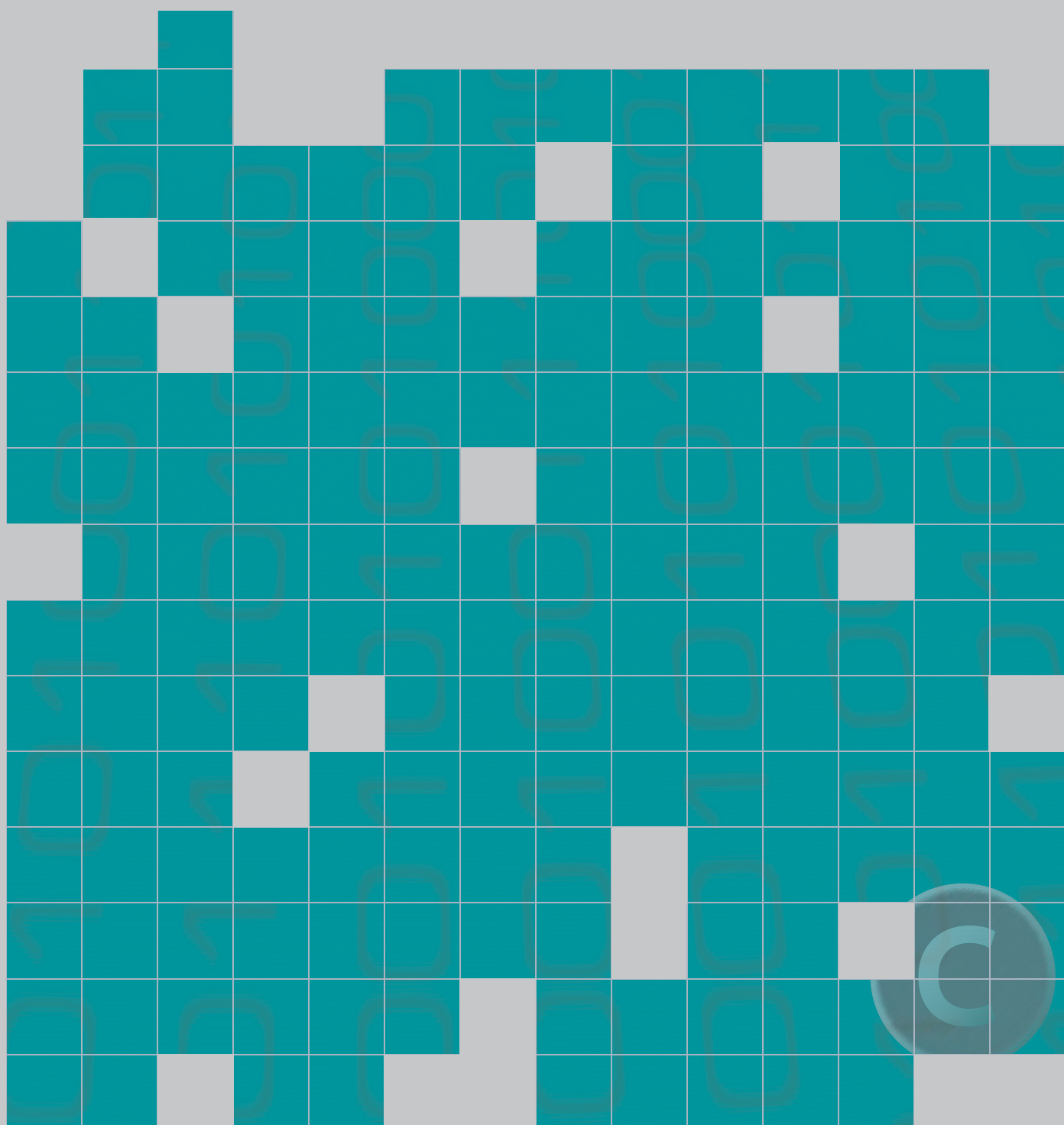




Taking Forward the Gowers Review of Intellectual Property: Second Stage Consultation on Copyright Exceptions



**TAKING FORWARD THE GOWERS REVIEW OF
INTELLECTUAL PROPERTY:
Second Stage Consultation on Copyright Exceptions**



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MINISTERIAL FOREWORD



The first copyright laws were created 300 years ago, covering the publishing of printed works. Since then the law has been updated on numerous occasions to take account of technological developments such as the ability to record sounds, broadcast and to reach a global audience via the internet. Whilst such developments facilitate access to copyright works, we need to consider whether these improvements in communication and delivery are mirrored in the way the law is framed and whether the law meets the needs of those who use it. Gowers recognised that there were a few areas where this wasn't the case and made recommendations accordingly.

These technical changes to the law need to be considered alongside discussions of the broader issues. The work we have done in other areas, such as the Copyright Strategy and the follow-up in the Digital Economy Bill, show that even the improvements now being proposed are just one step in a continuing process to ensure that the copyright framework is and remains fit for the digital age.

A handwritten signature in blue ink, which appears to read "David Lammy". The signature is fluid and cursive.

David Lammy MP

EXECUTIVE SUMMARY

1. The Gowers Review of Intellectual Property was published in December 2006 and a number of recommendations were made to improve the IP system; Government made a commitment to take these forward. As a result, the first stage¹ of a two-part consultation was launched in January 2008 dealing with five recommendations relating specifically to copyright exceptions. These recommendations were intended primarily to encourage greater creativity and innovation for the benefit of the UK economy by improving access to and use of copyright protected works by students, researchers and private individuals.
2. In the first stage of the consultation, we asked how the Gowers recommendations might work in practice and suggested a number of options. We received around 250 responses, all of which have been analysed. In addition, we held a series of meetings with numerous stakeholders to help inform our views further. Based on this information we have formulated detailed legislative proposals designed to achieve a fair balance between rights holder's interests and users needs. In this second stage of the consultation, we present a discussion of those proposals, and seek your views on the draft legislation which accompanies them and the accuracy of the impact assessments. The consultation closes on 31 March 2010.

EDUCATIONAL EXCEPTIONS

3. To better reflect the increasing use of technology as a means of enhancing the learning experience for students, changes to two of the educational exceptions (sections 35 and 36) were proposed by the Gowers Review and were followed up in the initial consultation. These proposals were to extend the current provisions to facilitate distance learning and enable the use of interactive whiteboards.
4. The overall majority of respondents were in favour of extending the current exception to cover distance learning, providing the material was delivered via secure networks. Rights holders generally supported moves to permit distance learning, but had some concerns about the inclusion of access to content delivered via on demand services, and the proposed extension of the section 36 exception to cover all types of works. Users, including those in educational fields, welcomed the proposals to encourage the broadest possible access.

5. We intend to extend sections 35 and 36 to enable distance learning and the use of interactive whiteboards and to permit access to a broader range of works, and within this consultation also to explore further access to on demand material.

FORMAT SHIFTING

6. Recognising the divergence between the current law, which does not permit private copying of legitimately owned content such as music, and what happens in practice, the Gowers Review recommended a limited form of private copying (format shifting). The first stage of the consultation followed this with a proposal to allow consumers to make a copy in another format of a work they legally owned for playback on a device in their lawful possession. It was proposed that the exception would only apply to personal or private use and the owner would not be permitted to sell, loan or give away the copy or share it more widely.
7. Although the overall majority were in favour of the principle of introducing this exception, there was little consensus as to how the proposal could be implemented. The main points of contention surrounded the circumstances under which copies could be made (some suggesting only when there was an absolute technical requirement), the types of content that should be covered (some would only accept copying of music, others wanted all types of content covered), and whether content holders would suffer significant harm as a result, and therefore require the introduction of a scheme for fair compensation (usually implemented in other Member States through a system of "levies").
8. The polarised nature of the responses to this proposal, in particular in relation to the issue of fair compensation, has highlighted the difficulty of meeting the needs and expectations of both consumers and rights holders in the digital age. The narrow, UK-only format shifting measure considered in the first stage of the consultation does not appear to meet those needs. The recent BIS/IPO Copyright Strategy² concluded that discussions at EU level might be a possible way forward, and should include consideration of a broad exception to copyright for non-commercial use together with any requirement for fair compensation.

¹ <http://www.ipo.gov.uk/consult-copyrightexceptions.pdf>

² See <http://www.ipo.gov.uk/c-strategy-digitalage.pdf>

RESEARCH AND PRIVATE STUDY

9. To better reflect technological developments in the way content is accessed and to reflect modern methods of studying and research, the first stage of the consultation considered the Gowers recommendation to extend the existing exception for research and private study to cover all forms of content. This would enable the use of sound recordings, films and broadcasts, which were not covered by the existing exception, but would not permit further distribution.
10. The overall majority of respondents were in favour of extending the exception to cover all types of work and areas of study. Most users thought there should be no distinction between research and private study and the exception should apply to both. Users were also keen for a DRM workaround.
11. Rights holders were not in favour of extending this exception and had concerns about the inclusion of private study and a DRM workaround. They were keen to link this exception to an educational course or establishment to assist in preventing the possible misuse of works.
12. While recognising the concerns of rights holders, we nevertheless intend to extend this exception to cover the additional forms of content, for both research and private study. Mindful of the potential for misuse, however, we intend to apply this extension only to genuine students or researchers that are linked to an accredited educational establishment, and are undertaking a course of study or research at that establishment. We do not intend to make any changes to the current procedures regarding DRMs (see paragraphs 22-24 and 239-240).

LIBRARIES AND ARCHIVES

13. To improve the ability to preserve the UK's national cultural heritage for the future, Gowers recommended changes which would permit libraries and archives to copy all classes of works in their permanent collection for archival purposes, and to make further copies from the master copy to mitigate against wear and tear. Gowers also recommended that libraries and archives be permitted to format shift archival copies to ensure records did not become obsolete. In the first stage of the consultation we also considered whether the exception should be extended to cover museums and galleries.

14. The majority of respondents, including rights holders and users, recognised the need to preserve the UK's cultural heritage, and were broadly in agreement with the proposed exception and the intention to cover all works, as long as the copying was for preservation purposes only. Some respondents raised concerns about what constituted a "museum" or "gallery". Some respondents felt that the exception could be open to misuse unless it was monitored. There were also conflicting views on the number of copies that should be allowed, with users favouring "no limits" and some rights holders wanting a limited number.
15. We intend to ensure that appropriate organisations, including museums and galleries, can preserve their collections as necessary to enable future generations to benefit from them.

PARODY, CARICATURE AND PASTICHE

16. The first stage of the consultation considered whether a new exception for parody, caricature and pastiche should be introduced. A fair dealing style exception was proposed.
17. Most respondents expressed no interest in this exception, and of those who commented opinions were quite polarised. Those in favour cited various reasons including promoting freedom of speech, and protecting the valuable cultural asset that parody represents. A minority incorporated caveats intended to restrict the extent of the exception in recognition of the potential negative consequences for rights holders.
18. Rights holders were generally against the introduction of an exception. Their objections included the vibrancy of the current parody scene in the UK, lack of evidence supporting change, and the potential financial and reputational damage.
19. Overall, we do not believe that there is sufficient justification to introduce a new exception for parody in the UK now. There is scope for further debate within an EU context about the potential for a non-commercial use exception which if implemented could cover some parody.

ADDITIONAL CONSIDERATIONS

20. In addition to issues specific to each of the recommendations, the following issues were also considered in relation to each proposal:

Performers' Rights

21. This consultation considers exceptions to the exclusive rights set out in section 16(1) of the Copyright, Designs and Patents Act 1988 (as amended) – CDPA - and, in particular, to the rights of reproduction and communication to the public. The provisions covering performers' and recording rights are set out separately in Schedule 2 of the CDPA. To ensure that certain users are permitted to carry out lawful activities under the exceptions without infringing performers' rights, we propose amending these provisions in parallel where appropriate.

Digital Rights Management

22. EU Member States are required to ensure that the beneficiaries of certain exceptions are not prevented from making use of the exception by a technological protection measure (TPM) or digital rights management (DRM). These are often collectively known as "DRMs". Consequently, certain exceptions under UK law are accompanied by provisions to ensure that DRMs do not prevent their operation³; these provisions are listed in Schedule 5A of the CDPA. In the case of libraries and articles we conclude that we need to make consequential amendments to Schedule 5A.
23. The first stage of the consultation resulted in considerable comment about, and interest in, DRMs, which may suggest a need to consider this issue in the round. However, we conclude that the EU legislative framework, which promotes the use of voluntary measures to ensure accessibility to certain exceptions, may constrain changes to the current provisions. Given too that the current provisions under Section 296ZE are consistent with EU's approach, we do not propose to change it.

24. In any event, we note that the potential impact of this issue goes much wider than the original recommendations made in the Gowers Review, including those recommendations specific to both the copyright exceptions and to DRMs themselves. Any moves to amend DRM-related legislation are likely to require further, independent consideration. As part of its research agenda, SABIP is currently exploring the relationship between copyright and contracts, and hopes to shed light on issues related to copyright exceptions, including how exceptions are affected by digital rights management (DRM), technical protection measures (TPM) and contracts.

Three Step Test

25. We have assessed each exception being taken forward against the requirements of the 'three step test' found in the Berne Convention⁴. An analysis is provided at the end of each relevant chapter. To summarise, we believe that the way the recommendations are being taken forward complies with the three step test.

³ Section 296ZE CDPA

⁴ See "The Copyright Framework", paragraphs 46-49.

26. The UK's copyright law has been amended on numerous occasions since it was first introduced. Although these amendments have included measures broadly aimed at taking into account developments in technology, some of the new ways of using and disseminating content are not necessarily reflected in the current law. The recommendations of the Gowers Review aimed to bring certain areas of the copyright system up-to-date and meet the demands of the digital age. Amendments to the libraries and archives exception will help preserve our cultural heritage for future generations. Improvements to the educational and research exceptions will facilitate better access to knowledge, and improve learning and development opportunities.
27. Other areas of work, outside this current consultation, also consider amendments designed to improve the copyright framework. For example, the recent BIS/IPO Copyright Strategy⁵ has considered the copyright framework in the round and highlighted various areas for improvement including an issue which reads across to the Gowers recommendations to introduce new exceptions for format shifting and parody, namely the possibility of a broad EU-wide non-commercial use exception. It also looked at the practicalities of copyright management, such as model contracts which strike a fair balance between creators and publishers, and issues included in the recently published Digital Economy Bill⁶. This incorporates, for example, measures to permit the regulated use of orphan works (those works for whom the rights holder cannot be found), which at present cannot be used without infringing copyright. It also includes provisions to authorise certain collecting societies to set up extended collective licensing schemes, which will enable them to license more efficiently, and more realistically to meet demands for usage, without the risk of infringing works.
28. In seeking to update the copyright framework to try and deliver benefits, we are mindful of the need to retain appropriate rewards for creators as an incentive for further investment in creativity and to ensure the continued growth and success of the creative industries. We have also taken into account a variety of other factors, such as the public interest, the overall benefits to society, economic impact, potentially unintended consequences, and the constraints imposed by International and European legislation by which the UK is bound.

29. Despite these conflicting pressures, we nevertheless believe we have found workable solutions which will benefit users without unduly affecting rights holders.

THE CONSULTATION PROCESS

The process so far

30. The Gowers Review of Intellectual Property⁷ made a number of recommendations to amend the copyright exceptions regime. Following a series of preliminary meetings with stakeholders, the Intellectual Property Office (IPO)⁸ published the first stage of a two-part consultation in January 2008. Approximately 250 responses⁹ were received from a wide variety of organisations representing creators, rights holders, users, other interested parties and a number of individuals. Further stakeholder meetings took place to discuss the options in more detail.

