



## Response from The Educational Recording Agency Limited to the Gowers Review of Intellectual Property – Call for Evidence

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 educational use of copyright protected material.

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

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.

### Introduction

ERA welcomed the commitment in the Labour Party manifesto to “modernise copyright and other intellectual property so that they are appropriate for the digital age”.

ERA also welcomes the opportunity to respond to the Gowers Review.

As a copyright collecting society, we would comment only on the following questions raised by the Review.

These are:-

- 1.What are your views on the current exceptions in copyright law?**
- 2. Could more be done to clarify the various copyright exceptions?**

**3. To what extent has technological change presented difficulties in use of copyright material in the field of education?**

**4. Is lack of trust in the (IP) system a barrier?**

**Finally we comment concerning the role of ERA as a collecting society which is mandated to administer rights in a way specifically applicable within the United Kingdom.**

## **Copyright exceptions in the field of education**

This submission will address the first 3 questions as a group.

ERA has worked closely with Local Education Authorities, universities and their representatives, and individual educational establishments since its inception. It exists solely to deliver educational copyright licences, but has brought together a uniquely wide range of rights owners to facilitate the granting of licences within a very specific field.

Our work has taken into account the careful balance recognised within International Treaties between the rights of copyright owners and access to works for the purposes of education and teaching.

This balance reflects Article 10 of the WIPO Copyright Treaty 1996<sup>1</sup>. It also recognises the similar provision is made within Article 16 of the WIPO Performances and Phonograms Treaty<sup>2</sup>. 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 society<sup>3</sup>.

As under the WIPO Treaties, ERA welcomed the provisions of Article 5(5) of the EC Copyright Directive which provided:

**“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”.**

ERA believes that this international framework for the recognition of copyright exceptions and limitations (**The Three Step Test**) remains effective for all exceptions and limitations for education and teaching within the digital environment.

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<sup>1</sup> 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”.**

<sup>2</sup> 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.

<sup>3</sup> See Appendix 1

However, the members of ERA believe that the way in which students and authorised members of educational establishments are now able to access information held by educational establishments on their behalf, warrants clarification of the two provisions within the Copyright, Designs and Patents Act 1988 (as amended) upon which the ERA certified licensing scheme now relies<sup>4</sup>.

## **Why is there a need for change?**

ERA discusses with its licensees the way in which they record broadcasts off-air so that programmes, or clips and extracts from programmes, can be used for educational purposes. In particular discussions have considered the ways in which ITC developments are enabling audio and audio visual material to be presented in new ways in an educational context. In 2004, the Department for Education and Skills published its Five Year Strategy for Children and Learners. This set out the challenges for education and skills and offered a vision of a system which better meets the needs and aspirations of learners.

**The vision encourages greater personal choice for learners so that resources are increasingly designed around the needs of the individual and available at a time and place which suits their needs.**

The deployment and use of information and communications technology (ICT) is seen as a crucial means of achieving progress towards this new goal of accessibility of resources.

Last year alone some £252 million was invested in ICT in primary and secondary schools.

Broadband roll-out to all schools is well advanced. Latest figures published by the DfES at the end of 2005 suggest that 83% of primary schools and 99% of secondary schools have broadband connections.

Alongside this the Government has recognised that access to educational material is an important element in promoting lifelong learning and opportunities for “extended schools” offering many opportunities to learn and develop beyond the formal school day.

**ERA has therefore been considering the ways in which its licensing scheme may be extended to enable students and teachers to access off-air recordings of broadcasts made by or for educational establishments for the non commercial educational purposes of such establishments, whether the students or teachers are physically on the premises of the educational establishment, or not.**

## **Steps taken by ERA to date.**

Since its establishment in 1989, ERA has grown to encompass a uniquely broad membership willing to mandate ERA to represent the copyright works relevant to licensing under section 35 and paragraph 6 of Schedule 2, Copyright, Designs and Patents Act 1988 (as amended).

The growth in membership of ERA has to a large extent been driven by the efficiency of ERA as a copyright licensing agent, and the copyright distributions that can be made through ERA in an area where individual licensing would prove much more costly and time consuming for rights owners and consumers.

However, the structure provided by section 35(2) and paragraph 6 (1B) Schedule 2, has helped simplify both the application and the administration of ERA licences by educational establishments of all kinds.

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<sup>4</sup> See section 35 and paragraph 6 Schedule 2 CPDA 1988 (copies in Appendix 2).

