRAPHIC COPYING BY EDUCATIONAL ESTABLISHMENTS OF PASSAGES FROM PUBLISHED WORKS)

8. Should limits be placed on the form of communication used by educational establishments to communicate extracts to distance learners?

Section 36 does not currently extend beyond applying exceptions to the “reproduction right” in published literary, dramatic or musical works.

When section 35 CDPA was amended by the Copyright and Related Rights Regulations 2003 to insert for the first time provisions to recognise works being “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 situated outside the premises of that establishment” – rights owners involved in licensing rights against the provisions of section 35 had to assess the way in which fair compensation was to be secured for licensing both “reproduction” rights and “communication to the public” rights.

The value of any communication to the public rights does need to be assessed separately from the value of the reproduction right for the purposes of applying the Three Step Test to any copyright exception involving the communication to the public right.

The experience gained in defining and limiting “communication to the public” so that communications cannot be received by persons situated outside the premises of an educational establishment linked to the provisions of section 35 and paragraph 6 Schedule 2 is important when considering how any similar provisions might operate for reprographic copies made within the provisions of section 36 CDPA.

We have already commented on the important restrictions that need to be in place to help with this when responding to question 4-7 above.

9. Should the expanded exception be limited to communication inside a VLE?

ERA believes that enshrining a definition of “VLE” or “Virtual Learning Environment” within the CPDA may be counterproductive. Any wording used may also become outdated due to future advances in digital file sharing technologies.

Instead, attention should be given to defining the “authorised persons” or users with whom an educational establishment is entitled to communicate “for the purposes of instruction” as envisaged by section 36.

Licences already offered by the CLA to educational establishments help to define “authorised users” in a way that supports use by or on behalf of an educational establishment for the purposes of instruction (both for use that would fall within the scope of the exception permitted by section 36 and the additional use covered by the terms of the CLA licence).

Such authorised users should be distinguished from the general public by ensuring that they are entitled to access any source of communication authorised by an educational establishment through secure authentication. The way that the CLA has developed a definition of “Secure Network” in its educational licences, provides helpful guidance.

The key elements of the definition are:-

- (a) there is a network, which may be a standalone network or a virtual network (within the Internet). Generally e-mail traffic on e.g. personal e-mail accounts is not permitted;
- (b) the network is only accessible to individuals who are approved by the licensee for access;
- (c) such individuals must authenticate their identity at the time of log on and periodically thereafter by the use of passwords;
- (d) such logon and authentication must be in accordance with best practice¹⁷; and
- (e) whose conduct is subject to regulation by the educational establishment.

As with section 35, it is suggested that secure authentication should only be permitted for those who are:-

- (a) enrolled to study at the educational establishment; or
- (b) members of the academic, research or teaching staff of the educational establishment (whether on a permanent, temporary or contract basis;

¹⁷ Requiring that the authentication system operates “in a manner consistent with current best practice” will help ensure that developments in security protocols and software such as Shibboleth used for “trust management” picked up by sectors within the educational world, will actually also help to improve the security arrangements in place to support observance of copyright licences (because establishments will tend to find it economic for security systems to apply across all their activities – rather than applying security developments on a piecemeal basis).

and who are (in either case) authorised by an officer of the educational establishment to have access to the material to be communicated by means of appropriate password and other appropriate secure authentication in a manner consistent with best practice for educational establishments.

Should communication by email outside a VLE be permitted?

10. Should communication by email outside a VLE be permitted?

Communication should only be permitted when made by or on behalf of an educational establishment to “authorised users” who request that the material is made available to them on demand within the geographic limits relevant to application of section 36.

SECURE ENVIRONMENTS

11. Do you agree that access should be subject to security measures, such as a requirement to enter a secure password in order to access the recording? What other security measures might be appropriate?

Yes. Access should be subject to security measures. Please see comments in answer to question 4 above.

12(a). Who should be able to access extracts made available by an educational establishment in a VLE?

Only authorised users connected to an educational establishment who are authorised by the establishment to access extracts for the purposes of instruction and through use of a Secure Network along the lines previously outlined, should be permitted access.

12(b). Is the reference to “teachers and pupils at an educational establishment and other persons directly connected with the activities of the establishment” in section 34 sufficient or too widely cast?

Yes. Difficulties arise from use of the words “persons directly connected to **the activities** of the establishment”.

Not all activities within an educational establishment are of an “educational nature”.