The focus of this stage of the consultation

31. This second stage of the consultation includes an analysis of the responses we received during the first stage of the consultation, an outline of our proposals and draft legislation. The legislative proposals focus on the three recommendations now being taken forward concerning educational provisions; preservation by libraries and archives; and fair dealing for research and private study purposes.
32. Some comments covered issues outside the scope of this consultation process, which are being taken forward by other means¹⁰.

5 See <http://www.ipo.gov.uk/c-strategy-digitalage.pdf>

6 See <http://www.publications.parliament.uk/pa/ld200910/ldbills/001/10001.i-ii.html>

7 See http://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_755.pdf

8 Formerly the UK Intellectual Property Office

9 For a summary of responses see <http://www.ipo.gov.uk/response-copyrightexception.pdf>

10 For example, action on orphan works is included within the 'Digital Economy Bill'; the relationship between copyright and contracts have been considered as part of the Copyright Strategy work (see paragraph 27 above).



Next steps

33. Following the end of this second period of consultation (31 March 2010), the responses will be evaluated with a view to considering what, if any, amendments to the draft legislation are required. Once final decisions have been made, the draft legislation will be laid in Parliament with a view to its coming into force in October 2010.

RESPONDING TO THIS CONSULTATION

HOW TO RESPOND

34. The first stage of the consultation raised a number of difficult issues, and we would like to thank everyone who took the time to consider them and provide information which has helped to shape these proposals.
35. We would therefore urge interested parties to direct their comments to the legislative proposals presented here, and in particular to the questions being asked in Annex B.
36. It would be appreciated if you could structure your comments by reference to the relevant Gowers recommendation. Where you refer to a specific aspect of the consultation document please provide a page and paragraph number.

Impact Assessments

37. In taking these recommendations forward, we aim to find the best option with the maximum benefits and minimal cost and burdens to businesses and society as a whole.
38. We received few comments on the draft impact assessments in our first consultation or evidence of the likely costs (i.e. actual figures rather than general statements). We encourage you to comment on the accuracy of the information provided in the revised impact assessments for the three recommendations being taken forward, in light of the draft legislation. Whether you agree or disagree with our assessments it would be helpful if you could submit financial data to support your point.

When and where responses should be sent:

39. Please send responses by 31 March 2010 to:

Gowers Copyright Consultation
Copyright and IP Enforcement Directorate
Intellectual Property Office
Concept House
Cardiff Road
Newport
NP10 8QQ

Email: copyrightconsultation@ipo.gov.uk
Fax: 0044 (0) 1633 814 922
Tel: 0044 (0) 1633 814 815

OPENNESS / CONFIDENTIALITY

40. This is a public consultation, the results or conclusions of which may be published. As such, your response may be made public. If you do not want all or part of your response or name made public, please state this clearly in the response. Any confidentiality disclaimer that may be generated by your organisation's IT system or included as a general statement in your fax cover sheet will be taken to apply only to information in your response for which confidentiality has been requested.
41. Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004). If you want other information that you request to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.
42. In view of this, it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. The Intellectual Property Office will process your personal data in accordance with the DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.



WHO IS BEING CONSULTED?

43. Notification of this consultation document has been sent to the organisations listed in Annex E. Further copies, including large print and Braille versions, may be requested from the IPO by contacting Stephanie Parry, tel: 0044 (0) 1633 814815; e-mail: copyrightconsultation@ipo.gov.uk
44. This consultation document has been prepared in accordance with the Code of Practice on Consultation issued by the Department for Business Innovation and Skills (BIS). If you have any comments or complaints about how this consultation process is being handled, please contact the IPO Consultation Co-ordinator. Information on the Code of Practice and contact details for the Consultation Co-ordinator are set out in Annex D.

THE COPYRIGHT FRAMEWORK

National, European and International law

45. Copyright applies to literary, dramatic, musical and artistic works, sound recordings, films, broadcasts and the typographical arrangement of published editions. It essentially gives the owner the exclusive right to copy, communicate, distribute, perform, rent, lend and adapt their work¹¹ for a limited period of time. It also provides a number of exceptions to these exclusive rights to facilitate consumer access and use for socially desirable purposes, as well as encouraging further creativity.
46. The law of copyright in the UK is governed by the Copyright Designs and Patents Act 1988, (CDPA)¹². It must comply with various international treaties and European Directives¹³ and must satisfy the “three step test” found within them¹⁴.
47. The test has been the subject of a large amount of academic comment but there is very little decided case law. The first step requires an exemption to apply in clearly defined circumstances. The second step requires the normal exploitation of the right to be judged for each exclusive right individually. The underlying aim of the test is to ensure that an excepted use should not enter into competition with the original work. In making this assessment, the potential as well as actual effect of the exception on the market would need to be considered.

48. The third step involves a balancing exercise between the general interests in protecting the rights holder’s exclusive rights in a copyright work and the public interest in the exploitation of the work. The rights holder’s interests may be but are not necessarily limited to its economic interests. It has been suggested that this step essentially takes on the focal point of the three step test.¹⁵
49. In the chapter on each recommendation, we discuss the extent to which we believe the proposals set out in the draft legislation meet this test.

Implementation

50. We propose to use section 2(2) of the European Communities Act 1972 to implement these proposals which involve extending the existing UK exceptions to copyright and related rights whilst operating within the framework of the relevant European Directives and international treaties on copyright as referred to above.
51. Although these Directives and international treaties have already been implemented in UK law, we are proposing to re-implement or re-exercise options granted under the relevant Directives to give effect to these proposals.
52. While we would not restrict the exceptions already enacted, in expanding the exceptions we would confine the scope of copyright further than we did when we first implemented the Directives. We believe that this approach is within the scope of section 2(2).

¹¹ Section 16(1), Copyright, Designs and Patents Act 1988 (as amended)

¹² A consolidated version of the copyright sections of the Act, as amended is available at: <http://www.ipo.gov.uk/cdpact1988.pdf>

¹³ For example, World Trade Organisation (WTO) Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs); Berne Convention for the Protection of Literary and Artistic Works; Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations; European Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society (2001/29/EC) (‘the Directive’); Council Directive 92/100/EC on Rental Right and Lending Right and on Certain Rights Related to Copyright in the Field of Intellectual Property as consolidated into 2006/116/EC.

¹⁴ The Berne Convention and others of the international treaties, as well as the Copyright Directive incorporate the ‘three step test’, which says that exceptions and limitations shall only be applied in certain 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 rights holder.

¹⁵ According to a report on the implementation of the Copyright Directive commissioned by the EC Commission http://ec.europa.eu/internal_market/copyright/docs/studies/infosoc-study_en.pdf; paragraph 2.3.3.



European Convention on Human Rights

53. Ministers are required to make a statement in accordance with section 19 of the Human Rights Act 1998 that the provisions of any amending instrument are, in their view, compatible with the European Convention on Human Rights (“ECHR”). The primary relevant ECHR consideration is whether Article 1, Protocol 1 ECHR is engaged.

54. Now that the original Gowers proposals have been refined in the light of the first stage of the consultation, we have considered the amendments included in the draft statutory instrument and have concluded that they meet the requirements of the ECHR.

CURRENT POSITION

55. **Section 35** allows educational establishments to record and show off-air broadcasts but only to persons situated on the premises and **Section 36** permits reprographic copies of passages from published literary, dramatic or musical works to be made available as class “hand outs”.
56. The Gowers Review identified that the education sector was making increasing use of digital technology to enhance the learning experience for students, with secure networks playing a prominent role in the emergence of distance learning. However, the current educational exceptions were written at a time when such technology was not available or at least not widely accessible to the education sector.
57. The Gowers Review therefore recommended that changes be made to Sections 35 and 36 to improve access to educational materials in the light of opportunities offered by emerging technologies.

GOWERS' RECOMMENDATION

58. Enable educational provisions to cover distance learning and interactive whiteboards by amending Sections 35 and 36 of the Copyright, Designs and Patents Act 1988 (CDPA).

BACKGROUND

59. In the first consultation we offered stakeholders the opportunity to comment on the proposed amendment of two of the educational exceptions, broadly split between Section 35 and Section 36 of the CDPA.
60. Section 35 currently allows the recording and showing of broadcasts to students physically present at an educational establishment. The expanded section would allow distance learning students to receive and view these recordings remotely. Section 36 of the CDPA currently allows educational establishments to copy (usually by photocopier) passages from published works and provide hand outs to students. The expanded exception would enable educational establishments to communicate such passages using interactive displays and electronically to distance learners and to do so with a broader range of works.

61. We received 114 responses from all sections of the stakeholder community in relation to these proposals and the vast majority were in favour of some form of an extension to the educational exceptions. However, there were marked differences in opinion over how far reaching the extension should be and how the amendments to Sections 35 and 36 should be framed.

IMPACT AND COSTS OR BENEFITS OF EXPANDING THE EXCEPTIONS IN SECTIONS 35 AND 36

62. We asked about the potential impact and the costs or benefits associated with an expansion to the educational exceptions. The overwhelming majority of responses were in favour of some form of extension to the exceptions, however even those who were in favour were of the opinion that there would be both costs and benefits associated with any changes.
63. Those in favour of the extension claimed it would reduce the disparity between the quality of distance learning against traditional methods and allow the educational sector to make full use of modern technology and teaching methods to increase learning opportunities for all. Many respondents also said that these changes are needed in order to bring copyright law up-to-date with developments in educational policy.
64. Numerous respondents said that one of the benefits of the proposed changes would be increased research and knowledge in the education sector and it would ultimately result in a strong and vibrant education sector fit for the 21st century. Other positive respondents suggested rights holders would also benefit due to a wider audience and ultimately greater recognition and use of their works.
65. However, there were a minority of respondents who were opposed to the extension, as doubts were raised by a number of journalist and publishing stakeholders over the relevance of an expansion to educational exceptions in an environment where licensing schemes were widely used and appeared to work well.

66. Those who raised concerns also cited the need for caution when proposing changes to the treatment of on-demand services, as there was a belief that existing and future business models would be harmed if they were too far reaching. In addition, respondents cited the need for well defined legal language that would reduce uncertainty amongst those in the education sector and also reduce the possibility of abuse.
67. Linked to the issue of legal language was a concern that museums, galleries, libraries and archives would not benefit from the proposed changes, as these stakeholders are not currently covered by the definition of an “*educational establishment*” within the CDPA. Museums and galleries suggested that the current definition of “*educational establishment*” is too limited and due to the educational services they offer they should now be included in the definition, at least for copyright purposes.

Proposal

68. Our intention is not to fundamentally change the way the exceptions in Sections 35 and 36 operate; namely that they only apply if and to the extent that there are no relevant licensing schemes in place, so any extension to those exceptions would operate subject to such licensing schemes. **We therefore propose to retain the current licensing arrangements although we accept that it will be necessary for such licenses to be revised to reflect changes to the relevant exceptions.**
69. In relation to the question of including museums and galleries within the definition of educational establishments, the exceptions are framed with reference to educational establishments which have as their main purpose the provision of education and have pupils (as defined) in the CDPA. Education is an ancillary purpose for museums and galleries and the difference between activities carried out by museums and galleries for educational purposes and those which are not is difficult to define. There may also be questions over who is a pupil in this context, which could give rise to concerns amongst rights holders as to how relevant security measures might apply.

Proposal

70. We have carefully considered the additional information supplied to us on this issue, but we feel that an amendment of the CDPA is an inappropriate way of changing the status of museums and galleries. This question goes beyond any changes for copyright purposes and would not sit comfortably with the definition contained in the various education statutes. **We have therefore decided against changing the definition of an educational establishment to include museums, galleries, libraries or archives.**

SECTION 35 (RECORDING BY EDUCATIONAL ESTABLISHMENTS OF BROADCASTS)

RECORDING ON-DEMAND SERVICES

71. We asked whether educational establishments should be permitted to record on-demand services in addition to traditional scheduled broadcasts¹⁶ and also whether any recording of on-demand services should be limited to material that was subject to an original scheduled broadcast.
72. Opinions were clearly split between those wholeheartedly in favour (primarily members of the educational sector and museums/libraries) and those strongly opposed to the proposal (rights holders and media related stakeholders). Those in favour agreed that there is a strong and ever increasing demand for on-demand services and legislation should reflect this. Respondents claimed that the growth of on-demand services has progressed at such a pace so as to blur the lines between scheduled and on-demand broadcasts and therefore a distinction should not be made between them.

¹⁶ Section 6 of the CDPA states : “...a “broadcast” means an electronic transmission of visual images, sounds or other 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 at a time determined solely by the person making the transmission for presentation to members of the public, and which is not excepted by subsection (1A); and references to broadcasting shall be construed accordingly...”

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73. Many referred to the increasing popularity of on-demand services and how it would soon become difficult to establish the origin of a particular broadcast, the logical conclusion being that any limitations would become outdated. A number of stakeholders also said that the growth in on-demand services meant that disallowing their recording would be nonsensical and unfair, given that some broadcasts may shortly only be available via this route anyway. One respondent suggested that the recording of on-demand services should only be allowed where the original work is no longer available from the publisher or authorised distributor. Another respondent suggested that recording should be allowed as long as it was for the sole use of the educational establishment.
74. Those that were opposed to the recording of on-demand material were unified in their opinion that the very nature of on-demand services meant recording the material was unnecessary, unjustified and doing so would fail the three step test. Many media stakeholders explained that current and future broadcast models would be at risk if recording of on-demand material was allowed and that the newly emerging broadcast models allowed them to target their audience and that recording would undermine this. Some also cited the availability of recorded material, including recorded on-demand material, material under the ERA licence and that allowing recording would also undermine this established system.
75. Stakeholders were also concerned at the possibility of DRM type measures associated with most on-demand services being circumvented in order to allow recording and linked this to the possibility of widespread abuse of the system which would cause practical as well as financial problems for rights holders.
76. The second part of our question, asking stakeholders to consider whether the recording of on-demand services should be limited to material that was subject to an original scheduled broadcast, met with slightly fewer responses. Those that were in favour of recording on-demand services said that the recordings should be for all material regardless of how it was originally broadcast. Many of the responses claimed that it would soon become difficult to establish the origin of a particular broadcast and difficulties in establishing the origin of a broadcast would result in confusion for the user and would prove hard for the industry to monitor.
77. However, it was suggested by one stakeholder that “catch-up” services (where previously broadcast material is made available to download online for a specific period of time after the original scheduled broadcast) could be recorded under some sort of time-restriction as long as they were for educational purposes.
78. An examination of freely available on-demand services showed that the current on-demand business model appeared to be centred on services intended for private individuals rather than organisations (such as educational establishments). As such, it was restricted to personal, non-commercial use by various terms and conditions and along with DRM they combined to explicitly prohibit the recording or further communication of the content.
79. It is worth noting at this point that there has been debate among stakeholders regarding the potential use of Section 296ZE of the CDPA to circumvent DRM in cases where those measures may prevent a permitted act, in this case the act of recording an on-demand service. However, Section 296ZE (9) specifically excludes on-demand services from this remedy and as such the potential for a DRM “override” is one that the CDPA currently does not allow.
80. Given the existing limitations placed on on-demand content it is not possible for users to legitimately record on-demand services, as the user is blocked from recording the material by DRM and also by the contractual restrictions applied by the terms and conditions. We do not intend to override DRM or other restrictions placed on the use of content by those who are using and developing new business models in this area.
81. In contrast to the most widely available on-demand material which could be classed as “restricted” in some way, one stakeholder provided an additional proposal to amend Section 35 to permit educational establishments to record and then make use of what they referred to as “unrestricted” on-demand services. This stakeholder suggested that the very nature of these on-demand services, through their lack of technological or contractual restrictions indicated that copying and further use was permitted almost by default.