For the benefit of both its members and its licensees, ERA has always attempted to keep the bureaucracy involved in licensing to a minimum, and has supported the issue of blanket licences for schools within the remit of Local (Education) Authorities to help minimise bureaucracy.

Recognising issues touched upon in the DfES vision and the trends reported in the Becta Review 2005<sup>5</sup>, ERA has been considering offering educational establishments an add-on licence which falls outside the ambit of section 35(2) and paragraph 6(1B) of Schedule 2, for the first time.

**If the new scheme were to be launched, it would entitle educational establishments to make the educational recordings covered by the ERA certified scheme available for educational purposes to students and teachers directly connected with the relevant educational establishment via a secure network.**

Whilst ERA knows this is of great interest to licensees, it is also aware that the add-on licence may raise new rights clearance issues for licensees.

Although an enormously broad range of rights would be covered by the additional licence (as mandated by ERA members participating in the certified scheme), there is nevertheless 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 add-on licence.

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 that relevant to Open University programmes, which are easily identifiable.

ERA can give no such assurances as regards the “remote access” rights to be licensed in ERA members’ repertoire under the possible add-on licence. It is also true to say that the situation is more complex when the “missing” rights are inextricably embedded in an unidentified number of the wide range of broadcast programmes potentially available for educational copying under the current ERA licences.

On the other hand, the risks to licensees over the “missing rights” clearances are likely to be low because of the broad spectrum of ERA representation. In any event such risks exist in all areas where blanket licences from collecting societies are relied on. In that context the proposed extended licence from ERA would still have a significant value to licensees. ERA’s consultation with current licensees is already addressing this value in the light of broadband roll-out and increased use of on line and wireless technology in the education sector.

However, bearing in mind the broader social benefits which arise from educational copyright licensing, the members of ERA have considered possible options which could reduce the “missing rights” risk for licensees.

One possible option is to consider whether section 35 (1) and paragraph 6 of Schedule 2 might be amended so that it might embrace the full scope of the current ERA Licence and the additional licence, enabling ERA recordings to be accessed from the server of an educational establishment by authorised students, when they are not physically on the campus of the school or college.

One way that this might be done, would be to extend the proviso currently at the end of section 35 (1A) so that the section provides:-

Copyright is not infringed 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 is communicated

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<sup>5</sup> The Becta review 2005 – Evidence on the progress of ICT in education –  
<http://www.becta.org.uk/research/research.cfm?section=1&d=4390>

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 premise of that establishment **save to the extent that the communication is**

- (a) to persons who are connected with the establishment; and**
- (b) for the non commercial private study purposes of such connected persons; and**
- (c) controlled by the educational establishment so that the identity and use by such connected persons is known.”**

A similar change would also be made to Schedule 2 paragraph 6(1A).

Obviously terms such as “connected persons” would have to be tightly defined to ensure that the above changes did not move beyond the proper boundaries of The Three Step Test previously referred to.

Bearing this in mind, **“connected persons” might comprise:-**

**“individuals who are either currently enrolled to study at an educational establishment (which holds an ERA licence) or who are current members of the academic, research or teaching staff of the educational establishment (whether on a permanent, temporary or contract basis) and who are authorised by the educational establishment to access a secure network where the (ERA) recording has been reproduced”.**

### **The benefits of collective licensing through ERA.**

ERA acts as agent for its members to enable transparent collective licensing of the rights of its members.

**It only operates within a specific area of copyright law applicable within the United Kingdom to enable rights owners to secure remuneration for the exercise of specified restricted acts, by educational establishments, for the (non commercial) educational purposes of such establishments.**

As with other collecting societies, ERA is mandated to license rights for which it is appointed as agent on the basis that ERA is able to secure effective economic returns from the exercise of such rights.

The range of rights owners who have mandated ERA to act on their behalf is extremely broad, because the remit for which ERA can issue licences is limited to the narrow provisions of Section 35 and paragraph 6 Schedule 2 of the Copyright, Designs and Patents Act 1988 (as amended).

Under these provisions, if rights owners are not part of a certified licence scheme, they effectively lose the opportunity to license or otherwise authorise the use of rights for the uses provided for under certified schemes (including the scheme operated by ERA).