It is important that licences linked to any licence scheme(s) operating under sections 35 and 36 can be related to the educational purposes of an educational establishment.

Reference to persons “directly connected with an educational establishment” may not recognise this important link with “educational purposes”. For example, it might be argued that parents or guardians of a pupil are “directly connected to an establishment”. However, to bring such persons within the scope of copyright exceptions covering the use of copyright material for educational purposes could hardly be called a “special case” for the purposes of the first of the tests under the Three Step Test.

13. What level of responsibility should an educational establishment have for maintaining the security of a password protected VLE?

As copyright licensees, educational establishments must take on responsibility for compliance with the licence terms.

That said, if the system acknowledged as applicable for “Secure Authentication” under copyright licences is also the system used to preserve personal data etc, it is submitted that the burden of ensuring compliance then falls against the wider business and educational interests of an educational establishment. The burden of compliance is not then just “a copyright licence” issue.

These wider business interests will include precautions to ensure that children and young persons are protected against access to inappropriate or offensive material.

14. How should onward communication beyond a secure environment be prevented?

Primarily licence terms agreed by the educational establishment, should govern restrictions on onward transmission.

This should be supported :-

- (a) by appropriate application of section 36(5) CDPA¹⁸ and
- (b) by the use by educational establishments of geo id software when permitting authorised users to access “Secure Networks”.

As with possible changes to the scope of educational communication relevant to section 35, the final paragraph of section 36(5) will need amending to ensure that any communication to the public other than expressly permitted “educational communication” will still be treated as “dealing” and therefore outside the scope of section 36.

CLASSES OF WORK

15. Should section 36 be expanded to include classes of work other than short extracts from published literary, dramatic and musical works? If so, what classes of work should be included?

No. The suggestion that the introduction of interactive whiteboards in the classroom somehow makes the limits of section 36 no longer relevant, is a red herring. Section 35 already lays the ground for the use of off-air recordings of broadcasts of sound recordings and films to be communicated to students through the use of interactive whiteboards.

Many educational materials are now licensed with this express use in mind.

¹⁸ S 36 (5) currently provides “Were 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, offered or exposed for sale or hire or communicated to the public”.

Many more materials are now being made available in on-demand services which can also be received and viewed in the classroom directly.

Against this background, section 36 applies an exception to reprographic rights involving no more than one per cent of the relevant copyright works.

To try and apply such a percentage to artistic works would be impractical.

Section 35 already covers the off-air recording of broadcasts and all types of work included in the broadcast. As such, section 35 services educational establishments recording and using a library of recordings in the form of sound recordings and films for non-commercial educational purposes. The one per cent limit does not apply to use of off-air recordings of broadcasts.

16. What consequences would such an amendment have on rights holders?

The different genres of works previously referred to in this submission (some more targeted at educational markets than others) must be considered when addressing the consequences of applying section 36 to any additional types of copyright work.

The one per cent limit in section 36(2) is important to reflect the way that reprographic copying by educational establishments above this level would fail to comply with the Three Step Test (in that it would conflict with the normal exploitation of the work and unreasonably prejudice the legitimate interests of the rights owner through the loss of opportunity to sell or otherwise provide access to works for educational purposes).

An amendment to extend section 36 to artistic works would be impractical and impossible to police.

An amendment to extend section 36 to sound recordings and films and broadcasts is rendered unnecessary when the provision of sections 34 (2), 32 (2) and section 35 are taken into account.

Section 35 has previously been commented on.

Section 34 (2) already provides:-

“The playing or showing of a sound recording, film or broadcast before (an audience consisting of teachers and pupils) at an educational establishment for the purposes of instruction is not a playing or showing of a work in public for the purposes of infringement of copyright.

Further section 32 (2) already provides that:-

“Copyright in a sound recording, film or broadcast is not infringed by its being copied by making a film or film sound track in the course of instruction, or of the preparation for instruction, **in the making of films or film sound tracks**, provided that copying

(a) is done by a person giving or receiving instruction; and

(b) is accompanied by sufficient acknowledgement”.

It is important to bear in mind the many legitimate sources of films and sound recordings when considering the wish of educational establishments to reproduce clips of films or sound recordings reprographically in course packs.

When this is done, it is hard to see how an additional copyright exception to cover reproduction in course packs will not contravene the “non-commercial purpose” requirements of section 36.