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82. However, the difficulty with this suggestion is in formulating an effective and workable definition of “unrestricted” on-demand material. Although suggestions of how to tackle this had been made, the proposals were not acceptable either in a legal or practical sense and in attempting to formulate a definition we encountered many issues that either made the law too unwieldy and restrictive or too vague and ineffective to deliver a solution which we considered educational establishments could confidently rely on when recording such material.
83. We feel that the most important development in the on-demand market will be when the traditional terrestrial broadcasters move to supplying their educational programming on-demand and in a truly “unrestricted” state. However, it is not clear when this will happen or how, in legal, contractual or technological terms, the material will be “unrestricted”. This uncertainty, both in terms of content and timing means that it would be premature to amend the educational exceptions to permit recordings of on-demand material at this point.
84. We have been given various examples of “unrestricted” educational material available on-demand and have been made aware of material available through members of the Creative Archive Licence Group. We see this as a good example of how educational material is being made available through a relatively new on-demand business model, but it doesn’t appear to form a “replacement” for the recording of traditional, scheduled TV broadcasts which is what most stakeholders seemed to be referring to in their desire to record on-demand material.
85. Other examples of “unrestricted” on-demand material provided by stakeholders included user generated material such as blogs, video blogs and streaming webcasts of lectures etc. These have been useful in understanding the use of technology in education but again do not appear to meet the requirements of an alternative to traditional broadcasts.
86. We have been informed that traditional, lengthy and in-depth educational broadcasts are no longer favoured by educational establishments under the current National Curriculum teaching methods. The alternative, which is either already in use or desired by educational establishments as the future of educational programming, are short “clips”, available on-demand and in a recordable format that the educational establishment can add to their “clip” library.
87. We understand that “unrestricted” on-demand material is, or at least soon will be, closely linked with the use of these broadcast clips and as such these two issues pose many difficult questions in relation to the accepted definition of a “broadcast”. The Section 6 definition of a broadcast clearly excludes on-demand material and the question now is whether the Section 35 exception as a whole still adequately represents the needs of the education sector given the sweeping changes to technology, broadcasting and educational delivery.
88. With that in mind we would encourage stakeholders to provide us with further evidence regarding the broadcast “clips” in relation to their use in education and how, if at all, they can be linked to “unrestricted” material, particularly in relation to the proposed changes to Section 35.
- ### Proposal
89. Having examined the on-demand market in great detail it is clear that it represents a significant and expanding business model for content providers and is an area that the education sector is keen to make use of. In order to fairly represent the interests of both users and rights holders we have undertaken an exercise in which all possible methods of achieving a satisfactory outcome have been examined.
90. **We believe we have explored all feasible options and given the complexities of the issues, particularly in relation to the difficulty in framing a workable definition of “unrestricted” on-demand material and the uncertainty over how the market will develop in the future, the recording of on-demand works will not be included in our amendments.**
91. However, we remain open minded on this matter and welcome evidence from interested stakeholders on this issue.

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

EXPANSION OF SECTION 36 TO COVER OTHER CLASSES OF WORK

92. We asked if Section 36 should be expanded to include short extracts from classes of work other than published literary, dramatic and musical works. The vast majority were in favour and added that all classes of work should be included, with most of these positive responses coming from the education sector and museums and libraries.
93. Around a quarter of respondents failed to comment on the issue but the remaining respondents were opposed to the expansion. These were mostly rights holders and licensing agencies and in most cases their argument against the expansion was that current licensing schemes should allow enough freedom already and if not, current licensing schemes should be expanded rather than expanding the exception.

CONSEQUENCES OF EXPANSION

94. We asked what consequences such an amendment would have on rights holders and the response to this question saw rights holders taking one view and users generally taking another, as users claimed there would be minimal consequences whereas rights holders claimed the effect would be negative. Those that claimed there would be little or no effect cited the benefits already accrued from current licensing schemes and also said that far from having a negative effect, rights holders may actually benefit from increased sales due to greater exposure.
95. However, the main argument against the expansion was that it would deprive rights holders of established revenue streams and this would stifle the development and launch of new products, with some respondents claiming the proposed amendment would increase the risk of copyright infringement.

BENEFITS FOR EDUCATORS

96. In contrast to the consequences of the expansion on rights holders our next question asked what benefits there would be for educators. While there were a handful of comments from rights holders saying that educators already benefit enough from the existing exception, all other respondents who chose to answer this question

provided examples of positive benefits for educators. These responses were all slightly different but in every case the message was the same – the expansion would allow educational institutions to make use of the latest information and technology to facilitate innovative and effective teaching methods that would result in a richer learning environment and an improved learning experience.

Proposal

97. We recognise the value of enabling educational establishments to use as broad a range of material as possible to encourage students to learn. **We therefore believe that we should extend the exception to as many classes of work as possible.** We note that the copying of broadcasts is already covered by virtue of Section 35 and the proposed amendments to it. **We therefore believe it is unnecessary to duplicate references to broadcasts in Section 36.**
98. In relation to artistic works, we are mindful that any attempts to incorporate them within this section are problematic. Permitting the copying of the whole work is likely to push the exception outside the requirements of the three step test, whereas permitting the copying of a small proportion of the work is likely to be of limited practical value. **We therefore propose that the amended Section 36 exception will be extended to incorporate film and sound recordings but will not incorporate broadcasts or artistic works.**

LIMITS ON SIZE OF EXTRACTS

99. The final Section 36 question related to classes of works and asked if the classes were to be expanded what limits should be placed on the size of extracts and whether the application of existing limits would be desirable or practical. Responses were particularly varied but many suggested that due to the way the works would be used, different classes would necessitate different limits but it is the subject of artistic works that lead to most disagreement.

100. Certain respondents asked for no limits to be set at all, with some identifying the need to view a piece in its entirety to fully appreciate it, whereas others suggested setting limits would simply be unworkable. For example, it was argued that 1% of a painting cannot be effectively measured and if this sort of limit was introduced there would be uncertainty among users which in itself could lead to an abuse of the system.
101. Other respondents believed limits were appropriate and asked for limits ranging from the current 1% to 2-5% and 10% but some argued that there should be no arbitrary limit and instead the law should suggest a “reasonable amount” with limits negotiated between rights holders and stakeholders. It seems clear from the responses that the current 1% limit, whilst not popular with all, is certainly well understood and we are not convinced that changing this limit will be of any real benefit to either users or rights holders.

Proposal

102. Taken at face value the suggestions made for raising the current 1% limit per quarter (to 5% for example) seem fairly innocuous, as the difference between four helpings of 1% over a 12 month period and one helping of 5% of a work isn't that significant. However, the CLA's 5% limit in its current licences clearly represents the upper limit that copyright holders are prepared to license voluntarily through such schemes and if we were to increase the limit within the exception to 5% what has previously been a maximum would be regarded as a minimum. As a consequence, 5% of the work could then be copied freely in the absence of a license which may mean the exception fails the three step test, as copying is not permitted where it conflicts with the normal exploitation of the work.
- We therefore consider that the 1% limit should remain unchanged.**

SECURITY ISSUES ASSOCIATED WITH SECTION 35 AND 36 PROPOSALS

103. As our Section 35 and 36 questions relating to security were very similar we will discuss the responses to these questions collectively.

USE OF SECURITY MEASURES

104. We asked if access to broadcasts and excerpts should be subject to security measures such as passwords and what other measures might be appropriate. Every respondent who answered this question agreed that some form of security measure was necessary, however it was also agreed that the method of security should not be prescribed in law. The rationale behind this was clear, as all stakeholders wanted to ensure security but not at the expense of overburdening the educational sector with unwieldy or costly security measures.
105. Many respondents said that rather than prescribing the nature and extent of security methods used, educational establishments should put in place “appropriate and proportionate procedures”. A common theme throughout all the security related responses was a desire to avoid the term Virtual Learning Environment (VLE), as most stakeholders cited the need to avoid anything that would become outdated. Some respondents suggested the use of specific security systems such as “Shibboleth” and “Athens” however the use of “appropriate security measures” was more widely favoured.
106. We also considered how best to reflect the requirement for safeguards within the law in the most practicable way, whether this should be an absolute requirement on educational establishments or whether it should be a conditional requirement. The current law says that recorded broadcast works can be communicated to the public “...provided that they cannot be received by any person situated outside the premises...” and although this is an absolute requirement, it is one that organisations can reasonably be expected to be able to fulfil in the circumstances under which the exception currently operates.

Proposal

107. We believe that some form of security measure should be in place in order for the exception to apply but we do not wish to impose conditions which would mean that educational establishments would feel inhibited from being able to offer distance learning opportunities to their students. However, we recognise that sufficient safeguards must be in place to protect the interests of rights holders and provide them with a reasonable expectation that their works will not be misused. We understand that educational establishments already have such measures

in place for other non-copyright reasons, such as data protection, etc. **We therefore propose that educational establishments must use “all reasonable steps” to ensure that only authorised persons may access material.**

RESPONSIBILITY FOR MAINTAINING SECURITY

108. We asked what level of responsibility an educational establishment should have for maintaining the security of a password protected VLE. Some rights holders suggested that educational establishments should be liable for any damages caused to rights holders by breaches of security whilst others suggested that if the users do not comply with the educational establishment’s terms and conditions of use, it should be they and not the institution that are held responsible. The use of a contract between the user and educational establishment, perhaps in the form of an acceptable use policy, was also a popular suggestion amongst respondents.
109. However, the most common response, from both rights holders and users, was that educational establishments should take “all reasonable steps” to ensure security is maintained and that specific methods of achieving this should not be prescribed in law. **This is in line with our view that the amended exception should not be overly prescriptive and should, given the speed of technological change, be drafted in a way which is technology neutral.**

COMMUNICATION TO DISTANCE LEARNERS

110. We asked if restrictions should be placed on the form of communication used by educational establishments to communicate extracts of material to distance learners. Nearly half the respondents chose not to comment on this area while around 90% of those that did respond were against the imposition of restrictions. For example, the education sector and libraries were of the opinion that the principles of distance learning and access should be sufficient and any limitations would cause confusion. In addition they said that the inclusion of restrictions on specific methods of communication would be too restrictive and would become outdated too quickly.
111. The small number of responses in favour of restrictions came mostly from rights holders and their representatives. In each case their comments centred on the need for an appropriate level of security to ensure only those entitled to the material should receive it. One particular

licensing agency suggested that geographical restrictions should be imposed in order to ensure communication remains in the UK and sharing between institutions should not be permitted.

Proposal

112. We recognise the need to ensure that there is a reasonable degree of control exerted over the distribution of copyright material to ensure its use does not go beyond that required. We also do not wish to be prescriptive about the methods of communication which may be used, given the potential for future changes in delivery technology. **We therefore do not propose to specify particular types of delivery mechanisms.**
113. In relation to the potential requirement for geographical ID restrictions, a small number of stakeholders requested that restrictions be placed to restrict the exception to use within the UK only. We do not consider that the issue of distance pupils being located outside the UK is likely to arise in practice. **We therefore do not propose to introduce a requirement for geographical ID restrictions.**

ONWARD COMMUNICATION BEYOND A SECURE ENVIRONMENT

114. We asked how onward communication beyond a secure environment should be prevented. A very small minority of respondents suggested that onward communication was impossible to prevent or that any limits would be unworkable but most were positive that the combination of institutional procedures and some form of technological measures would be sufficient.
115. Many responses from the educational sector suggested the use of contracts between users and the educational establishments, with one respondent saying that as onward communication would constitute infringement this would act as a powerful deterrent. The use of written agreements, contracts and institutional procedures was a common suggestion across all stakeholder groups but so too was the use of technological measures. However, it was noted that technological measures should not be prescribed by law as they would change quickly over time.

116. The technological measures suggested by respondents included systems that would limit access to the VLE in the first instance such as high level access systems or geographical ID software as well as methods that would allow material to be tracked if it did leave the VLE, such as electronic watermarks or embedded markers.
117. We also asked if the expanded exception should be limited to communication inside a VLE or if onward communication outside a VLE by email should be permitted. Respondents were divided in their opinions, as rights holders said it would be acceptable to limit communication to inside the VLE whereas users said this was not acceptable. One respondent suggested the communication should be limited just to VLEs in the UK and another suggested that limiting communication to inside a VLE may be reasonable but communication outside a VLE may be inevitable.
118. Those that were against onward communication said that communication should only be permitted to “authorised users” and that email was too open to illegal dissemination therefore placing the work at unnecessary risk of infringement. One respondent made the point that as long as educational establishments have proper security measures they should be allowed to decide the most appropriate means of communication.

Proposal

119. **Under our proposal, any further transmission of the material by the pupil to a third party will not be sanctioned and it will be the responsibility of the educational establishment to use “all reasonable steps” to ensure only “authorised persons” access the material. The current provision under sections 35 and 36 which prohibit subsequent “dealing” with the material will be retained.**
120. We consider that sanctioning distribution outside networks controlled by educational establishments could have a negative effective on the ability of rights holders to reap appropriate rewards for their copyright work. It is therefore likely to fall outside the requirements of the three step test. **We therefore propose that the exception does not authorise the onward distribution of material to those outside the controlled networks.**

WHO SHOULD ACCESS MATERIAL WITHIN A VLE

121. We asked who should be permitted to view recordings or access extracts within a VLE and whether the reference to “...*teachers and pupils at an educational establishment and other persons directly connected with the activities of the establishment...*” in Section 34 was sufficient or too widely cast. Although there were a limited number of responses, the general feeling across all stakeholder groups seemed to be that “only those individuals connected to the educational establishment” should be permitted to view or access material.
122. Those that thought the wording was acceptable were in a minority and although they said the wording was acceptable they did for the most part suggest slight alterations to it. Suggestions for alterations were more common from those that thought it was too widely cast, particularly in the use of “...*other persons directly connected with the activities of the establishment...*”, as many were concerned that the nuances of the wording could be misinterpreted. For example, the concern was that persons not originally intended to make use of the exception could conceivably believe they were entitled to do so and therefore the exception could be abused.
123. The responses offered a wide variety of suggestions, from simply adding or removing a specific word to offering completely new wording for large portions of the section. Many of the responses suggested including other users to the existing “...*teacher and pupils...*”, some suggested parents or guardians and others suggested including people such as special needs teachers, teaching assistants and even the admin and IT staff who maintain the secure network.

Proposal

124. In considering who should have access to these works we have concluded that the wording of Section 34 is not appropriate for use in circumstances where distance learning is engaged. We believe that access should essentially cover teachers and pupils.
125. **We therefore propose that communications should only be received by an “authorised person” and in this instance an “authorised person” is considered to be teachers and pupils authorised by or on behalf of the educational establishment. However, this**

will also include teaching support staff in their various forms i.e. staff whose role is to assist the teacher and individual pupils during lessons (for example, classroom assistants and learning support assistants). We consider that the definition of “teacher” in Section 174(5) is sufficiently widely cast to extend to such support staff.

126. In addition, where access is required for distance learners situated outside the premises of an educational establishment it is reasonable to expect that the pupil may, in some circumstances, require assistance (whether from a parent, sibling or carer) in analysing or understanding the material which has been transmitted. We consider that the current proposals are sufficient to enable a third party to assist an authorised pupil in this way (once the authorised pupil has accessed the material), whilst at the same time ensuring that third parties cannot access works for their own purposes.

THREE STEP TEST

127. We consider that the proposed amendments to the Section 35 and 36 exceptions comply with elements of the three step test as set out below:
128. **Step 1 – ‘certain, special cases’:** The amendments to Section 35 and 36 will only apply in clearly defined cases. For Section 35 it will only apply to the recording and showing of broadcasts, undertaken by educational establishments for non-commercial educational purposes and for Section 36 it will only apply to limited copying and communication to the public where such activities are undertaken by educational establishments for educational purposes. In both instances a limited number of beneficiaries and activities are clearly identified, we therefore believe this satisfies Step 1 because the exceptions will only apply in certain, special cases.
129. **Step 2 – ‘do not conflict with the normal exploitation of the work or the subject matter’:** The amended exceptions will only apply in situations where there is no licensing scheme in operation and in both Section 35 and 36 related areas there are a number of licensing schemes already in use. The amended exceptions will therefore operate in a way that permits normal exploitation of the work in these specifically defined areas.