This distinguishes the role played by ERA from the role of many other collecting societies in that:-

- (a) the rights relevant to ERA’s current licensing scheme are only recognised in the specific way provided for under Section 35 and paragraph 6 – Schedule 2 of the CDPA 1988 (which is not exactly mirrored in Member States outside the United Kingdom);and**

(b) if rights owners do not participate in a certified licensing scheme for the purposes of Section 35 (2) of the CDPA 1988 then the remainder of section 35 provides that the acts covered by the ERA certified licence scheme do not infringe copyright; and

(c) if rights owners do not participate in a certified licensing scheme for the purposes of paragraph 6 (1) and 6 (1B) of Schedule 2 of the CDPA 1988 then the remainder of paragraph 6 provides that the acts covered by the ERA certified licence do not infringe copyright.

**In other words the collective representation operates to apply an exception to acts which would otherwise not infringe copyright.**

**Do International Treaty obligations restrict the proposed change?**

**ERA submits that the changes suggested to both section 35 and Schedule 2 paragraph 6 CDPA (as amended) can be approved within the flexibility already provided for copyright exceptions and limitations under Article 5.2 of the EC Copyright Directive.**

The approach of the UK in using the flexibility over educational copyright exceptions and limitations recognised in the International Treaties previously referred to (and in particular Article 5 of the EC Copyright Directive) has been valuable for both rights owners and users alike.

In particular it reflects the “fair compensation” provision in Article 5.2 (e) of the EC Copyright Directive.<sup>6</sup>

In terms of the reproduction and communication to the public which the extended section 35 and Schedule 2 paragraph 6(1) would address, it is submitted that Article 5(3)(a) provides for the necessary flexibility when taken with the provisions of Article 5.2(e).

Article 5.3 (a) provides:

“Member States may provide for exceptions and limitations to the rights provided for in Articles 2 and 3 in the following cases

(a) use for the **sole purpose of illustration for teaching** or scientific research, **as 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 purpose to be achieved”.**

**Would the change be in the general interest of both the educational community and rights owners?**

At present ERA has 14 members each representing a very significant copyright repertoire. They are:

Authors’ Licensing and Collecting Society Limited

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<sup>6</sup> Member States may provide for exceptions and limitations to the **reproduction** right provided for in Article 2 in the following cases ....(e) in respect of reproductions of broadcasts made by **social institutions pursuing non commercial purposes.....on the condition that the rights holders receive fair compensation”.**

BBC Worldwide Limited  
Channel Four Television Corporation  
Channel 5 Broadcasting Limited  
Design and Artists Copyright Society Limited  
Equity  
The Incorporated Society of Musicians  
The British Phonographic Industry Limited  
ITV Network Limited  
Mechanical Copyright Protection Society  
Musicians' Union  
The Performing Right Society Limited  
Phonographic Performance Limited  
Sianel Pedwar Cymru (S4C).

### **Licences issued by ERA.**

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 5.2 million primary school students and 3.8 million secondary school students each year.

To cover this wide range of licensing, ERA issued blanket licences to 171 of the 174 Local Education Authorities in England and Wales last year. 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 3 LEA's elected to require schools in their area to take our individual ERA Licences. As a result of this ERA issued 62 individual licences to state schools in Lambeth, 65 licences to individual state schools in Haringey, and 163 licences to individual state schools in Liverpool.

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

470 licences to colleges of Further Education

1,414 licences to Independent Schools

218 licences to language and nursing colleges

129 licences to cover other educational establishments, including independent universities, the Offenders Learning and Skills unit, the Fire Service and Police Training Colleges.

**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.**

It would be hoped that the current approach to blanket licensing could continue to apply if the scope of section 35 and Schedule 2 paragraph 6 CDPA were amended as proposed.

**Bearing this in mind it is submitted that the proposed extension of section 35 and Schedule 2 paragraph 6(1A) CDPA (as amended) would be in the general interest, reflecting the digital environment, whilst not requiring changes to be made to the law at European or wider international level.**

## **Is lack of trust in the IP system a barrier?**

Improving trust in the intellectual property system between rights owners and users, within industry and between companies and consumers will be a key part of the welcome education and awareness initiatives highlighted by the recent work of the Creative Industries Forum on Intellectual Property.

Whilst industry has a role to play in promoting understanding about the conditions which attach to use of copyright works in the digital world, this understanding will be helped by the wider education and awareness initiatives which exist, and are being developed on the back of the work of the Creative Industries Forum on Intellectual Property.