An alternative would be for course packs to refer to the clips from sound recordings and films legitimately available for viewing under an ERA licence (with the educational establishment being responsible for communicating the chosen clips to authorised students on demand within the scope of the ERA licence).

17. What benefits would there be for educators?

If the issues raised in response to question 16 are taken into account, relevant benefits to educators would ensue, without detriment to rights owners.

18. If the exception is expanded to other works, what limits should be placed on the size of extracts? Would the application of existing limits to other works be desirable or practical?

For the reasons previously described it is not thought appropriate for section 36 to be expanded to cover additional works.

The application of the existing limits to artistic works would be impractical.

Expansion of section 36 to cover other works would create confusion and reduce transparency in the application of the other educational copyright exceptions that already apply to the use of films, sound recordings and broadcasts.

**FORMAT SHIFTING EXCEPTION
RECOMMENDATION 8**

19. What impact would the introduction of a format shifting exception have? What costs or benefits would accrue to right holders and users of copyright?

The Gowers Review appears to have accepted the widespread belief amongst consumers that private copying of works between devices that they own is permissible, of itself justifies the introduction of a new exception to copyright to make the law match the perception.

“We do not believe that the present statutory exemptions from infringement of copyright are providing clarity or confidence for users or for the creative industries, particularly in relation to home copying”.

However the suggested remedy runs in danger of making what is legitimately a complex issue even less satisfactory for both rights owners and consumers.

From the rights owners' perspective, any format shift exception must take into account the effect of both:-

- (a) the provisions of the Three Step Test; and
- (b) Article 5(2) (b) of the EC Copyright Directive which provides that any "private copying" exceptions may apply ONLY

"in respect of reproductions on any medium made by a natural person

- (i) for private use; and
- (ii) for ends that are neither directly nor indirectly commercial

on the condition that the rightsholders receive fair compensation which takes into account the application or non-application of technological measures ... to the work or subject matter concerned.

In trying to accommodate these conditions, the Consultation Paper suggests that, by relying on (debatable) interpretation of recitals in the EC Copyright Directive, a "narrow" exception might mean that prejudice to rights owners is minimal, and therefore no obligation for payment (comprising fair compensation) may arise.

The conditions referred to in the Consultation apply to :-

- (a) format shifting for copies that people have legitimately purchased
- (b) when they keep the original; and
- (c) when they only use the copies for their own private use.

Crucially the Consultation Paper also recognises that any exception would not permit any "private copy" to be given away or shared more widely (for example in a file sharing system or on the internet).

But coupling this with a further condition that private copies could not be retained if an individual was no longer in possession of original, is hardly conducive to encouraging legal transparency or an improved ability for rights owners to police use of their work.

The first impact for both rights owners and consumers is that, despite good intentions, any change is likely to make the legal situation more, rather than less, complex.

The second impact is that the exception mooted will be likely to provide perceived cover for illegal activity. For example, recent IPSOS data has shown that one of the main reasons for which people justify buying counterfeit DVDs or using home copied DVDs is that it is much cheaper than buying legitimate copies, alongside reasons indicating an lack of willingness to pay for content (particularly if other easy alternatives are available). This does not suggest that a format shift exception along the lines proposed would lead to increased respect for the law. Indeed, the

additional conditions necessary for any exception is to be introduced are likely to reduce, rather than increase, respect for the law.

A third impact is dependent upon the extent to which the UK government can rely upon its interpretation of a “narrow exception” for format shifting meaning that relevant “fair compensation” for rights owners is nil.

This raises a number of concerns about the level of economic evidence gathered by the Gowers Review as the likely effect of any new format shift exception, before making its recommendation for “clarification” of the law.

There is a real concern that a “gut feeling” about wanting to allow individuals to copy CDs onto their own MP3 Players without infringing copyright has been used to open up debate on copyright licensing structures that are in reality working well or evolving well for other parts of the creative industries.

This is particularly true for the film and online services which are increasingly using controlled access to works in an on line/streaming/download environment to support vital new business models.

SCOPE OF THE EXCEPTION

20. Do you agree with the conditions proposed above?

If an exception is to be introduced, the conditions outlined in the Consultation Paper are important to move towards reconciling any exception with the Three Step Test. But, as previously mentioned, the more widely any exception is made, the more the “no compensation necessary” approach of Gowers becomes unsustainable.

Even the conditions outlined do not in reality go far enough if licensing options to support any exception for any works are not more fully explored and tested.