130. **Step 3 – ‘do not unreasonably prejudice the legitimate interests of the rights holder’:** As mentioned above, the amended exceptions will continue to allow rights holders to license their works and we therefore believe the amended exceptions would not unreasonably prejudice their rights.

DIGITAL RIGHTS MANAGEMENT

131. The amended exceptions will not necessitate a change to the current DRM regime. The existing remedy (which applies where technological protection measures prevent the acts permitted by these sections) should therefore also apply to the amended Sections 35 and 36, other than where Section 296ZE (9) specifically excludes on-demand works.

IMPACT ASSESSMENT

132. A partial impact assessment for the Section 35 and 36 exceptions was included within the first stage of the consultation. Following the receipt of additional information and a further examination of the issues it has been revised and the revised version can now be found in Annex C.



SUMMARY

We propose to:

- Extend the educational exceptions to permit certain broadcasts and study material (for example handouts of excerpts from copyright works) to be transmitted outside the institutional campus for the purposes of distance learning but only via secure networks.
- Extend the exception relating to small excerpts so that it covers film and sound recordings but this will not cover artistic works.

We also propose to retain existing provisos so that:

- The exception will apply only to the extent that licensing schemes are not in place.

To see how we envisage this working, please refer to the draft Statutory Instrument at Annex A. We welcome comments on this and the accompanying questions at Annex B.

CURRENT POSITION

133. The Gowers Review noted that UK copyright law does not permit individuals to make copies of any music they might own, even to enable them to copy music from a legitimately owned CD to a legitimately purchased computer or MP3 player. Although most discussion centred around music, the Review also noted that films fell into the same category. The point was made that the law was in direct contrast to the beliefs of many consumers about what the law was and/or should be, and raised concerns that respect for copyright could be undermined in such circumstances. Gowers therefore proposed that the law should be changed to permit such private copying, and wanted to make sure that consumers did not 'pay' for this facility by means of levies on equipment that might enable such copying.
134. Since the publication of the first consultation on how to implement these recommendations, the Government has published the Digital Britain¹⁷ report in June 2009 and its copyright strategy¹⁸ in October 2009.

GOWERS' RECOMMENDATION:

135. Introduce a limited private copying exception for format shifting for works published after the date that the law comes into effect. There should be no accompanying levies for consumers.

BACKGROUND

136. In the first consultation we proposed a narrow, specific format shifting exception which would allow individuals to copy legally owned material for their own personal, private use (not for family or friends), so that they could transfer content to different devices. Certain restrictions, discussed below, were proposed to meet the second part of the Gowers recommendation (that consumers should not be required to pay 'levies'), and to ensure that the exception fell within the bounds of the EU's copyright framework.
137. As well as more general questions about the exception, we asked how such an exception might be framed. 105 respondents commented specifically on the format shifting exception.

IMPACT AND BENEFITS OF A NEW EXCEPTION

138. The majority of respondents, including many rights holders, individuals, libraries, and user and consumer groups were in favour of amending the exception, but views on how to implement the exception were more polarised.
139. We asked about the potential impact and benefits of a new exception. Many respondents, mostly individuals and those from user focused communities, such as consumer groups, libraries and those in education, believed that there would be little, if any, impact on rights holders, and that no compensatory payments were required. They believed that the practice of copying legitimately owned works was already widespread, and this amendment would simply bring the law into line with common practice. Consumers would be unlikely to pay several times for the same piece of music or other creative work, simply to play on other devices they own, so loss of revenue would be unlikely. As rights holders were taking no action about current infringing practices this was argued to imply that there was little or no economic loss at present, so changing the law to permit legal copying would have little impact. It was also suggested that any potential for harm had probably already been reflected in other ways, such as setting the purchase price to take account of any harm.
140. It was suggested that the impact would rather be on consumers as it would reduce excessive restrictions currently in place, would clarify existing law, and harmonise it with existing technological practices which already facilitate copying. It was felt that the proposal would enable consumers to update the means by which they accessed the content they own by moving it between technologies as they become obsolete, merely reflecting the modern world. They felt it would regularise the current, generally accepted practice of copying and legitimise it.
141. It was also thought that the exception could have a particularly beneficial effect on consumers in the educational field, permitting individuals to shift content provided in a single, open format, to their preferred method of accessing it. Others commented that e.g. the research and private study exception¹⁹ already permitted format shifting in certain circumstances for researchers and students.

17. See http://www.culture.gov.uk/what_we_do/broadcasting/5631.hsp

18. See footnote 5

19. Section 29, CDPA, considered in paragraphs 173-255 of this consultation document

142. It was also suggested that a change in the law could provide a new incentive for the information and communication technologies industry to sell devices dedicated to private copying, such as MP3 players.
143. Some respondents felt that the current state of the law meant that even those who knew that format shifting was not permitted were unlikely to respect it. It was thought that changing this aspect of the law could make it more understandable and justifiable, which could potentially benefit rights holders: a law seen as more reasonable was more likely to be observed in its other aspects. Some suggested that the flexibility to format shift could make content more desirable to consumers, but would still enable the creative industries to offer consumers better quality, higher definition versions of works as technology developed.
144. Some from the rights holder community agreed that the law should reflect reality, and were not opposed to an exception in principle but were concerned that the proposal, although apparently narrow, would none the less have a negative impact on them, and not meet the requirements of the 3 step test²⁰. They believed that some form of compensation would be necessary if the exception was to be introduced. Rights holders suggested that this could take the form of licensing, perhaps with the law constructed in such a way that the exception would only take effect to the extent that there was no licensing scheme in place. Other suggestions for compensation included a form of Public Lending Right. Concerns were also expressed that the current debate simply served to undermine legitimate licensing activity, particularly in the fields of film and online services.
145. Some were concerned that the proposals would serve no one's interests, just making the law even more complex, creating further confusion. It was suggested that a complex exception would not lead to increased respect for copyright law, particularly when for example any copies could not be retained should originals be sold or passed on to others, and would instead make it more difficult for rights holders to police their rights. It was suggested that the introduction of even a narrow format shifting exception would raise expectations that copies of *any* content could be made whereas the first consultation acknowledged that TPMs would not be overridden. Additionally such a change in the law could actually encourage more widespread unauthorised copying (on behalf of others) and increase levels of piracy, particularly in relation to e.g. film and broadcasts.
146. Markets for digital forms of content e.g. audio and e-books are under development and some rights holders argued that an exception could seriously undermine emerging business models, which required significant investment from creators and publishers. Concerns were raised about any potential inclusion of 'media' shifting e.g. digitisation by scanning. It was felt that this would be in direct competition with the emerging markets for e-books and other portable reading devices, and introducing an exception permitting such activity would have a detrimental effect on rights holders.
147. There were also concerns about individual creators and the detrimental effect format-shifting might have on their right to control the use of their works and on established revenue streams. This was felt to be the case particularly for journalists and visual artists. For example, it was suggested that if photographs were included within the exception, they argued that this would have considerable detrimental effects on the incomes of commercial artists: portrait and wedding photographers would lose the right to control reprints of their work, and fine art creators and photographers would lose the right to license images for e.g. pictures and wall hangings, screen savers, and for use on mobile phones. Likewise journalists argued that they would be unable to control the use of their works which currently manifest themselves in blogs, podcasts and videos, as well as the more 'traditional' media.
148. Many commented that an exception applying to audio visual material, such as broadcasts and films would undermine existing business models, and jeopardise the development of future ones. Industry had been working to provide new business models, such as video on-demand, electronic sell-through, and the BBC's iPlayer, which – they argued - would provide the sort of ability to copy that is now being sought. Some referred to the development of other business models, which offered a range of pricing options for accessing content in e.g. multiple formats, either during a specific period or permanently. Any moves to permit similar copying under a new format shifting exception, would endanger nascent markets.

20. See footnote 14

149. There was also some concern with the suggestion that consumers should be able to transfer content in order to mirror changes and developments in technology. For example, some respondents noted that video and DVD producers were able to earn valuable revenues from repeat business when consumers who own a video or DVD 'upgrade' and purchase the same programme again, but in the most recent technology formats.

150. There were a few additional suggestions concerning the scope of the exception. For example, it was stated that the exception cannot apply to computer software²¹, and hence to computer or interactive video games. For clarity's sake, and given superficial similarities between such games and audio visual works, it was suggested that computer games and interactive video games be specifically excluded. Some respondents argued that there was also a case for the format shifting exception to go beyond private use and to permit certain organisations, such as museums to format shifting to provide new opportunities for the public to access their collections, or to permit educational use. This issue of permitting format shifting by certain organisations is considered further under the recommendation concerning libraries and archives in paragraphs 270-279.

SPECIFIC ISSUES

Scope of the Exception

151. The first consultation proposed various limitations on the way the exception might be implemented with a view to ensuring that it would be consistent with the EU's legal framework whilst enabling a degree of copying. To fulfil these requirements a proposal was made to cover:

- Format shifting only (from e.g. CD to MP3 player)
- By an individual solely for his own benefit (not family and friends)
- No retention of copies if no longer in possession of the original (to avoid e.g. resale of originals once copies had been made)
- To apply only to legitimately acquired works

152. Responses to these suggestions were varied. The general approach was felt by many to be the correct one, welcoming any facility to permit the legal copying of works and recognising the intention behind the proposals to minimise any potential harm to rights holders. Most agreed that format shifting should be restricted to an individual rather than be available for the use of family and friends, but some consumer groups felt that this was too restrictive. One suggestion was that family and friends could be included if they shared the same household and the same devices. In relation to the possible disposal of an original if a copy was not retained, many regarded this as unenforceable and unworkable. Others however pointed out that this was, in their view, a crucial condition – it would help consumers understand the scope and function of an exception and would give rights holders the ability to enforce their rights if an exception was being abused, even if that enforcement should prove difficult.

Classes of Work

153. There was a clear divergence of opinion amongst respondents as to what classes of works should be covered by the exception. Those from user communities, such as consumer groups, libraries, and from education favoured the broadest possible exception covering all classes. Some rights holders also felt that a broad exception would be the most appropriate, provided it was accompanied by appropriate means of compensation. Others felt any restriction as to the types of works would cause further complications in future, as more works become available in electronic formats, and multimedia works become the norm. It was felt that applying different laws to different types of work would cause confusion and effectively encourage abuse.

154. Many rights holders were particularly concerned that a 'one size fits' all approach would not be appropriate. Many, including some from the music industry, preferred that the exception should relate specifically to music, highlighting particularly that the discussion in the Gowers Review focused almost exclusively on music. Some cited the lack of evidence relating to other forms of content such as literary or artistic works, and said that the focus should solely be on music and film.

²¹ Computer programs are regulated by the Directive on the legal protection of computer software programs (91/250/EEC)

155. A number of rights holders indicated that there were differences between the consumption of music and audio visual material. For example, they said that consumers were more aware that copying e.g. a DVD was not legal (because of warning notices) and were therefore less inclined to assume – as with music - that copying was acceptable. They felt that the proposal in the first stage of the consultation not to override DRMs in a sector in which DRMs were frequently used would also serve to confuse and frustrate users, and would therefore be unlikely to contribute to the aim of giving public legitimacy to the copyright framework as a whole. It was said that music was often listened to repeatedly, whereas film tended to be watched once, and then retained for later consumption, suggesting that users of films were more likely to buy the content in the format that best suits their needs, with – it was argued - less desire to shift the same content on to multiple different platforms.

Number of Format Shifts

156. In response to the questions about the number of format shifts, including permitting format shifting to take account of technological developments, there were very few respondents who suggested any specific number. Some, particularly individuals and those in favour of broader access to and use of content, believed there should be no limit so as to allow for changing technologies. Others commented that regardless of any number it would be difficult to police. However, many rights holders raised concerns about permitting a large number of shifts at all: whether such an exception was likely to meet the three step test; that it should be a matter of agreement via licensing and that it might undermine current businesses. For example, they noted that repeat purchases have historically provided important revenue streams in the film and broadcast sectors, as consumers 'upgrade' content they already own to the most up to date technology formats. Of the few who commented about the need for multiple copies arising purely from the technological processes involved, most agreed that this should be permitted but narrowly defined. Section 28A was suggested as a useful model by some.

Timing of Application of Exception Relative to Copying Activity

157. Many respondents did not respond specifically to questions about when the exception should apply. Three options were given in the first stage of the consultation: that format shifting be allowed for works *published* after the exception takes effect; for works *purchased* after the exception takes effect; or for works *copied* after the exception takes effect. Some agreed with the suggestion in the original consultation document that the least confusing - and most practical and transparent - option for consumers would be to ensure that the exception took effect for acts of copying which took place after the date the law changed. Others, whilst recognising the benefits to consumers of this option, were concerned about the impact on rights holders that this would have: it would apply the exception to works published before the exception came into force, and therefore raised questions as to how rights holders would be able to compensate retrospectively for any economic effects arising. Several rights holders reiterated that this could only be done via some form of licensing. Overall, there was no agreement about how to proceed, nor were any alternative proposals made.

Fair Compensation

158. Although we asked no specific questions about fair compensation several respondents presented us with their views on this specific issue. Music rights holders, for example, underlined their concerns that even the narrow format shifting exception proposed was likely to be prejudicial to them. To overcome this, they proposed that fair compensation should take the form of licences, agreed with the manufacturers and distributors of devices which have been developed and are used primarily for non-internet ('offline') copying. Manufacturers whose equipment was subject to the 'levies' of various other EU member states, highlighted the difficulties in the way the current levies systems operate across Europe, mentioning their concerns about lack of transparency and accountability as well as legal uncertainty as to how the levies were applied, and administrative difficulties given that each Member State applies its own rules. Others were clear that no compensation should be due at all for what they regarded as a very limited exception which would have no effect on rights holders. Some pointed out that the proposal to change the law merely reflected the type of current behaviours the music industry had already said it would not take action against.

Proposal

159. One of the main issues associated with the possible introduction of any private copying-related exception, is the interplay between the breadth of that exception and the extent to which any fair compensation²² may be required. In most EU Member States which have a private copying exception, fair compensation to rights holders takes the form of levies applied to copying equipment, which consumers pay when they purchase items such as MP3 players, computers, and blank media. When Gowers made the recommendation to introduce a limited form of private copying i.e. format shifting, he also considered this issue. Rather than recommending the introduction of levies, Gowers considered that such fair compensation could be built into the price of the content covered by any exception. A slightly different approach was taken in the first stage of the consultation, namely the possibility of introducing a form of private copying that was sufficiently specific such that no harm would accrue to rights holders. This approach reflected the possibility that if there was no harm, then fair compensation could be set at zero.
160. While the responses indicated a broad agreement with the concept of a format shifting exception, how this could be achieved – including the need to introduce fair compensation or not - was subject to considerable disagreement, as described above.
161. Consumer representatives, individuals, and those from the libraries and museums sector favoured a clear, simple approach: the exception should apply to all types of works, be unrestricted in relation to the number of copies which could be made, and should apply to copies created after the law had changed, regardless of when the original work was published or purchased. It should also be without any compensatory payments to rights holders. It is clear however, that any such exception without fair compensation falls outside the scope of current EU legislation.
162. Some rights holders were concerned to avoid altogether any exception which undermined both current and potential business models in their particular sector. Other rights holders, although sympathetic to the need for clarity and simplicity, took a more positive approach, but wished the exception to be restricted to music ideally (or at most music and film) and that it be accompanied by some form of compensation. Such limitations to the types of works to which the exception applies would clearly not meet consumer expectations, either in terms of accessibility or in terms of visible costs, given the likelihood that any additional compensatory payments are likely to be passed on to consumers.
163. The nature of responses highlighted the difficulties inherent in constructing an appropriate exception. A narrow format shifting exception is unlikely to satisfy the needs of consumers who wish to carry out a range of activities associated with the consumption of content in the digital age. Neither is it likely to meet the needs of rights holders in a way which would resolve satisfactorily the current debate on fair compensation.
164. On the other hand, an exception broad enough to meet consumer needs could well require an element of fair compensation for rights holders, and any cost would almost certainly be passed on to consumers.
165. According to the Information Society Directive (“the Directive”), fair compensation can take a number of forms (it gives the example of a licence fee) and can be provided in advance. Possible harm to rights holders is “a valuable criterion for determining the form, detailed arrangements and possible level of such fair compensation”.²³
166. The Government remains of the view that the fair compensation for certain limited exceptions to copyright can be zero²⁴ and this is compatible with the Berne three step test (which is repeated in Article 5(5) of the Directive). The Government considers that fairness must be seen not only in terms of any detriment to rights holders but also in terms of fairness to consumers and to society as a whole; for example, fair competition must be part of the basis for any assessment of fair compensation.