The Education Working Group within the Forum recognised:

“Intellectual Property Rights are an intangible concept that is difficult to grasp and generally very poorly understood. Improving the communications and educational messages, and the way they are targeted at specific audiences, as the way to improve understanding, are therefore central to the whole IP agenda. A snapshot of current communication activity shows that there are many agencies and organisations communicating about IP, but that this communication lacks a consistency and co-ordination of message. The working group’s primary focus therefore, has been to consider the tone and theme of IP communications and their appropriateness to particular audiences.

The Group agreed that messages should be positive and empowering. The Group therefore developed a Statement of Principles, the “CREATE” statement<sup>7</sup>, to capture and enunciate the importance of IP as a social, creative and economic tool.

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<sup>7</sup>CREATE for the future

Tools for innovation, enterprise and reward in the 21<sup>st</sup> century.

It is hoped that the Review will endorse further work to encourage the adoption and promotion of the CREATE principles in the context of the citizenship curriculum in schools and more broadly within industry and Government in the future.

Coordinated support to improve education and awareness about the value of intellectual property and the role that it plays within the economy, in supporting jobs and providing reward for innovation, will be increasingly important.

The Patent Office should play a key role in encouraging this coordination within Government and in connecting with creators and industry. However this will need the support and involvement of key Government Departments if their work is to have the best effect.

Work by the Patent Office to develop its educational initiatives about IP should be continued, linking with industry where appropriate.

The Patent Office "Think Kit" for secondary schools has proved a useful educational tool. The work now being undertaken to extend the Think Kit concept to provide information for use in primary schools and the tertiary education sector is welcome .

However these initiatives also need support from the DfES to encourage better understanding of the importance of the value of intellectual property within education as a whole..

**It is hoped that the Review team will support and encourage the involvement of DfES in this respect.**

Improving trust should also be addressed through encouraging improved media literacy across the whole of society, and through industry becoming more transparent about the way in which it explains to consumers the conditions which attach to the licensing or authorised use of copyright works.

The use of technological protection measures to provide different levels of access and rights to licensed material will become an increasingly important part of the digital marketplace, if real choice of access and opportunity for the development of new services are to prevail in the future.

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C Creativity improves the quality of our lives, and our economic prosperity at home and abroad.

R Respect for rights promotes investment in innovation, empowers artists, authors and rights holders to receive appropriate reward and respect for their work, and stimulates choice of access for consumers.

E Education is vital to help people understand what intellectual property is, and how, like physical things, it is relevant to and improves their everyday lives.

A Access to art and creativity enhances diversity of expression and quality of life for everyone when properly balanced with reward for those creating and investing in new work.

T Trust between the creators and consumers of intellectual property is to deliver access to creativity with respect for rights.

E Economic benefits from intellectual property must be publicly recognised by government and understood by the community, if they are to continue to provide the new jobs and the growth which have resulted from intellectual property in the last decade.

## **Additional issue**

### **The role of ERA as a collecting society administering rights recognised for the purposes of copyright law applicable within the United Kingdom.**

As previously stated, ERA acts as agent for its members to enable transparent collective licensing of the rights of its members. It only operates within a specific area of copyright law applicable within the United Kingdom to enable rights owners to secure remuneration for the exercise of specified restricted acts by educational establishments for the (non commercial) educational purposes of such establishments.

As with other collecting societies, ERA is mandated to license rights for which it is appointed as agent on the basis that ERA is able to secure effective economic returns from the exercise of such rights.

The range of rights owners who have mandated ERA to act on their behalf is extremely broad, because the remit for which ERA can issue licences is limited to the narrow provisions of Section 35 of the Copyright, Designs and Patents Act 1988 (as amended).

However the rights which ERA is currently mandated to administer are narrow and locally based in that they apply an exception to acts which would otherwise not infringe copyright.

The ERA licensing scheme therefore provides for important locally recognised rights to be administered in a fair and effective way for the benefit of both its members and licensees.

ERA therefore recently responded to the European Commission Internal Market DG consultation relating to the Communication "Management of copyright and Related Rights in the Internal Market".

ERA was concerned that the approach taken by the Commission ignored the local nature of services provided through collecting societies such as ERA.

ERA's submission is attached as Appendix 3.