21. Would a requirement to keep an original copy, or dispose of a format shifted copy if the original was given away or sold or otherwise disposed of, be practical or enforceable? What alternatives can you suggest to address the problem of original copies going back into circulation after copies have been made?

No. It is submitted that such a proposal would be very difficult to police or enforce in practice.

In addition, one of the main problems that led to the format shift proposal from Gowers would fail to be addressed. This concerns the (misplaced) view that when consumers “buy” a CD, they also “buy” all the material included on it.

If they feel that they “own” a CD and so they can “do what they like with it” under the current law – how are new rules that say, in return for a right to format shift, you are not now allowed to sell on your old CDs at a car boot sale, or return your watched DVD to Blockbuster in return for money off new purchases, actually going to change current perception?

The fact that CD buyers felt that they had been somehow deprived when they discovered that technical protection measures prevented them from making copies of the CD was (and remains) a real problem for the industry.

However, the value of transparent terms and conditions stating what a customer can and cannot do in terms of private copying is likely to build more long term trust and economic stability for the creative industries than an inevitably complex effort to introduce a private format shift exception into UK copyright law.

In terms of alternatives, licensing solutions should be able to operate against increased consumer awareness of the terms and conditions applied to the purchase of physical formats incorporating copyright works.

22. Should further conditions be imposed? If so, what are these?

The main additional condition is recognition of **the option** for rights owners (should they wish to do so) to secure fair compensation for the use of their work.

At the very least all the conditions applied to territories in which a private copying exception is recognised (whether or not supported by a system of blank tape levies) should be imposed.

These are

- Initial copy legitimately acquired

- Copying must be by a natural person

- For private/domestic purposes only

- For the purposes of format shifting between devices owned by the individual

- When the copying is not for direct or indirect commercial purpose

- All subsequent dealing is prohibited.

In addition it is important that the initial copy must be acquired in a physical format and not through electronic delivery or transmission of any kind.

23. Should the non-infringing acts differ depending on the class of work concerned?

Yes.

If the government continues to seek introduction of any format shift exception, the provisions should be limited and apply only to commercially released sound recordings when sold in recognised physical formats. (e.g.CD).

In such limited circumstances there are arguments that rights owners have agreed that they do not wish to apply Technical Protection Measures to the specified formats because they are willing to accept consumers undertaking a recognised degree of private copying (possibly subject to

recouping “fair compensation for such private copying through a use it or lose it licensing regime involving third parties who, in the absence of a licence, would be liable for secondary copyright infringement when private copying takes place).

CLASSES OF WORK

24. Should the proposed format shifting exception be limited to recorded music and film or should it also apply to other works? If so, which ones?

Whilst attempting to address “the CD issue” it appears that Gowers has equated the markets for the sale and distribution of print materials and films with those for the sale of commercial music sound recordings.

The way in which people watch films or read or refer to magazines and periodical publications is not the same as the way they wish to listen to music on a repeated basis (making use of different hardware to listen to their music in different places).

The Gowers Review appears to have produced no economic evidence to set out the extent to which illegal format shifting of films and other audiovisual material is taking place, or the level of activity which would be legalised by the introduction of a format shift exception for films or any other copyright works (over and above commercial music CDs).

The Option 1 question appears to have been unfairly drawn to assume that if a format shift exception were introduced for recorded music, the exception should also apply to film. This is not accepted.

This lack of economic assessment or evidence for the effect on films is particularly damaging in view of the assumption that somehow the exception proposed is so narrow that no obligation for payment to rights holders is relevant.

25. What impact would the introduction of a format shifting exception have on particular sectors of the creative industries?

We refer to our response to question 24 and the lack of evidence collected on the likely economic impact. It is not accepted that changing consumer patterns and use reflecting the availability of increasing numbers of DRM controlled online services in the audio, audiovisual and online publishing industries, have properly been taken into account for the purposes of applying the Three Step Test to any UK format shift exception beyond the CD to MP3 scenario.

One reason why government has consistently opposed the introduction of private copying levies under UK law has been the suggestion that rights owners would be unable to organise themselves to collect revenues in any sort of economically efficient way. ERA would submit that its breadth of membership shows how, in clearly defined circumstances, rights owners of all kinds can work together within straightforward licence arrangements. The ERA structure allows individual ERA members who are collecting societies or broadcasters dealing with wider rights for their own members to ensure that appropriate distributions are made or provided for the benefit of individual authors, producers and performers.