22 According to European law, ‘fair compensation’ must be considered in relation to private copying, although in certain circumstances no obligation for payment may arise. Directive 2001/29/EC refers

23 Directive 2001/29/EC, Recital 35

24 For example, where the prejudice to the rights holder would be minimal, as set out in recital 35 of Directive 2001/29/EC

167. However, the Government's copyright strategy © the way ahead²⁵ notes the view that "a format shifting exception is insufficient to meet either consumer or business needs in the digital age, and that a more comprehensive approach associated with the legal use of copyright material is needed".
168. The fundamental issue, as the strategy notes, is that enforcing rights over personal, non-commercial use of works appears disproportionately difficult in the digital age. A case can therefore be made for an exception much broader than simply format-shifting, potentially covering not just the reproduction of legitimately-purchased works but also some degree of sharing of those reproductions in derivative works and/or with family and friends. Such an exception could impact on revenues for rights holders; an element of fair compensation for any loss would be required. Any such exception would have to be developed at the European level.
169. The copyright strategy also notes that any UK levy system to fund fair compensation would suffer similar problems to those noted in the section on 'fair compensation' above. The Government has no plans to introduce any such compensation systems in the UK. However, "A transparent, harmonised system across the EU that did not place additional unwarranted burdens on business and was fair to authors, rights holders and consumers could merit further examination as a means of fair compensation."
170. The Government also notes the suggestions that different sectors would be impacted differently by a format shifting exemption. And it is always open to rights holder to find ways to permit or licence format shifting or other private copying.
171. However, as the copyright strategy notes, this issue is much broader than the potential UK-only solution considered in the first stage of the consultation. **The Government does not therefore currently consider it appropriate to introduce a narrow UK-only format shifting exception.** We would however encourage the EU to look at options that benefit consumers, including the possibility of a broad exception to copyright for non-commercial use.
172. In addition we will continue to pursue other measures in the UK which facilitate easier access to works, including those incorporated within the recently published Digital Economy Bill²⁶. This includes, for example, measures to permit the regulated use of orphan works (those works for whom the rights holder cannot be found), which at present cannot be used without infringing copyright. It also includes provisions to authorise certain collecting societies to set up extended collective licensing schemes, which will enable them to licence more efficiently, and to more realistically meet demands for usage, without the risk of infringing works.

25 See <http://www.ipso.gov.uk/c-strategy-digitalage.pdf>

26 See <http://www.publications.parliament.uk/pa/ld200910/ldbills/001/10001.i-ii.html>

CURRENT PROVISIONS

173. The current 'fair dealing' exception under section 29 permits students and non-commercial researchers to copy articles and small sections of literary, dramatic, musical and artistic works. This enables them to repeatedly consult sources and 'quote' extracts in their own works without having to obtain prior permission from the rights holder. There are also provisions covering the typographical arrangement of a published edition. The law recognises that this type of fair dealing does not normally interfere with the incentives and rewards that copyright provides to rights holders, and also encourages the creation of new works.
174. Gowers observed that sound recordings, films and broadcasts were excluded from the current exception. He recommended amending section 29 to remove the inconsistencies in negotiating rights and make the exceptions better suited to currently available media and modern methods of studying and carrying out research.

GOWERS' RECOMMENDATION

175. Allow private copying for research to cover all forms of content. This relates to the copying, not the distribution, of media.

BACKGROUND

176. In our first consultation we asked stakeholders a number of questions about the existing research and private study exception and how it should be amended to accommodate Gowers' recommendations. We received over 120 responses on this issue and over three quarters (mostly copyright users) were in favour of expanding the exception to cover all forms of content. Only a handful of respondents were opposed. There was also a difference of opinion on the detail and exactly how the exception should operate. Library privilege – a related issue – was also raised frequently. This chapter provides a summary of the responses and our proposed solutions.

IMPACT AND BENEFITS OF AN EXPANDED EXCEPTION

177. The first consultation asked various questions about the potential impact and benefits of an expanded exception. We were particularly interested in hearing about the difficulties researchers and students experienced obtaining permission to make copies and whether this impacted on their choice of study. We also asked about the benefits for those involved in education and society overall.
178. Most respondents (universities, libraries, archives, individuals and some representatives of rights holders – including film and music) were in favour of expanding the exception to include sound recordings, films and broadcasts. This would remove some of the current inconsistencies and problems in obtaining permission from rights holders to copy works still in copyright. They believed that this would facilitate quicker, simpler, inter-disciplinary research encompassing modern technology and enable better comparison between works held at different locations. However, some organisations representing rights holders stressed that copyright works should not be 'free for all'.
179. Researchers and students claimed that the rights clearance process was complex, time consuming and expensive. They gave many examples of the problems they had encountered obtaining permission to copy works, particularly where they needed to contact several copyright holders (who didn't always reply). 'Orphan works', although not covered by this particular consultation²⁷, added to their frustration. Whether they obtained permission to make copies frequently depended on the commercial value of the work. In some instances researchers needed to travel long distances to view original works at designated premises, as they were unable to obtain copies to use locally.

²⁷ The recommendations by Gowers to facilitate access to orphan works are being taken forward separately – see the Digital Britain Report http://www.culture.gov.uk/what_we_do/broadcasting/5631.aspx/

180. Researchers commented that it was often desirable to copy entire works for effective study and comparison, particularly if they were not commercially available, e.g. in the fields of musicology (several tracks may be needed for computer analysis and sound recordings are often used to illustrate lectures), media studies, film, oral history, architecture, medicine (audio / visual stimuli), genealogy and science. Some works were available via library sound archives / reading rooms, but they were often subject to copyright clearance (and inevitable delays) so researchers would prefer to be able to copy a portion of commercial CDs themselves. However, rights holders argued that wider use was only needed in rare, specialised cases.
181. Some responses suggested that researchers based their studies on works that were readily available for copying to avoid the complications of obtaining permission – this could potentially distort the pattern of research. Occasionally they felt forced to pursue alternative subjects or use illegal copies (either through ignorance or because they considered the research important enough to take a risk).
182. Many respondents believed that researchers, the general public (e.g. local historians) and society as a whole would benefit from a wider exception (e.g. museums, galleries and heritage sites would be permitted to research their collections). This would improve the UK's research base, encourage creativity and support Government's 'lifelong learning' campaign. A few educational institutions commented that countries with more general exceptions, e.g. the US, probably had an advantage over the UK.
183. Responses from libraries and universities suggested that the impact on rights holders would probably be minimal providing use was 'fair' and complied with the 3-step test. Others argued that most works were older and commercially unavailable so the financial impact on rights holders (if any) would be negligible. A number of respondents suggested that rights holders may benefit from additional publicity arising from the exception, resulting in increased demand for their works²⁸.
184. A small number of bodies representing rights holders argued that there was no real need or economic justification for change as many works were already 'available' via other sources (e.g. via ERA Plus licence, free on-demand services or by purchasing copies) and users will have improved access via extended educational exceptions (see paragraphs 55-132). Some rights holders had concerns about the potential effects on business; there were fears that the proposals could conflict with the normal exploitation of works, impact on primary sales and upset the balance of collective licensing schemes which provide unlimited access for a reasonable fee (e.g. the ERA licence). Some organisations representing rights holders didn't believe that researchers experienced difficulties obtaining permission, or were unaware of any problems.
185. Some respondents made isolated comments, e.g. allowing fair dealing for genuine researchers and developing licensing schemes for wider usage; also industry action to make information available via other sources e.g. libraries and museums.

Proposal

186. It was clear from the responses that some respondents misunderstood what the exception was intended to permit. The expanded exception would not 'give access' to a work. However, it would allow users who already had lawful access to 'copy' a portion of the work providing it fell within the scope of 'fair dealing'. It is doubtful that copying entire works (e.g. for musicology) would be considered fair because of the detrimental effect this would have on rights holders.
187. **We propose extending section 29 to include sound recordings, films and broadcasts.** This would eliminate many of the rights clearance problems and enable individuals to make their own 'fair dealing' copies. However, we are mindful of the fact that it may be appealing to copy such works purely for 'entertainment' purposes. Therefore, **we intend to restrict the permitted acts relating to these additional works to those who are members of an educational establishment, and for the purposes of private study, or research being undertaken at that establishment.** This should minimise the potential risks of unauthorised use and give some assurance to rights holders.

²⁸ The source must be sufficiently acknowledged for non-commercial research purposes, where practical.

188. We recognise that in practice this proposal will cover many, but not all, individuals. It nevertheless extends the types of works that can be copied and will not affect the requirements relating to works already covered by the current section 29, namely literary, dramatic, musical and artistic works.

SCOPE OF THE EXPANDED EXCEPTION: RESEARCH AND PRIVATE STUDY

189. The Gowers recommendation only covered research, but the existing exception covers research AND private study. The consultation asked whether there were any reasons why the expanded exception should be limited to research, and whether clear boundaries needed to be set between research and private study.
190. The majority of respondents were in favour of the expanded exception covering both research and private study and thought that no attempt should be made to distinguish between them. There was considered to be an overlap between informal and formal education and one may lead to the other.
191. Rights holders had some concerns about the inclusion of 'private study' – the exception could potentially be used to work around copy protection measures (e.g. TPMs) for entertainment purposes.
192. Most respondents stipulated that the exception should be limited to non-commercial research. They also stated that the non-commercial conditions for research and private study should be well defined and consistent. It was pointed out that there were many 'commercial researchers' which could lead to misinterpretation.
193. Several bodies representing rights holders stressed that an exception did not 'give access' and TPMs may legitimately prevent users from copying works. Many works were readily available via the current exceptions (fair dealing and educational), through libraries, licensing schemes, on-demand services, by time-shifting or purchasing copies. The exception should only apply if there was a genuine need to copy the work, rather than simply view it.
194. Bodies representing rights holders also stated that a new exception could cause confusion between fair dealing and the educational exceptions. Users linked to an educational establishment accessed works via licensing schemes (e.g. ERA). One respondent suggested that licensing arrangements could be tied in with section 35 (recording by educational establishments of

broadcasts) and section 36 (reprographic copying by educational establishments of passages from published works) so that the 'fair dealing' use of sound recordings, films and broadcasts for private study would be linked to library privileges.

Proposal

195. We propose that **the expanded exception will apply to both research and private study – the responses generally confirmed the difficulties of trying to distinguish between the two activities, and that in practice there is no specific boundary which delineates them.**
196. **Copying of new works will continue to fall within the scope of 'fair dealing' and the requirement for research to be for non-commercial purposes will be retained, in line with the requirements of the Directive. Dealing must be for the purposes of a course of study, or for research being undertaken at an educational establishment; any further dealing may result in an infringement. We will retain the requirement for acknowledgement of source where practical in the case of non-commercial research.**
197. It is not the case that provision in sections 35 and 36 will provide all that is necessary for students and researchers. Those exceptions, which are considered elsewhere in this consultation (see paragraphs 55-132) apply specifically to copying by educational establishments, whereas Section 29 permits individuals to carry out specific activities for themselves. Furthermore, it is not limited to any particular type of establishment so can therefore apply to material legally accessed e.g. from within libraries and other establishments.

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

198. Most stakeholders agreed that the expanded exception should cover all types of works including films, sound recordings and broadcasts to enable better use of a wider range of material including multimedia and currently unavailable works.
199. There was an emphasis on the growing importance of new works. Individuals needed to be able to produce compilations of film extracts for research purposes and incorporate extracts into multimedia dissertations; the tutor also needed to be able to receive and view these works for marking.
200. Some raised issues of particular concern to them, e.g. excluding sound recordings from the amended exception, placing restrictions on the amount copied and permitting visually impaired people to copy extracts from audio books (which are classed as sound recordings).

Proposal

201. We do not believe that we should restrict the types of works to which the extended exception should apply. **We therefore propose extending the current exception to cover sound recordings, films and broadcasts, but only in the circumstances described above (see paragraph 187).** We recognise that any amendments to the current law will inevitably raise new questions about how the law is to be interpreted, but incorporating the changes within the structure of the existing 'fair dealing' exception should help ensure that no new, and therefore untried, concepts are introduced into the law – it also reflects the current situation regarding the amount that may be copied.
202. **New section 39A (see paragraph 226) will permit librarians to make copies on behalf of individuals who meet the criteria. Similar provisions will enable librarians and archivists to make copies under section 43A.**

SCOPE OF THE EXPANDED EXCEPTION: FIELDS OF STUDY

203. The consultation asked if there was a need for action in particular areas of research or fields of study where progress was currently being constrained, and whether the exception should apply to all areas of research and study.
204. Many researchers stated that they had experienced problems obtaining permission to copy works, particularly in the fields of musicology, film studies, sound recordings and artistic works (some of which are excluded from library privilege).
205. The majority of respondents claimed that progress was being constrained by the current exception in ALL areas of research and study and many felt that everyone should benefit equally (not just those studying specialised fields).

Proposal

206. **It would be inappropriate to limit the exception to specific purposes or specialised subjects as material included in sound recordings, films and broadcasts may be relevant to a wide range of subjects.**

THE SCOPE FOR MISUSE OF THE EXPANDED EXCEPTION

207. The consultation asked if it was necessary to limit the scope of the exception to prevent intentional misuse and suggested several options. We also asked if the boundaries of the expanded exception needed to be made clear to avoid misunderstanding.
208. We received diverse comments on the scope for intentional misuse. Most respondents agreed that the exception should be narrowly drafted and retain the current conditions (i.e. use should be fair, for non-commercial purposes, sufficiently acknowledge the author, comply with the 3-step test and retain the restriction on the making of multiple copies by librarians). Providing these conditions were met then no further limits were considered necessary.
209. Others remained unconvinced of a 'genuine need' for expansion and believed a solution would be best left to the industries involved. A few bodies representing rights holders indicated that remuneration was probably necessary, especially if the expanded exception included private study and a new format shifting exception was introduced.