Key points were:

1. ERA welcomed recognition by the Commission that the degree of common ground regarding the rules on copyright contracts across Member States appears to be sufficient, so as not to necessitate any immediate action at Community level.
2. The Communication from the Commission stated that most collecting societies form part of a network of interlocking agreements, by which rights are cross licensed between societies in different Members States.  
However, this is not always the case.  
The important locally recognised role played by collecting societies such as ERA must not be forgotten.
3. It is important that collecting societies can continue to be able to operate within local and niche markets. Schemes such as the one operated by ERA allow rights to be managed efficiently, with the educational purposes of the licences also contributing to the establishment of fees at levels that the user community are prepared to accept.

4. If proposals are made for the establishment of common ground at Community level to promote good governance of all collecting societies, it is important that the different scale and scope of different collecting societies are taken into account. Just as the rules applicable to publicly listed companies, and small or close companies differ to reflect the internal administrative, and the external shareholder, obligations of a corporate entity, so the scale of a collecting societies operation should be taken into account.

If this is not done there is a danger that well intentioned regulations to promote good governance within collecting societies actually serve to impose regulatory burdens on smaller societies which result in an increase in administrative costs without commensurate benefits to members of the society or its licensees.

This point is also important when continuing to recognise the importance of respect for subsidiarity and proportionality principles being observed concerning any recommendations for the harmonisation of certain features of collective management.

**ERA would urge the Review team to take these issues into account in anticipation of further review of the role of collecting societies by the European Commission**

ERA would welcome the opportunity to provide further background concerning the issues raised in this submission, should the Review team require.

Andrew Yeates  
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19 April 2006.

## Appendix 1

### The Educational Recording Agency

#### Response to Gowers review of Intellectual Property

19 April 2006.

Extract from EC Directive (2001/29) of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

#### Article 5 (Exceptions and limitations)

1. Temporary acts of reproduction referred to in Article 2, which are transient or incidental, which are an integral and essential part of a technological process and the sole purpose of which is to enable:
  - (a) a transmission in a network between third parties by an intermediary, or
  - (b) a lawful useof a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.
2. Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:
  - (a) in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, provided that the rightholders receive fair compensation;
  - (b) in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-

application of technological measures referred to in Article 6 to the work or subject-matter concerned;

- (c) in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage;
- (d) in respect of ephemeral recordings of works made by broadcasting organisations by means of their own facilities and for their own broadcasts; the preservation of these recordings in official archives may, on the grounds of their exceptional documentary character, be permitted;
- (e) in respect of reproductions of broadcasts made by social institutions pursuing noncommercial purposes, such as hospitals or prisons, on condition that the rightholders receive fair compensation.

3. Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:

- (a) use for the sole purpose of illustration for teaching or scientific research, as 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 purpose to be achieved;
- (b) uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability;
- (c) reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character, in cases where such use is not expressly reserved, and as long as the source, including the author's name, is indicated, or use of works or other subject-matter in connection with the reporting of current events, to the extent justified by the  
informatory purpose and as long as the source, including the author's name, is indicated, unless this turns out to be impossible;

- (d) quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose;
- (e) use for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings;
- (f) use of political speeches as well as extracts of public lectures or similar works or subject-matter to the extent justified by the informatory purpose and provided that the source, including the author's name, is indicated, except where this turns out to be impossible;
- (g) use during religious celebrations or official celebrations organised by a public authority;
- (h) use of works, such as works of architecture or sculpture, made to be located permanently in public places;
- (i) incidental inclusion of a work or other subject-matter in other material;
- (j) use for the purpose of advertising the public exhibition or sale of artistic works, to the extent necessary to promote the event, excluding any other commercial use;
- (k) use for the purpose of caricature, parody or pastiche;
- (l) use in connection with the demonstration or repair of equipment;
- (m) use of an artistic work in the form of a building or a drawing or plan of a building for the purposes of reconstructing the building;
- (n) use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2© of works and other subject-matter not subject

to purchase or licensing terms which are contained in their collections;

- (o) use in certain other cases of minor importance where exceptions or limitations already exist under national law, provided that they only concern analogue uses and do not affect the free circulation of goods and services within the Community, without prejudice to the other exceptions and limitations contained in this Article.
4. Where the Member States may provide for an exception or limitation to the right of reproduction pursuant to paragraphs 2 and 3, they may provide similarly for an exception or limitation to the right of distribution as referred to in Article 4 to the extent justified by the purpose of the authorised act of reproduction.
  5. The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interests of the rightholder.