FORMAT

26. How many format shifts should be allowed?

The number of permitted private format shifts must remain a matter for rights owners to specify in licence terms and conditions.

27. Should the exception allow additional format shifts to take account of changing technology?

Trying to provide solutions to cover possible changes in technology in the future by permitting repeated format shifting is likely to be particularly counterproductive as rights owners and consumers start to look at the ways in which the relative value of the “reproduction right” and the “communication to the public” right in copyright material shifts as the restricted act through exercise of which major economic returns are made for rights owners.

The more “shifts” permitted within any exception, the more likelihood that the exceptions will fail to comply with the Three Step Test and the more significant the “fair compensation” will need to be to recompense rights owners for the damage that permitted copying causes to the legitimate interests of rights owners.

28. Should more than one copy be allowed to address the technological process of transferring content?

It is submitted that section 28A CDPA (covering the making of temporary copies) should be applied for the purposes of addressing the technological process of transferring content within the scope of any permitted format shift exception¹⁹.

The transient and incidental nature of copies made relevant to this provision will be important.

TIMING

29. Should the exception apply to works:

- a. published after the date the law changes;**
- b. purchased after the date the law changes; or**
- c. copied after the date the law changes?**
- d. What would be the practical implications of the above options?**
- e. Can you think of any alternatives?**

¹⁹ S28A CDPA – Copyright in a literary work. Other than a computer program or a database, or in a dramatic, musical or artistic work, the typographical arrangement of a published edition, a sound recording or a film, is not infringed by the making of a temporary copy which is transient or incidental, which is an essential part of a technological process and the sole purpose of which is to enable (b) a lawful use of the work; and which has no independent economic significance.

These questions and the difficulties acknowledged in the Consultation Paper do seem to suggest a “lose -v- lose” option for rights owners.

On the one hand it is argued that a new exception would be so “de minimis” that it would not affect the economic interests of rights owners and so no form of compensation should be forthcoming.

Alternatively it is suggested:-

- (a) that private copying may have an economic effect, but that it must be down to rights owners to anticipate the economic effect of the exception when setting original prices for the sale of materials; but
- (b) the changes to the law are about improving transparency and consumer understanding of what they can and cannot do in terms of private format shift copying.

Taking point (a), rights owners have to consider the point from which materials will include the relevant “compensatory charge”. In reality this is almost impossible because there is no way for rights owners to know in advance how much private format shift copying of a work will take place in the future.

Taking point (b), the Consultation Paper recognises that consumers will not remember when they purchased works that they wish to format shift “ and so allowing format shifting of works purchased after the format shift exception takes effect .. would cause confusion and would be impossible for right holders to enforce and so is likely to be viewed by consumers as nonsensical”.

ERA agrees with this last view, and therefore submits adoption of an option whereby any format shift exception applying to all works copied after the exception takes affect, leaves open the question of how rights owners are, in practice, to secure “fair compensation” for format shift copying that takes place.

EXTENDING THE EXCEPTION FOR COPYING FOR RESEARCH AND PRIVATE STUDY RECOMMENDATION 9

GENERAL QUESTIONS:

30. What impact would the expansion of the exception for research and private study have?

The suggested expansion of the fair dealing exceptions for research and private study, currently set out in section 29 CDPA, is primarily linked to films, sound recordings and broadcasts.

The Gowers Review backs its call for the expansion with a total of 4 lines of text :-

“Many users in the Call for Evidence outlined problems in using material for genuine academic purposes. Fair dealing for the purposes of non-commercial research and private study, permitted by section 29 of the CDPA excludes copying of sound recordings

or film, which is inconsistent and adds to the cost of negotiating rights for sound recordings or films”.

However, it is questionable whether the “problems” referred to are actually related to the use of sound recordings, films or broadcasts in all but very specialised circumstances.

31. What benefits can the expanded exception be expected to deliver?

It is important to remember that creating an exception does not of itself give access to material that might be copied under a “fair dealing exception”. Paragraph 134 of the Consultation Paper therefore erroneously refers to benefits allowing “researchers and students to access and make use of material”. Whether or not a person has access to material or not will depend upon availability through libraries, purchasing copies or other means.