210. Many respondents agreed that the boundaries of the exception needed to be made clear and that students and researchers needed to gain a better understanding of copyright and fair dealing. This could be achieved through guidelines (preferably following consultation with stakeholders), training events and/or campaigns to generate respect for copyright and creativity. Although most respondents agreed that guidelines were either essential or useful, others believed they could be misleading. Some felt that Government guidelines may not be enforceable and drafting would be best left to the establishments involved.
211. Some respondents commented that deliberate misuse was unavoidable and many believed that the courts should continue to act as arbiters in disputes over fair dealing and criminal offences. It was suggested that alternative forms of mediation could be made available (e.g. copyright ombudsman or the Strategic Advisory Board for Intellectual Property (SABIP)).
212. Education stakeholders were concerned about the idea of formal links to a course of study or educational establishment. They pointed out that there were non-affiliated researchers such as authors, composers, artists, film directors and amateur scholars who would not be able to benefit from the exception. Other respondents including librarians, archivists and individuals agreed, highlighting the importance of all types of study. Some organisations representing rights holders indicated that they could accept copying by 'genuine researchers', but had concerns about copying for 'private study' purposes. However, others objected to any amendments to this exception.
213. Most respondents stipulated that copying must fall within the scope of 'fair dealing' which was well established and provided a boundary for acceptable use. There were fears that expansion could cause confusion between fair dealing and the educational exceptions – potentially resulting in claims of alleged infringement. It was pointed out that photocopying for research and private study purposes did not appear to have had an adverse effect on the publishing industry.
214. A variety of respondents suggested that expansion could be beneficial for rights holders – improving their reputation and increasing both demand for their works and revenue. Bodies representing rights holders favoured restricting the exception to research and most agreed that libraries should be able to act as trusted intermediaries to make copies on behalf of individuals. A few respondents indicated a preference for voluntary licensing, or expanding the scope of fair dealing rather than statutory measures. Other suggestions for limiting misuse included the use of watermarks as a deterrent and better use of library declaration forms.
215. Many Universities raised a related issue concerning the publication of multimedia theses (which contain third party copyright works) on the Internet.

Proposal

216. We recognise the needs of those who wish to copy extracts of a broader range of works than is currently permissible, but also recognise the concerns of rights holders, particularly in relation to the potential misuse of the 'private study' exception. In making our proposals, we are seeking to retain a fair balance between improved conditions for users and strong rights for rights holders to comply with the 3-step test. We believe that if the exception is narrowly drafted, and therefore does not unduly prejudice rights holders, remuneration would not be necessary.
217. As discussed earlier, we do not believe it is practical to treat 'research' and 'private study' separately, nor would it be practical to define 'private study' in such a way as to exclude entertainment-type uses, which may be used as an excuse for misuse. Therefore we propose that copying of new works (sound recordings, film and broadcasts) will be restricted to members of an educational establishment and copying should be for the purposes of private study, for or research, undertaken at that establishment. This limitation will not apply to the works already covered by the current exception, but in general our aim is to retain the existing conditions and ensure that, where appropriate, they apply to new categories of works. So, for example, the author of the copied work should be acknowledged where practical (in the case of research), and onward distribution or publication will not be sanctioned.

218. In relation to material available in libraries, it is likely that most copies will be made in either specialist or research libraries. In such instances the public are rarely permitted to handle sound recordings, films, broadcasts or fragile works themselves, so librarians will act as trusted intermediaries. **We therefore intend to ensure library declaration forms will reflect the new works and be revised to enable individuals to confirm to librarians or archivists making copies on their behalf that they meet the criteria. The current conditions which are intended to prevent several individuals from obtaining more than one copy of the same material will be retained.**
219. We believe that the restrictions on who is able to make copies of new works under the expanded exception will minimise the risk of deliberate misuse and ensure that uses are sufficiently closely defined to minimise any losses to rights holders and therefore negate the need for remuneration.
220. We believe that legislation should not be prescriptive about the amount of a work that can be copied or what constitutes 'fair dealing'. Users should – as now with e.g. literary works – consider if they really need to make a copy (it may be sufficient to simply view it), how much they actually need and their intended use. **Universities and libraries are probably best placed to issue their own guidelines and suggest limits for individuals, in consultation with rights holders where appropriate.** We will also issue business guidance to comply with Government's "Code of Practice on Guidance on Regulation"²⁹.
221. **As now, we believe that the courts should act as arbiters if there is any dispute.**
222. The related issue concerning the publication of multimedia theses (which contain third party copyright works) on the Internet falls outside the scope of both fair dealing and the Gowers recommendations and will not be addressed here.

LIBRARY PRIVILEGE

223. The Gowers Review focussed primarily on self-copying by individuals (section 29). However, whilst analysing the responses it became clear that we also needed to consider "library privileges". Librarians and archivists are permitted to make copies of works on behalf of researchers and students under section 39 (copying by librarians: parts of published works) and section 43 (copying by librarians or archivists: certain unpublished works) of the CDPA. These form an integral part of the system whereby students and researchers obtain copies of works essential to their studies.
224. Many respondents asked for library privileges to be extended to cover all works to mirror the proposed research and private study exception. They also indicated that they were content for libraries to act as 'trusted intermediaries' as it offered some control over unlawful activities by ensuring that limits were enforced and making users sign a declaration form alerting them to the conditions of use.

Proposal

225. Given the proposed extension of the current research and private study exception we believe it is also necessary to make consequential amendments to the provisions which allow librarians and archivists to act on behalf of individuals.
226. **We intend to introduce a new section 39A which will permit librarians to make copies of published sound recordings and films³⁰ on behalf of individuals for research and private study purposes. Similarly, a new section 43A will enable librarians and archivists to copy unpublished sound recordings or films.** The conditions to be prescribed in regulations to be made under sections 37-43A will reflect the new amendment to section 29, namely that the individual must be a member of an educational establishment and copying must be for the purposes of a course of study, or research being undertaken at that establishment. This will be reflected in amendments to the appropriate library and archive forms (see paragraph 232 below).

²⁹ <http://www.berr.gov.uk/files/file47158.pdf> - the code of practice recommends issuing guidance at least 12 weeks before the regulations come into effect to help businesses understand how the changes will affect them.

³⁰ We do not consider it to be necessary to extend library privilege to broadcasts. Recordings of broadcasts are deposited in libraries. A copy of a recording of a broadcast taken for the purpose of non-commercial research or private study is, in effect, a copy of a film or sound recording.

227. We believe that rights holders will not be unduly affected by these proposals. Libraries have indicated that users would not be permitted to handle original sound recordings or films to make their own copies, so librarians will be in a position to exercise a degree of control over any copying. To ensure that librarians themselves do not become liable for infringement proceedings **we propose that users should, as now, sign a declaration form to agree to certain terms and conditions.**

228. We wish to enable librarians and archivists to assist individuals with access to works as far as possible. For this reason **we propose to extend section 43 to include all unpublished artistic works.** Such amendments will enable individuals to acquire the necessary copies, whilst reducing the risk of damage or theft of rare or delicate works and thus helping to preserve the UK's heritage.

229. As now, in the case of unpublished works, it will continue to be the case that no copies can be made where the rights holder has expressly forbidden it, or where the work has been published before being deposited, to ensure that rights holders interests continue to be protected.

230. In relation to published artistic works, we believe these are more likely to be accessible to individuals to make copies for themselves, so access is unlikely to be such an issue. In any case, librarians may already copy illustrations which form part of literary works. We believe that any changes to the law to include artistic works could only permit part of a work to be copied (under fair dealing) which would be of little practical benefit.

231. Additional **amendments to the libraries and archives exception in section 42 will enable them to make copies of items in their collections for preservation purposes (see paragraphs 256-298). They will also be permitted to copy 'preservation copies'**, in order to prevent further deterioration of originals. The preservation copy would be treated in the same way as the original work – i.e. if copying the original was permitted for the purposes of research or private study, then copying the preservation copy for that purpose copy would also be permitted.

232. Librarians and archivists need to be confident that they are providing copies of the additional works lawfully, and we also need to provide some assurances to rights holders. Therefore we propose extending the existing 'self declaration'

form to cover the additional works. As the requirements for the works being added to section 29 are slightly different to those for the existing works, **we propose to introduce a new library declaration form to cover sound recordings and films with additional sections asking users for the name of the educational establishment of which they are a member and an indication of the relevant course of study or research undertaken.** As now, individuals will be required to pay a fee to cover the cost of making the copy, if a librarian or archivist makes a copy of a work on their behalf.

233. For the purposes of section 39A, legal deposit libraries are prescribed only as regards the copying of published sound recordings and films which are not incidental to other works.

234. Department for Culture, Media and Sport (DCMS) regulations will provide for copying by the legal deposit libraries on behalf of individuals of films and sound recordings which are incidental to other works, subject (in the case of copyright works) to the same conditions as will be prescribed by the 1989 Regulations as amended.

DIGITAL RIGHTS MANAGEMENT

235. We asked whether a DRM workaround should be provided for all copying under the expanded exception or if it should be limited in some way. We also asked what impact a workaround might have on rights holders.

236. The comments we received on DRM were very diverse, suggesting that this issue is not straightforward. Some considered that unprotected versions were already widely available; others preferred a narrow workaround.

237. Rights holders believed a workaround would conflict with EU law and could present significant costs, render DRM worthless, undermine new business models or increase unauthorised use. Others felt that DRMs / contracts interfered with access for researchers, archivists and the disabled, and should not override copyright law. Some suggested licensing schemes or secure access as an alternative solution.

238. Many respondents raised concerns that the complaints procedure was insufficient, unworkable and complex – only a handful wanted to retain it. A few respondents noted that the complaints procedure was under-used which suggested that voluntary measures already exist.

Proposal

239. We conclude that the potential impact of this issue goes much wider than the original recommendations made in the Gowers Review. We also believe that **any moves to significantly amend DRM-related legislation would require further, independent consideration**. However, **we intend to retain the current system ('Notice of Complaint' via the SoS under s296ZE)**, whereby a procedure for accessing DRM protected works is provided. Although no specific amendments to the law are required, the wording of schedule 2 of the Act means that this provision will also apply to the additional works proposed for section 29.
240. We recognise that the legal language set out in the CDPA, does not make the complaint procedure as comprehensible as it could be. As recommended by Gowers, we are implementing a set of web-accessible directions to assist complainants to understand the procedure, to enable them to identify more readily the actions they need to take, and if they believe a formal complaint is necessary, to inform the Intellectual Property Office in an appropriate manner to allow the complaint to be processed efficiently.

PERFORMERS' RIGHTS

241. We asked a general question about whether the corresponding performers' rights should be amended to ensure that any copies made under the proposed amended exceptions to the economic rights should not infringe performers rights.
242. Of those who responded on this issue, most agreed that performers' rights should also be amended to ensure that legitimate copies made under the amended section 29 should not then be regarded as infringing performers' rights. Some raised concerns that any extension to performers rights should not affect primary sales, the ability to collect remuneration from collective licensing or royalties from online or on-demand use.

Proposal

243. **We propose to amend provisions covering performers' rights to ensure that the legitimate copying of film etc for research and private study purposes does not infringe performers rights**. We will also ensure that the amendments cannot be construed as encouraging camcording or otherwise recording film etc in cinemas or at live theatre or concert performances. Therefore the exception will not apply to copying during live performances, performances before an audience or showings of recordings in front of an audience.
244. We propose to make clear that the exception cannot be relied upon where the recording is an "illicit recording". We further propose to mirror the requirements of the amendments to the research and private study exception, namely to ensure that the exception applies only where the individual, at the time of the dealing, was a member of an educational establishment and was undertaking a course of study, or research at such establishment.

THREE STEP TEST

245. Any new provisions in UK law must comply with the 3-step test, and most respondents recognised the importance of the test as a benchmark for fair dealing. We have considered each of the steps in relation to our proposed amendments to the research and private study exception.
246. **Step 1 – 'certain, special cases'**: The new provisions will only apply to members of an educational establishment and copying must be for the purposes of a course of study, or for research being undertaken at that establishment.
247. Revised library declaration forms will enable individuals to confirm to librarians and archivists that they meet the criteria before copies are made on their behalf. Individuals may also make their own copies providing they meet the criteria and adhere to the principle of 'fair dealing'. We believe this approach satisfies step 1 because the exception clearly identifies the beneficiaries and the activities covered, and will therefore only apply in narrow, clearly defined circumstances.

248. **Step 2 – ‘do not conflict with the normal exploitation of the work or the subject matter’:**

In our opinion the expanded exception will not impinge on the normal exploitation of works. Individuals who are not members of an accredited educational establishment or who do not satisfy other relevant criteria will have to obtain copies from other legal sources – e.g. by purchasing copies or under other copyright exceptions.

249. The principle of ‘fair dealing’ will also apply to new works covered by the exception. Users would not be permitted to copy for entertainment purposes or to distribute copies widely, such as posting on a web site. Taken together, these safeguards mean that the circumstances in which copies of extracts can be made are very specific. This should ensure that the exception will not act as an alternative means of acquiring works in totality and should therefore not conflict with normal exploitation by rights holders.

250. **Step 3 – ‘do not unreasonably prejudice the legitimate interests of the rights holder’:** We believe that the expanded exception controls the extent to which works can be copied so as to ensure that it will not unduly affect rights holders.

251. Where the additional works are copied by individuals, they may only do so in instances which are regarded as ‘fair’, where they have links to formal education and in the case of research only where it is for non-commercial purposes.

252. The amendments to the exception do not act as an alternative means of sourcing information, but are intended to allow those who wish to make copies of selected parts of a work the ability to do so for specific purposes. So those seeking to take advantage of it will still need to have access to legal source material.

253. It is possible that, in a few cases, extending the exception could have a beneficial effect: allowing individuals to copy works previously unavailable under the exception may increase demand and therefore revenue for rights holders, particularly as wherever possible the author or creator of new works will need to be acknowledged.

254. In these circumstances, we believe the current proposals meet the requirements of this part of the 3-step test, not to unreasonably prejudice the legitimate interests of the rights holder.

IMPACT ASSESSMENT

255. We received very few comments on the IAs in our first consultation or evidence of the likely costs. We would be grateful if you could comment on the accuracy of the information provided in the revised IAs at Annex C. If you disagree with our conclusion it would be helpful if you could provide evidence to support your point.

SUMMARY

- We propose extending the current research and private study exception under section 29 (fair dealing) to allow the copying of sound recordings, films and broadcasts, but only if the individual is a member of an educational establishment and copying is for the purposes of a course of private study or for research at that establishment.
- Literary, dramatic, musical and artistic works will continue to be covered as now, with no limitation to formal learning.
- New section 39A (parts of published works) will enable librarians to copy sound recordings and films on behalf of individuals providing certain criteria are met.
- New section 43A (certain unpublished works) will enable librarians and archivists to copy sound recordings and films on behalf of individuals providing certain criteria are met.
- Section 43 will also be extended to allow librarians and archivists to copy unpublished artistic works on behalf of individuals providing certain criteria are met.

To see how we envisage this working, please refer to the draft Statutory Instrument at Annex A. We welcome comments on this and the accompanying questions at Annex B.

LIBRARIES AND ARCHIVES

RECOMMENDATION 10A AND 10B

CURRENT POSITION

256. Gowers identified limitations to the way the current exception permits librarians and archivists to copy works for preservation purposes. Specifically, he accepted submissions to the effect that the exception permits the making of only a single copy, does not cover sound recordings or film, and does not permit the transfer of works from obsolete media. He recommended changes to the current exception to remove such restrictions relating to the preservation of cultural material.

GOWERS' RECOMMENDATION

257. Amend section 42 of the CDPA to permit libraries to copy the master copy of all classes of work in permanent collections for archival purposes and to allow further copies to be made from the archived copy to mitigate against subsequent wear and tear.
258. Enable libraries to format shift archival copies to ensure records do not become obsolete.

BACKGROUND

259. In the first consultation we offered stakeholders the opportunity to comment on a number of questions relating to the possible amendment of the current exceptions permitting libraries and archives to carry out the preservation of copyright works. A large majority of those replying to the consultation were interested in this particular proposal, with about 190 commenting specifically. There was general agreement about the need to improve the current arrangements.