## Appendix 2

### The Educational Recording Agency

#### Response to Gowers review of Intellectual Property

19 April 2006

#### Section 35

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

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

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

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

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

## Schedule 2 paragraph 6

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

(1A) The rights conferred by Part 2 are not infringed where a recording of a broadcast or a copy of such a recording, whose making was by virtue of subparagraph (1) not an infringement of such rights, is communicated to the public by a person situated within the premises of an educational establishment provided that the communication cannot be received by any person situated outside the premises of that establishment.

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

(2) Where a recording which would otherwise be an illicit recording is made in accordance with this paragraph but is subsequently dealt with, it shall be treated as an illicit recording for the purposes of that dealing, and if that dealing infringes any right conferred by Part II for all subsequent purposes

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

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

Appendix 3

The Educational Recording Agency

Response to Gowers review of Intellectual Property

19 April 2006

**Response from The Educational Recording Agency Limited to the European Commission Internal Market DG consultation relating to the Communication on “The Management of Copyright and Related Rights in the Internal Market”.**

**Introduction.**

The Educational Recording Agency Limited (ERA) was set up under the laws of England in 1989 with a view to operating a copyright licensing scheme certified by the Secretary of State under the provisions of Section 35(2) of the Copyright, Designs and Patents Act 1988.

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). More information about ERA, its membership and the scope of the licensing scheme operated by ERA can be found on the ERA website at <http://www.era.org.uk>

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.

The members of ERA support this document in so far as it deals with the potential impact of the Communication on the role of ERA as a collecting society only. It is not intended to supersede the individual submissions of the individual members of ERA.

**Management of Rights in the Internal Market.**

**Role of ERA.**

ERA acts as agent for its members to enable transparent collective licensing of the rights of its members. It only operates within a specific area of copyright law

applicable within the United Kingdom to enable rights owners to secure remuneration for the exercise of specified restricted acts by educational establishments for the (non commercial) educational purposes of such establishments.

As with other collecting societies, ERA is mandated to license rights for which it is appointed as agent on the basis that ERA is able to secure effective economic returns from the exercise of such rights.

The range of rights owners who have mandated ERA to act on their behalf is extremely broad, because the remit for which ERA can issue licences is limited to the narrow provisions of Section 35 of the Copyright, Designs and Patents Act 1988 (as amended).

Under Section 35 if rights owners are not part of a certified licence scheme they effectively lose the opportunity to license or otherwise authorise the use of rights for the uses provided for under certified schemes (including the scheme operated by ERA).

This distinguishes the role played by ERA from the role of many other collecting societies in that

(a) the rights relevant to ERA's current licensing scheme are only recognised in the specific way provided for under Section 35 of the CDPA 1988 (which is not exactly mirrored in Member States outside the United Kingdom); and

(b) if rights owners do not participate in a certified licensing scheme for the purposes of Section 35 (2) of the CDPA 1988 then the remainder of section 35 provides that the acts covered by the ERA certified licence scheme do not infringe copyright.

In other words the collective representation operates to apply an exception to acts which would otherwise not infringe copyright.

### **The local nature of rights licensed collectively by ERA.**

The ERA licensing scheme therefore provides for important locally recognised rights to be administered in a fair and effective way for the benefit of both its members and licensees.

ERA welcomes continued recognition of the principle of territorial exploitation of

copyright. Attempts to assert a Community copyright would conflict with this and fail to recognise the market benefits which can be provided through the existence of collecting societies which perform locally defined functions such as those applicable to ERA.

**Territorial recognition and licensing of copyright within the EEA continues to be vital.**

ERA believes that it should be left to the market to further develop any appropriate Community wide licensing, while respecting the basic rules of intellectual property protection, including its territorial nature.

This territorial recognition will mean that for licensing relevant to ERA, the market can continue to operate recognising the (uniquely) local nature of the rights licensed through the ERA certified scheme. This local recognition must continue to the extent accepted and recognised by the existing Community Directives concerning the recognition of copyright and its enforceability throughout the European Community.

**New proposals must not remove carefully established International recognition of the economic importance of the restricted acts of communication to the public and making available on demand on the increasingly on line world of today.**

Debate surrounding the adoption of Directive *2001/29/EC* on the harmonisation of certain aspects of copyright and related rights in the information society highlighted the economic significance for rights owners of the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, relevant works and performances in such a way that members of the public may access them from a place and at a time individually chosen by them.

This economic significance led to lengthy and detailed debate over the interaction between such rights and the extent to which Article 5 (Exceptions and limitations) and Article 6 (Protection of Technological Measures and Rights Management Information) might be reconciled with the exclusive right to authorise or prohibit the exercise of the rights.