In reality many people like to study sound recordings and films. However, with the existence of the time shift exception linked to broadcasts, and the falling prices of CDs and DVDs it is hard to see how a researcher or individual engaged in private study will not be able to access the relevant materials for repeated listening or viewing without infringing copyright. In addition ERA licences facilitate off-air recordings of radio and television broadcasts being made available to students for the purposes of private study.

32. What might be the impact of the expanded exception on rights holders and other affected parties?

The expanded exception will create a new area of possible confusion between the scope of “fair dealing” and other copyright exceptions that already facilitate the use of sound recordings, films and broadcasts in an educational and research context.

The Consultation Paper rightly acknowledges this concern and the importance of not blurring the boundaries between the “fair dealing” exceptions in section 29 and those in sections 35 and 36 (relating to educational establishments).

We refer to our comments about possible changes to the scope of section 35.

If an individual is connected to an educational establishment that holds an ERA (and where appropriate an Open University) Licence linked to section 35 and paragraph 6 Schedule 2 CDPA, the library of off-air recordings of broadcasts (whether sound recordings from radio broadcasts or films from television broadcasts) will be available to the individual for the purposes of private study.

Consequently it may be appropriate to link more formally the use of sound recordings, films and broadcasts for fair dealing in the context of private study with the scope of section 35 (and possibly section 36). If “authorised users” can gain access to the materials through licences issued by ERA it may be possible for the certified licence arrangements to be more specific about the “fair dealing” with sound recordings and films made off-air from broadcasts which is permitted for the purposes of individual private study.

33. Should the expanded exception cover both research and private study?

It is not thought that there is a need for expansion of the exceptions within section 29 to refer to sound recordings, films or broadcasts. However, it would be helpful to make the non-commercial conditions linked to each of “research” and “private study” more consistent.

At present section 29 .1 provides that relevant research must be “research for a non commercial purpose”.

Section 29.1(C) states that “fair dealing with a literary, dramatic, musical or artistic work for the purposes of private study does not infringe any copyright in the work”. It is then necessary to refer to section 178 CDPA for “private study” to be defined by the provision

“private study does not include any study which is directly or indirectly for a commercial purpose”.

34. Should all types of work be covered?

No.

Bearing in mind the way that recordings of broadcasts and sound recordings and films can be accessed by use of the section 70 time shift exception, purchase of physical copies, viewing or listening through an increasing array of on demand services, and used through such access and the availability of library services and licenses issues to educational establishments linked to section 35 CDPA, it is not thought helpful or necessary to extend the provisions of section 29 to apply to sound recordings, films or broadcasts.

35. Should the expanded exception cover all fields of study or just specific areas?

For compliance with the Three Step Test and Article 5 Copyright Directive, fields of study linked to any section 29 exceptions must only involve study that is neither directly nor indirectly commercial.

36. What action, if any, should be taken to address possible concerns about misuse of the expanded exception?

THE BENEFITS OF AN EXPANDED EXCEPTION

For response to questions 37-45 – please see 46 below.

37. Do researchers and students experience difficulties getting permission to make copies today?

38. Are areas of research and study not being pursued as a result of issues regarding permissions for film, sound recordings and broadcasts?

39. What benefits might an expanded exception deliver for researchers and students, for educational establishments and research institutions and for society overall?

SCOPE OF THE EXPANDED EXCEPTION: RESEARCH AND PRIVATE STUDY

40. Are there reasons why the expanded exception should be limited to 'research' rather than covering both research and private study?
41. If the expanded exception is limited to 'research' is it necessary to set a clear boundary between research and private study in order to avoid confusion?

SCOPE OF THE EXPANDED EXCEPTION: CLASSES OF WORKS TO BE COVERED

42. Are there reasons why the expanded exception should not apply to all works i.e. including films sound recordings and broadcasts?

SCOPE OF THE EXPANDED EXCEPTION: FIELDS OF STUDY

43. Is there a pressing need for action in particular areas of research or fields of study where current progress is being constrained by the current exception?
44. Should the expanded exception apply to all areas of research and study?

THE SCOPE FOR MISUSE OF THE EXPANDED EXCEPTION

45. Is it necessary to limit the scope of the expanded exception to prevent intentional misuse? If so how should it be limited? For example, would guidance on fair dealing be useful? Should there be a formal link to a course of study or research establishment?
46. Are steps needed to make the boundaries of the expanded exception clear to researchers and students so as to prevent misunderstanding? If so, what steps should be taken?