IMPACT AND BENEFITS OF A NEW EXCEPTION

260. The majority of respondents, including libraries, museums, those with educational interests and rights holders, were in favour of amending the exception. Many rights holders made reference to the need for provisos, especially the need to ensure that the exception continued to apply only for preservation purposes, and not to permit general access to the works by the public.
261. We asked about the potential impact and benefits of a new exception. Some respondents from the library sector, publishing, and rights holders, commented that, as long as the exception was restricted to preservation purposes only, there would be little impact on rights holders. Permitting any activity enabling access by the public could however impact negatively on established

markets for certain types of works, including artistic works. It was also noted that the type of preservation envisaged by this exception – a form of 'substitution' or replacement of the 'old' copy – was different to the type of preservation usually required for original works of art.

262. Comments on the beneficial effect of the recommendation focused on the better preservation of cultural heritage, which might otherwise be lost for future generations, and enabling libraries better to carry out one of their main functions, that of preserving historical documents. It was also suggested that works which may otherwise have been withdrawn from public access on the grounds that they could be damaged by further use, could continue to be available by means of preserved copies.
263. Some felt that the benefit to libraries and archives would also assist researchers in that source material would continue to be available, rather than simply decaying over time. It was suggested that as technology develops, rights holders themselves could also find a value in having their material preserved in the form of viable copies by libraries and archives if it was no longer available elsewhere, or the original format had become obsolete. It was pointed out in this context that libraries and archives had become an important source of access for some rights holders who had not necessarily conserved their older works. Some of those able to make use of the preservation exception felt that rights holders could ultimately benefit financially in that the preservation of a greater range of works could lead to more works being accessed with permission and on payment of royalties.

264. There was also likely to be a financial benefit overall to those preserving works, as waiting until a work was out of copyright increased preservation costs associated with obsolete technologies. For example, transferring material in existing formats such as CDs was quoted as costing about £19 per hour, but transferring material from older technologies such as vinyl or 78 rpm records was estimated at costing £211 and £490 per hour respectively. While such figures may not be appropriate for digital preservation, the point was also made that in some cases, digital technology became obsolete relatively quickly – with some formats no longer commercially available or supported after only 5 years, which may make preservation altogether impossible, if it had to be delayed until copyright has expired. Cutting the overall costs of preserving individual items was considered an

issue particularly for smaller less well financed institutions, but it was pointed out that there may be cost implications for such institutions if they were then to be under an obligation to conserve more material.

265. In relation to costs for rights holders, some members of the record industry indicated that it was not receiving any significant income from licensing archival copying so there would be no material loss if the exception was extended to cover sound recordings (provided the exception was not extended to cover museums, or if extended, to allow such organisations to copy only in limited circumstances).
266. A couple of respondents from the publishing sector were opposed to the amendments. They were concerned that any such exceptions could potentially undermine revenue streams in the light of developing business models which facilitate digital preservation. They felt generally that licensing schemes – possibly with a combination of voluntary measures including codes of practice – would be more appropriate.

Proposal

267. We note the general degree of support for this recommendation, and the recognition of the necessity to ensure works can be preserved in varying circumstances. We agree that this proposal has particular benefits for the preservation of cultural heritage by specific types of organisations, with minimal cost implications for rights holders. **We therefore propose to implement the recommendation to amend the current exception.**

CLASSES OF WORK

268. Many respondents did not comment specifically on the consequences of the proposal to extend the exception to cover all types of copyright work, in many cases because it was not relevant to their interests. Most who considered this issue were in favour of covering the additional works (sound recordings or film³¹), and referred to the benefits and impacts mentioned above. An example was given of the lack of consistency in an exception which permitted the copying of a transcript of an oral history interview but did not permit the copying of the original recording. Rights holders generally did not raise objections, but some were concerned that the making of such copies should not prejudice their commercial interests. The point was made that the law should retain the current proviso that copying for preservation purposes should only be allowed if purchasing a copy was not practicable.

Proposal

269. We recognise the broad consensus about this issue, and the overwhelming support for the objective of ensuring that all forms of the UK's cultural heritage are preserved for future generations. We also acknowledge points made in response to the more general question about impacts and benefits that such preservation activities may not be relevant for original works of art, but note that there are many types of artistic work for which 'copying' is a legitimate form of preservation, for example maps, charts and photographs. **We propose to extend the exception to cover artistic works, films and sound recordings. We also propose retaining the current proviso that restricts the making of such copies to cases where it is not reasonably practical to purchase another copy, and to extend that proviso to the additional works.**

³¹ The permanent collections of libraries, archives, museums and galleries include recordings of broadcasts (as opposed to the broadcasts themselves). Copying a recording of a broadcast for preservation purposes is the same thing as copying a film or sound recording for preservation purposes. The amended exception, therefore, refers to films and sound recordings but not broadcasts.

FORMAT SHIFTING AND NUMBER OF COPIES

270. There was little disagreement with the proposal to allow format shifting. Some respondents commented specifically on it, indicating general support, but also noting that format shifting should be limited to preservation purposes only.
271. A limited number of respondents made reference to placing a specific numerical limit on the number of copies that could be made, with most indicating that a numerical limitation would be unduly restrictive given the constant changes in the way technology develops. Such a limit could hamper preservation on an ongoing and perpetual basis. The majority agreed that restrictions should take other forms. For example, some preferred allowing whatever was reasonable, with the possibility of guidelines to advise what this might mean, or ensuring that the number of copies made did not increase the number in circulation. The restriction that most, including some rights holders, favoured was to ensure that the copying was limited to preservation purposes only. It was suggested that the approach adopted in New Zealand might be used, in that the number of copies should not exceed the number of originals legally owned by the institution, although others suggested this was too prescriptive.

Proposal

272. We agree with the broad consensus about the need to ensure that cultural material should be preserved in the best way possible as technologies develop and change, so **we propose that the amendments to the exception should permit format shifting**. We also agree that a numerical restriction as to the number of copies would be unduly restrictive so **we further propose that there be no numerical limit as to the number of copies which can be made**.
273. We believe that the provisos incorporated within the current exception provide a sufficient check on how many copies will be made, so this amendment will be framed in such a way that **copies can be made for preservation purposes only**. Conditions to be prescribed in relation to the works to which the amended exception extends will restrict access to those works.

SCOPE OF THE ORGANISATIONS COVERED

274. Many respondents in the museums, libraries and educational fields agreed that the new exception should also apply to museums and galleries. Where reasons were given, it was generally felt that such institutions also hold collections of culturally important material, and should therefore be able to make use of the same rules as apply to libraries and archives.
275. Some respondents, from libraries, educational establishments, and rights holders suggested that a form of control could be exercised over any additional organisations, such as some form of designation by the Secretary of State, or other form of accreditation such as the Museum Libraries and Archives Museums Accreditation Scheme. It was also suggested that the new organisations should be limited to those not conducted for profit, or ensuring that the prescribed conditions currently applied to libraries and archives also applied to museums and galleries.
276. Some rights holders' organisations, including some of those in the publishing and artistic fields, were content for the suggested additional organisations to be included within the exception. They suggested certain provisos, such as limiting the use to non-commercial and preservation purposes only. Another point made was that communication to the public, which covers use of digitised works in virtual galleries, should not be included as it represented significant revenue streams for rights holders. Rights holders affected by inclusion of the new works - those with film and music interests - were more circumspect. Music interests in particular were not convinced that museums and galleries had a role to play in the types of preservation activities currently available to libraries and archives.
277. Not many commented specifically on the possible impact on rights holders. Those who did were generally non-rights holders who believed that there should be no significant impact, particularly if the same criteria were applied to the new organisations as to libraries and archives. It was also suggested that there may be benefit to rights owners in that the preservation of works can contribute to their promotion.

Proposal

278. There was clearly some concern from certain rights holders about extending the current exception to allow museums and galleries to be able to carry out the same sort of preservation activities that libraries and archives currently do. Nevertheless, we recognise that museums and galleries also have a role to play in preserving the nation's heritage. Their collections are as valuable for this purpose as those of libraries and archives, and therefore they should also be able to perform the same preservation activities. **We therefore propose to amend the exception to cover museums and galleries.** Conditions to be prescribed in relation to museums and galleries will take account of concerns already expressed by rights holders in relation to loss of revenue and access to works and the response to this consultation exercise.
279. We recognise the concerns of rights holders in particular that such an extension should be crafted so as to minimise the impact on current and future licensing arrangements in relation to accessing works. **We propose, therefore, to retain provisions already included within the current exception, so that the exception continues to apply to preservation activities** rather than, for example, 'performance' or 'communication to the public', which will remain a licensable activity. **We also propose that, as now, any copies must relate to items within the organisation's permanent collection, that copying is only for preservation purposes, and that copying can only be carried out where it is not reasonably practicable to buy a replacement copy.**

PERFORMERS' RIGHTS

280. We posed a general question about whether changes to the exceptions should be reflected in similar changes to performers' rights. Very few respondents commented specifically on this, but of those that did, there was general agreement that failure to do amend performers' rights would compromise the ability of the relevant organisations to preserve e.g. films which could potentially include hundreds of performances.

Proposal

281. We note that the current provisions relating to acts permitted in relation to performances are restricted to broadcasts, apply only in very limited circumstances ("being placed in an archive") and do not permit the subsequent copying of items in an archive. **We therefore propose to amend provisions covering performers rights to ensure that the legitimate copying of films and sound recordings for preservation purposes does not infringe performers rights.**

LEGAL DEPOSIT LIBRARIES

282. There is a further issue which we will have to take into account in determining how the legislation should be framed, namely the position of the British Library, the National Libraries of Scotland and Wales and the University Libraries of Oxford, Cambridge and Trinity College Dublin. These libraries are collectively known as the "legal deposit libraries" because they are entitled under the Legal Deposit Libraries Act 2003 (LDLA) to a free copy of each printed publication published in the UK. DCMS is the sponsoring Department in relation to the LDLA.
283. Our policy objective is to ensure that legal deposit libraries are put in the same position as other libraries in relation to the copying and format shifting for preservation purposes of the new categories of work to which the amended CDPA will apply, namely sound recordings, films and certain artistic works not previously provided for.
284. With the exception of Trinity College Dublin, the legal deposit libraries are currently regulated under the CDPA regime (because they are "prescribed libraries" for the purpose of the making, supply and receipt of copies under section 42 CDPA (copying for preservation purposes)).
285. The legal deposit libraries are also regulated by the LDLA, which currently covers works published in print but which also contains provision for regulations extending its application to non-print works including those contained on fixed format media such as CD-Rom, and those published on the internet – DCMS is currently undertaking a consultation exercise with a view to making such regulations.

286. We will need to take them into account as we consider how the CDPA and the LDLA interact with each other, once we have reflected on the responses to this second stage consultation, and how best we can ensure that our policy objective can be met.

DIGITAL RIGHTS MANAGEMENT

287. A few libraries and archives raised concerns about the potential adverse effect on their ability to preserve works where such works are protected by technical protection measures or digital rights management systems. Contrasted with that, some rights holders felt that any circumvention of such measures should not be allowed. Generally, rights holders felt that moves to – for example, include some sort of workaround would conflict with EU law and could present significant costs, render DRM worthless, and undermine new business models or increase unauthorised use.

Proposal

288. **As mentioned in the first stage of the consultation, we propose to retain for the amended exception the current system of submitting a notice of complaint to the Secretary of State where copying permitted under an exception had been prevented by digital rights management systems. In some cases, we consider that some of the proposed changes require consequential amendment to Schedule 5A of the CDPA. Read in conjunction with Section 296ZE, this provides a procedure to ensure that DRMS do not prevent the operation of certain exceptions.**

THREE STEP TEST

289. We consider that the proposed exception complies with elements of the three step test as set out below.

290. **Step 1 – ‘certain, special cases’:** The amended section 42 will only apply to specified organisations, which can carry out limited acts of copying for the purpose of preservation. We believe this satisfies the first step because a limited number of beneficiaries and activities are clearly identified.

291. **Step 2 – ‘do not conflict with the normal exploitation of the work or the subject matter’:** The amended exception will continue to restrict the acts of copying to preserving items in a permanent collection. It will also retain the provision in the current exception which requires that such copying can only be carried out if it is not practicable to purchase a copy. We believe that such provisos will prevent the amended exception from interfering with the normal exploitation of the work.

292. **Step 3 – ‘do not unreasonably prejudice the legitimate interests of the rights holder’:** The amendments to the exception will continue to allow it to be used in a limited set of circumstances and include a requirement that a replacement copy should be purchased, if practicable, rather than a copy made. From the information we have received, it seems that at least some of the rights holders whose works will be affected by the extension of this exception do not receive any substantial income from licensing the copying of archival copies. We believe that any prejudicial effects on rights holders are likely to be marginal. It is indeed possible that there may be beneficial effects to rights holders, if they can gain access to and use of works, which would otherwise be lost to them.

IMPACT ASSESSMENT

293. A partial impact assessment on this exception was included within the first stage of the consultation. It has now been revised (see Annex C) as a result of information received as a result of the consultation, and further examination of the issues.

SUMMARY

We propose:

- to extend the current exception to allow libraries, archives, museums and galleries to copy for preservation purposes films, sound recordings and certain artistic works not already provided for, to enable the transfer of works to different formats and to enable more than one preservation copy to be made;
- to ensure that legal deposit libraries are put in the same position as other libraries when it comes to copying for preservation purposes.
- We further propose retaining for the amended exception existing features of the current exception, namely that:
 - the exception continues to apply for preservation purposes;
 - the scope of the exception retains current limits so it does not extend to e.g. performance or communication to the public;
 - copying relates only to items within permanent collections;
 - copies should only be made where it is not reasonably practicable to purchase another copy.

To see how we envisage this working, please refer to the draft Statutory Instrument at Annex A. We welcome comments on this and the accompanying questions at Annex B.

PARODY, CARICATURE AND PASTICHE

RECOMMENDATION 12

CURRENT POSITION

294. There is currently no exception which covers the creation of parodies, caricatures or pastiches³² of others' works. However there are exceptions which apply, and circumstances where this type of creative endeavour does not require the consent of the rights owner and may therefore be carried out. For example consent is not required if:
- the part of the underlying copyright work being used is not 'substantial', which may also include parodies based loosely on a work rather than copying part of it;
 - the use of the underlying copyright work falls within the fair dealing exception for criticism, review and news reporting;
 - enforcement of copyright is contrary to the public interest.
295. Even if the use of a work does not fall within these examples, it may also be possible to create new works of parody, etc, where the holder of the rights in the underlying work has given their permission for their work to be used in such a way. And where a work is no longer protected by copyright, there is no need to request permission at all.
296. Nevertheless, as a result of comments received during his review, Gowers recommended the introduction of a new exception.

GOWERS' RECOMMENDATION

297. Create an exception to copyright for the purpose of caricature, parody or pastiche.

BACKGROUND

298. In the first consultation we asked a number of questions relating to the possible introduction of a new exception to permit parody, caricature and pastiche. Out of the total responses received, approximately one quarter (63) responded with comments specific to this recommendation, and a number of others indicated they had no formal position. Different stakeholders clearly had different views about the necessity for introducing a parody exception, with the number of responses from those in favour roughly equal to the number of those against.