As the Directive continues the process of adoption throughout the recently enlarged European Community, it is inappropriate to challenge the principle of territorial recognition of the rights at the crucial stage of new services being launched across the Community which are developing markets for the reception

and use of copyright works and performances made available to the public “on demand”.

In the same way it would be inappropriate at this stage to seek to reduce the exclusive communication to the public and making available rights to a remuneration right subject to mandatory collective management.

Where rights owners believe that collective licensing is an effective way to exercise certain rights which are recognised on a truly harmonised basis across the Community, and users are likely to wish to make use of such rights across borders within the Community, facilitating users having a freedom of choice as the collecting society in the EEA granting the required licence, and facilitating the collecting societies operating reciprocal agreements to reflect the value of rights granted on a territorial basis, will assist market development.

However, the extent to which collecting societies are mandated to offer Community-wide licences should be led by the extent to which rights owners/members are willing to mandate the society to act on their behalf. This should be the case in preference to any extension of mandatory collective management of rights in ways that challenge the principal means for creators to introduce their work into the marketplace, and to secure foreseeable returns against creative investment.

This in turn will help to promote transparency and accountability concerning the work of collecting societies as they administer the rights with which they have been entrusted.

### **Individual Rights Management.**

ERA welcomes recognition by the Commission that the degree of common ground regarding the rules on copyright contracts across Member States appears to be sufficient, so as not to necessitate any immediate action at Community level.

### **The Collective Management of Rights.**

The Communication from the Commission states that most collecting societies form part of a network of interlocking agreements, by which rights are cross licensed between societies in different Members States.

However, this is not always the case.

The important locally recognised role played by collecting societies such as ERA must not be forgotten.

It is important that collecting societies can continue to be able to operate within local and niche markets. Schemes such as the one operated by ERA allow rights to be managed efficiently, with the educational purposes of the licences also contributing to the establishment of fees at levels that the user community are prepared to accept.

If proposals are to be made for the establishment of common ground at Community level to promote good governance of all collecting societies, it is important that the different scale and scope of different collecting societies are taken into account.

Just as the rules applicable to publicly listed companies, and small or close companies differ to reflect the internal administrative, and the external shareholder obligations of a corporate entity — so the scale of a collecting societies operation should be taken into account.

If this is not done there is a danger that well intentioned regulations to promote good governance within collecting societies actually serve to impose regulatory burdens on smaller societies which result in an increase in administrative costs without commensurate benefits to members of the society or its licensees.

This point is also important when continuing to recognise the importance of respect for subsidiarity and proportionality principles being observed concerning any recommendations for the harmonisation of certain features of collective management.

## **Conclusion**

### 1. Background and Main Features of Rights Management.

Collecting societies such as ERA can assist both copyright protection and wider cultural diversity objectives by assisting with effective implementation of internationally recognised educational copyright exceptions at local/territorial level.

### 2. Impact of the Internal Market on Rights Management.

ERA welcomes continued recognition of the principle of territorial exploitation of copyright.

Effective implementation of Directive 2001/29/EC on Copyright and Related Rights should not be halted or restricted as a result of discussion surrounding the possible adoption of a Directive to address transparency issues relating to the collective management of copyrights that are recognised in Member States on a territorial basis.

Attempts to assert Community copyright would conflict with the principle of territorial recognition of copyright and fail to recognise the market benefits which can be provided through the existence of collecting societies which perform locally defined functions.

Provisions within Directive 2001/29/EC supporting the recognition and the development of Digital Rights Management systems should be allowed time to be fully implemented within Member States and support free market development of digital rights management systems which operate effectively for rights owners and users.

### 3. Individual Rights Management.

ERA welcomes recognition by the Commission that the degree of common ground regarding the rules on copyright contracts appears to be sufficient, so as not to necessitate any immediate action at Community level.

### 4. Functions of Collective Management.

Not all collecting societies form part of a network of interlocking agreements by which rights are cross licensed between societies in different Member States.

Some collecting societies operate effectively for rights owners and users within individual Member States.

Any proposals for the establishment of common ground at Community level to promote good governance of collecting societies must recognise the different size, scale and scope of individual societies.

Regulatory burdens on small societies should not outweigh the economic benefits reasonably anticipated by rights holders when authorising the collective administration of their rights within niche markets.