It is not thought necessary for an expanded exception to be introduced. However the general work to help promote a better understanding and appreciation of the value of copyright should address the role of fair dealing in order that students and researchers understand the scope of what is likely to fall within fair dealing provisions.

DIGITAL RIGHTS MANAGEMENT

47. Should a DRM workaround be provided for all copying under the expanded exception or should the workaround just be limited to scientific research in line with EU law requirements?

To date ERA is not aware of any "notice of complaint" having been served on the Secretary of State under section 296ZE CDPA.

This suggests that industry has been working well with user groups to ensure that voluntary measures are put in place to allow for recognised "permitted acts".

ERA has set out why it does not believe that an expanded exception under section 29 CDPA is necessary. Instead building on suggested links between the private study exception and licensing of educational establishments may provide for voluntary arrangements which remove the need for further legislative action.

In particular, by channelling the use of films and sound recordings through the authorisation and secure authentication systems in place for the copyright licences held by educational establishments, any DRM restrictions that might otherwise have triggered a “notice of complaint” under section 296ZE are likely to be avoided.

48. What impact might a broad DRM workaround have on rights holders?

Workaround should be avoided. It would undermine new business models and open up greater opportunities for unauthorised use. Voluntary measures within prescribed terms must be the preferred course.

49. If a narrower approach is adopted, is it necessary to adjust the current arrangements for literary and other works to ensure consistency in this area?

-

AMENDMENT OF LIBRARY PRIVILEGE EXCEPTIONS TO EXTEND PERMITTED ACTS FOR THE PURPOSES OF PRESERVATION RECOMMENDATIONS 10A AND 10B

50. What impact would the expansion of the exception for libraries and archives have? What costs or benefits would accrue to right holders and users of copyright?

Any changes should recognise the role of libraries and archives in preserving the material that they legitimately acquire through other sources.

CLASSES OF WORK

51. What are the consequences, for rights holders and beneficiaries, of extending section 42 to cover all classes of works?

NUMBER OF COPIES

52. Is it necessary to restrict the number of copies made for preservation purposes?

53. If so, why, and how many copies should be permitted?

SCOPE OF ORGANISATION COVERED

54. What would be the impact on rights holders if section 42 was extended to cover museums and galleries?

55. What types of museums and galleries should be included? What criteria should they meet to qualify?

CARICATURE, PARODY OR PASTICHE EXCEPTION

RECOMMENDATION 12

56. What impact would the introduction of an exception for parody have? What costs or benefits would accrue to right holders and users of copyright?

There does not appear to be any shortage of caricature, parody or pastiche within the UK creative industries. It therefore seems that there is little economic evidence of need for the UK to take advantage of the option open to it under Article 5(3) (k) EC Copyright Directive.

However, ERA acknowledges that its members have individual views on this issue and will be commenting in detail on questions 56 to 66 within individual submissions

FAIR DEALING

57. Could an unlimited exception undermine the interests of owners of copyright in the underlying work by allowing advertising or the endorsement of products which are contrary to their commercial interests?

See 56 above.

58. If so, would framing the exception as a 'fair dealing' exception address the problem adequately?

See 56 above.

ACKNOWLEDGEMENT

59. Should the exemption for parody include a requirement to acknowledge the underlying work and its author?

See 56 above.

DEFINITIONS

60. Is the ordinary meaning of the terms caricature, parody and pastiche sufficient?

See 56 above.

CLASSES OF WORK

61. Is there any reason for excluding particular classes of work from the exception?

See 56 above.

THE RIGHTS AFFECTED

- 62. Should the exception only apply to certain exclusive rights of a copyright owner or to all such rights? If the exemption is to be limited, how should it be limited and why?**

See 56 above.

WORK PUBLICLY AVAILABLE?

- 63. Should the exception explicitly state that it only applies where the underlying work has been made available to the public?**

See 56 above.

PARODY ONLY OF THE UNDERLYING WORK?

- 64. Should the exception only apply where the parody relates specifically to the underlying work?**

See 56 above.

MORAL RIGHTS

- 65. Is there any reason why section 79(4) should not be extended to exempt parodies from the right of attribution?**

See 56 above.

- 66. Is there any reason why section 84 should be amended to exempt parodies from the right of false attribution?**

See 56 above.

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APPENDIX 2 ERA Response © the Future – Developing a Copyright Agenda for the 21st Century

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26 June 2008

Edmund Quilty
Director
Copyright and IP Enforcement
Harmsworth House
13-15 Bouverie Street
London
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Confidential

Dear Ed

Taking Forward the Gowers Review of Intellectual Property

In its response to the recent IPO consultation over possible changes to the scope of UK copyright exceptions, ERA warned of the commercial damage to rights owners which would ensue if “educational establishments” were authorised to circumvent DRM applied to on demand services.

It is the view of ERA that circumvention of DRM applied to on demand services should be unnecessary, because the nature of an on-demand service is such that material is made available for accessing or viewing “on demand”.

However, it is accepted that :-

- (a) many educational establishments favour the use of their own libraries of tried and tested materials; and
- (b) some recordings may be recorded from materials made available on demand without DRM restrictions for private non commercial use in the future.

Background to “archive” use under ERA Licences

Over the years the “archive element” of ERA licensing has proved particularly attractive to licensees.

Once a teacher has found a useful recording of a broadcast programme, it appears that they tend to use the same recording again and again.

The ERA Licence covers both the making of new recordings of broadcasts and the educational use of recordings previously made under an ERA licence – whilst a Licensee continues to hold a current ERA Licence.

The fact that a school retains recordings of programmes that are popular with teachers, and wishes to continue to use these has therefore been a driving factor in the continued take up of ERA Licences.

ERA recognises that more and more on demand audio and audio-visual services are becoming available. Some of these already permit subscribers to download a copy for viewing at times set by the terms and conditions of the service.

Some of these on demand services are being specifically targeted at schools and other educational establishments.

However many more on demand services are more specifically targeted for use by individuals (rather than use within an educational establishment on a collective basis).

Possible enhancement of value for ERA Licences in the future

For material that is made available in an on demand service on terms that permit **individuals** to download and view/listen to the recording without time limit – it is likely that licence terms do not extend to cover any right for educational establishments to “communicate such recording to the public” when such communication is to Authorised Users within the ambit of an ERA and/or ERA Plus Licence.

ERA members are therefore considering ways in which such communication to the public might be brought within the scope of the ERA and the ERA Plus Licences.

It would therefore be helpful to discuss with IPO whether any such extension might also be mirrored by the provisions of section 35 and paragraph 6 Schedule 2 to the CDPA.

It is hoped that this new licensing based option might be introduced without raising DRM circumvention issues linked to programmes made available on demand with rights restrictions attached (Unrestricted on demand recordings).

New provisions might provide that, when recordings are made of Unrestricted on demand recordings by or on behalf of an educational establishment, then, to the extent that the educational establishment keeps the recording and subsequently communicates it to Authorised Users for educational purposes, the ERA Licence and/or section 35 and paragraph 6 Schedule 2 CDPA will cover such use.

One way of dealing with the issue might be to consider an amendment to sections 35 (1A) and paragraph 6(1A) Schedule 2 of the CDPA so that they provide something along the following lines:-

“Copyright is not infringed **either** where the recording of a broadcast or a copy of such a recording, whose making was, by virtue of subsection 1, not an infringement of copyright **or**

where the terms and conditions applied when a work is made available on demand to the public expressly permit a recording to be made for private and non commercial purposes and any such recording 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 situated outside the premises of that establishment save to the extent that the communication is

- (a) to Authorised Users connected with the establishment;
- (b) for the non commercial private study purposes of such Authorised Users; and
- (c) controlled by the educational establishment so that the identity and use by such Authorised user is known.

Sections 35(2) and paragraph 6(1B) would then continue to say that the above provisions would not apply if or to the extent that a certified licence scheme (such as ERA’s) was in place.

Such a change would then extend the scope of the ERA scheme to cover library educational use **of legitimate** on demand recordings.

In this respect some of the concerns raised in the Gowers Review linked to the future operation of section 35 may be addressed.

The issue also pre-empts some of the debate that is continuing within the European Commission over the right way to apply educational/teaching/ research and private study copyright exceptions and limitations within the EU.

The proposal should not reduce the commercial value of the on demand offering to the service provider (because the decision has already been made by the service provider (presumably with the consent of relevant content owners) to allow the material to be **recorded** for future reference). However, it would mean that secondary licence fees could be fairly and easily secured for “long tail” access to the recordings by educational establishments.

I would welcome the opportunity to meet and discuss in more detail, should you feel that this further development might be helpful in the context of responses already received to the recent IPO Consultation.

With best wishes

Andrew Yeates
General Counsel