BENEFITS AND IMPACT OF A NEW EXCEPTION

299. We asked about the potential impact and benefits of a new exception. The responses we received were fairly polarised.
300. The respondents who were in favour of the new exception, submitted that it would be in the public interest, encouraging freedom of speech. They felt that provisions in current law, such as fair dealing for criticism and review, were inadequate to deal fully with social commentary, whereas a new exception would generally support a healthy, open culture, especially as a means of communicating criticism and social comment. Many also commented on the potential for encouraging creativity, such as the increasing popularity of user generated content, or were concerned that the current position was putting a break on creativity or creating risks. For example, it was suggested by a broadcaster that 1 in 5 requests made to individuals for the use of their work within a parody was being denied, and it was estimated that an exception could add another 15-20 parodies to the annual total that programme makers would like to use. Examples were also given in which students had raised concerns about proceeding with projects for their courses: an architectural student wanted to create virtual reality model caricatures from architectural plans of buildings that had been destroyed; a graphic design student wanted to parody copyright images of celebrities. It was also suggested that, in an educational field in particular, such an exception could also be beneficial as a means of encouraging critical thinking.
301. Some thought that a new exception would be helpful in providing security (against infringement proceedings) to creators of parody for the exploitation of their new works, enabling them to create additional artistic and commercial value. It was also suggested that a new exception need not be harmful to rights holders, and could in fact prove of some benefit if a parody generated further interest in the underlying work. Others thought that any potential for harm would be mitigated as long as it complied with the three step test, and was subject to a requirement of 'fair dealing'.
302. Some who gave their support for a new exception had reservations, expressed mainly in the form of potential restrictions or limitations on how far such an exception should go. It was suggested that companies which already have rights under copyright law should continue to be able to take action against those seeking to compete unfairly

³² The word 'parody' is generally used, unless otherwise specified, to refer to all three terms.

- and that new legislation should not interfere with rights to prevent derogatory treatment of existing intellectual property rights, such as trade marks. An example was given of the use of websites parodying known brands. However, others in favour of parody believed that some consideration be given to extending parody beyond copyright law, to include for example, trade marks and designs, otherwise the creative freedom an exception should establish could be curtailed.
303. Stakeholders also raised other issues of particular concern to them. For example, one broadcaster was concerned about the potential ‘chilling effect’ on creativity under the current regime, under which clearance may simply take too long to fit with e.g. programming or competition schedules. Another suggested a parody regime to permit only those parodies derived from ‘social creation’ such as football chants, which may then be used in game shows, or where parodies are broadcast as part of a live performance, e.g. the Edinburgh Fringe Festival, or shown as extracts within another programme.
304. Museums and galleries raised the possible risks of infringement associated with displaying or commissioning works which subsequently are discovered to include other works. They were concerned that their policies on which works to collect may be determined by the risk of infringement rather than artistic merit, although others have commented that such an approach merely reflects poor legal advice. While some supported the principle of a new exception more generally, others suggested a limited parody exception to permit the exhibition of works containing appropriated material.
305. A legal question was also raised as to whether the lack of an exception undermines such the freedom of expression, which is enshrined in article 10 of the European Convention on Human Rights (ECHR).
306. Those who opposed the proposal were particularly concerned about the lack of evidence supporting the original recommendation, and the potential for unintended consequences. Many suggested that any ‘evidence’ in favour of creating a new exception was at best anecdotal, and believed that the case had not been made to justify a new exception.
307. Alongside this, many voiced the opinion that the lack of an exception had not created tremendous problems for potential users, some going further to suggest that there was a ‘rich tradition’ of such creativity in the UK, which had existed for a considerable period. It was suggested that the current copyright regime already provided sufficient room for parodies to be created, including taking into account the test of whether a ‘substantial’ part of an underlying work had been used in creating the new work. Respondents from various areas, such as publishing and music, also made the point that there was no shortage of parodies, and that their creation was often catered for by licensing. Reference was made to the example given in the original Gowers Review³³. Others cited the popularity and success of TV shows. The point was made that rights holders already had difficulty in preventing abuse of their works even where permission should be sought, and that the nature of the exception, no matter how well drafted, was such that it would make the job of enforcing their rights that much more difficult.
308. It was suggested that introducing a new exception was likely to create uncertainty and increased opportunities for abuse, for example, blurring the lines between parody and plagiarism, which was considered by some to be a particular problem in relation to e.g. photographic parody. This was likely to have a negative impact on rights holders in various ways, such as suffering financial loss, loss of artistic control, potential competition from the resulting parody and loss of reputation. The enforcement aspects of any change in the law were a particular concern of those representing individual creators, such as visual artists. They feared that the additional uncertainty created by an amendment to the law could result in increased litigation, as third parties push the boundaries as far as possible in trying to use another’s work. Drawing a distinction between an original (legitimate) parody and infringing use was likely to be extremely difficult for all concerned.

33 http://webarchive.nationalarchives.gov.uk/http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_755.pdf - page 68 refers.

309. Concerns were also expressed that individual creators of the underlying works would not actually have the means to test the extent of those limits in legal proceedings. The suggestion was made that although some might accept parodies as a type of homage, others may find parodies of their works offensive, or may suffer financial and other losses as a result - how their work should be used should be a matter for the rights holder in the first instance, rather than the potential parodist.
310. Respondents from several areas, including the visual arts, were concerned that potential users would use a new exception to justify the taking of copyright works. Music industry representatives also raised the same issue, pointing out that important licensing revenue streams in e.g. advertising, cover versions and sampling, could be lost as a result of a new parody exception, as users may argue that their use falls within the exception. Those who sought to use works in these circumstances would argue that use fell within the new exception and that permission and/or licensing was not required. Although representatives of the music industry acknowledged that it was hard to put a figure on the potential loss of income should a parody exception be introduced, they felt that an exception could undermine one revenue stream in particular (synchronisation licensing for use in e.g. advertising or in computer games), as potential users would claim their use was essentially a parody or pastiche and therefore permitted by virtue of a new exception. One respondent estimated such licensing was worth 10-15% of the music publishing income (estimated at more than £58 million in 2005).
311. Many of those opposed were concerned generally about the potential for abuse of an author's work, their name and their reputation. For example, defining a work as a parody could become an excuse permitting the dissemination of material detrimental to the original author, or could suggest support by the original author for an issue or item which was morally abhorrent to them. They were concerned about the interaction between a new parody exception and the moral rights regime, and that such an exception would undermine the ability of rights holders to be able to object to the derogatory treatment of their works.
312. In response to the idea that rights holders of the underlying work may gain some benefit from a parody through greater exposure, this benefit was considered unlikely to arise by some since they believed the value of parody would only occur if the original was already widely known.

SPECIFIC ISSUES

313. The first consultation document asked questions about how any new exception might be framed including such issues as whether the exception should be limited to 'fair dealing', whether an acknowledgement of the underlying work was necessary, and what works it should cover. The numbers of respondents specifically addressing these questions was significantly lower – less than half - than those commenting on the principal question about the benefits and impact of a new parody exception. Most of those who commented on the detailed questions were those who agreed with the need for an exception.

Impact on Commercial Interests, Restriction to 'Fair Dealing'

314. Most agreed that an unrestricted exception could have the potential to undermine the commercial interests of the original rights holder. There was less agreement about whether any exception should be limited to 'fair dealing'. Whilst some believed that a limitation to fair dealing would be appropriate, others suggested this was insufficient to protect rights holders adequately. Other respondents believed that such an approach would be too restrictive: adding a layer of complication for users and their funders, or potentially favouring rights holders in any court proceedings. There was also a suggestion that the 'fair dealing' used in UK law be abandoned altogether in favour of a US-style 'fair use' approach.

Requirement for Acknowledgement

315. Respondents were split roughly equally over the question as to whether acknowledgement of the author of the underlying work was necessary. The reasons for supporting acknowledgement included the needs of the audience, who may not make any connection to the original artist, as well as the needs of the author of the underlying work, without whom the parody would not exist. Those who were against any form of acknowledgement suggested that the prevailing practice was not to do so, and that the parody would fail in its inherent purpose if the inspiration for the work had to be identified.

Definition

316. The majority of respondents broadly favoured an approach of not specifically defining what was intended, as per the Directive. It was suggested that a limitation to 'fair dealing' would assist the courts in determining the meaning or that guidelines might be helpful. Some also suggested 'satire' should be included. Those who took an opposite view generally believed this was too uncertain, some suggesting particular approaches to be taken. For example, it was suggested that the inclusion of 'pastiche' without limitation would be particularly difficult to interpret, based on the definition cited in the first stage of the consultation, which lacked any reference to humour.

Classes of Work to be Covered

317. **The majority favoured no limitation as to the classes of work that any new exception should cover. The remainder variously cited specific classes of works that should not be covered by the exception, including artistic works, which were believed to be particularly vulnerable to unfair exploitation, by virtue of the ease of simply copying substantial parts, relative to music or literary works which may often require considerable re-working to be effective parodies.**

Types of Rights to be Covered

318. The majority who responded favoured no limitation as to the types of rights that any new exception should cover. Others raised concerns that the rights covered should only be those required for freedom of speech – for example, reproduction and distribution to the public, and that inclusion of the rental and lending right would unduly prejudice the legitimate rights of the rights owner.

Should Work be Publicly Available

319. Of those who responded, the majority agreed that the underlying work should have been made public beforehand, otherwise the parody could severely restrict the rights of the owner of the underlying work. Several believed there should be no such limitation, to take account of the parodying of e.g. 'leaked' (and hence unpublished) political memos, and that a limitation to fair dealing would give sufficient protection to rights holders.

320. Most believed that there should be no reference to the underlying work, so as to permit parodies to be created for wider social commentary. This reflected historical use of parody. Others were concerned that this would further reduce any element of control that rights holders might have over their works, possibly resulting in competition between the underlying work and its parody. It was noted that any parody should not suggest endorsement of a product.

Moral rights - Attribution and false attribution

321. While many respondents agreed that it was not appropriate for the author of the underlying work to be named as the creator of the new work, approximately a third suggested that the contribution of the author of the underlying work should be acknowledged in some way, and that an exemption from the right to be identified as author or director under section 79(4) of the (CDPA) would therefore not be appropriate.
322. The majority also agreed that the author of the underlying right should be able to protect themselves by an action under section 84 of the (CDPA) from being falsely named as the author of a parody.

Proposal

323. We do not accept that an exemption for parody is necessary for the CDPA to be compliant with article 10 of the ECHR. The existing exemption for fair dealing and the statutory limitation on enforcement of copyright where it is not in the public interest are sufficient to prevent or restrict the enforcement of copyright in circumstances where the interest in freedom of expression overrides the interests of the copyright owner³⁴.
324. Although some of those who responded on this issue commented on the details of how an exception for parody, caricature and pastiche could be introduced, the level of consensus on any particular avenue was particularly difficult to gauge, as many who opposed the exception did not comment. In fact, the main issue arising from the consultation process was not how an exception should be constructed, but whether or not it should be introduced at all.

Parody Relating Only to the Underlying Work or for Wider Purposes e.g. Social Commentary

34 See *Ashdown v Telegraph Group Limited* [2001] 4AER 666

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325. Views were split roughly equally as to whether or not an exception should be introduced, with no clear consensus emerging.
326. The evidence supplied to the original Gowers review in support of a new exception was rather limited in its scope. The first stage of this consultation prompted more interest in this issue, from both sides of the argument: from those who were keen to realise the possible benefits of an exception and from those concerned about the possible risks and threats it could pose. On the one hand fear of infringement may have prevented works of parody from being used or produced, but on the other, many creators already make use of the options available to them under the current regime to create works of parody without infringing copyright.
327. Some respondents gave examples of what was prevented by lack of an exception, or what might happen if an exception was introduced, but it was clearly difficult for robust data to be supplied about the possible benefits of an exemption. From such statements, assumptions could be made about the nature of the potential advantages that an exemption could bring, but there seemed to be little information about the level of the social benefits or value of the economic benefits. Equally, those against the introduction of an exception submitted examples of current difficulties and problems likely to be exacerbated by the introduction of an exception, but possible costs to individual rights holders or their representatives have proven difficult to estimate.
328. There are clearly many uncertainties surrounding the possibility of changing the law, and what the potential costs and benefits, both social and economic, would be. However, it is likely that there would be a potentially significant change in the balance between the creators and rights holders of underlying works and those who seek to use them - by removing existing avenues for rights holders to seek licensing revenue, and by reducing their ability to retain some level of control over their works through their economic and moral rights.
329. Although the current regime does not go as far as many would like to see, it does afford some basis for permitting parodies, etc to be created for example by taking parts from underlying works which are not considered substantial or by using parts of works under the fair dealing exception for criticism or by seeking permission, through licensing, to use the underlying work.
330. Overall, the information supplied in response to the first stage of the consultation was not sufficient to persuade us that the advantages of a new parody exception were sufficient to override the disadvantages to the creators and owners of the underlying work. **There is therefore no proposal to change the current approach to parody, caricature and pastiche in the UK.**
331. As discussed in the earlier chapter on format shifting, the Government's copyright strategy © the way ahead noted that "...a more comprehensive approach associated with the legal use of copyright material is needed". The strategy went on to reflect on the possibility of an EU-wide discussion about a non-commercial use exception. The focus was primarily on the types of uses normally associated with 'private copying', but should, a non-commercial use exception be implemented in the UK, we consider that it has the potential to read across to uses for the purposes of parody, caricature and pastiche, provided such uses are also for non-commercial purposes.

STATUTORY INSTRUMENTS

2010 No. 0000

COPYRIGHT

The Copyright (Permitted Acts) (Amendment) Regulations 2010

<i>Made</i> - - - -	2010
<i>Laid before Parliament</i>	2010
<i>Coming into force</i> - -	2010

The Secretary of State, being a Minister designated(a) for the purposes of section 2(2) of the European Communities Act 1972(b), in relation to measures relating to intellectual property (including both registered and unregistered rights), in exercise of the powers conferred by that section and by section 37 of the Copyright, Designs and Patents Act 1988(c), makes the following Regulations:

Citation and Commencement

1. These Regulations may be cited as the Copyright (Permitted Acts) (Amendment) Regulations 2010 and come into force on [xx] 2010.

Amendments to the Copyright, Designs and Patents Act 1988

2. The Copyright, Designs and Patents Act 1988 is amended as follows.

Research and Private Study

3.—(1) Section 29 (research and private study) is amended as follows.

(2) After subsection (1) insert—

“(1A) Fair dealing with a sound recording, film or broadcast by a member of an educational establishment for the purposes of research for a non-commercial purpose authorised by that establishment does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement.”.

(3) In subsection (1B), after “(1)”, insert “or (1A)”.

(4) After subsection (1C) insert-

“(1D) Fair dealing with a sound recording, film or broadcast by a pupil at an educational establishment for the purposes of private study does not infringe any copyright in the work provided that the pupil is undertaking a course of study at that establishment and the dealing is for the purposes of the course.

(1E) In subsection (1A), a “member” of an educational establishment means a pupil, teacher or other member of the staff of the establishment or any other person carrying out research at the establishment.

(a) S.I. 2006/608.

(b) 1972 c.68; section 2(2) was amended by the Legislative and Regulatory Reform Act 2006 (c.51), section 27(1).

(c) 1988 c.48.

(1F) Where a copy which would otherwise be an infringing copy is made in accordance with subsections (1), (1A), (1C) and (1D) but is subsequently dealt with –

- (a) it shall be treated as an infringing copy for the purpose of that dealing; and
- (b) if that dealing subsequently infringes copyright, it shall be treated as an infringing copy for all subsequent purposes.

(1G) In subsection (1F), “dealt with” means sold or let for hire, offered or exposed for sale or hire or communicated to the public.”.

4.—(1) Schedule 2 (rights in performances: permitted acts) is amended as follows.

(2) After paragraph 1A insert—

“Research and Private Study

1B.— (1) Fair dealing with a recording of a qualifying performance by a member of an educational establishment for the purposes of research for a non-commercial purpose authorised by that establishment does not infringe a performer’s rights under section 182A or the rights of a person having recording rights in relation to a performance under section 186 provided that—

- (a) the recording is not an illicit recording;
- (b) the researcher has not made the recording from a live performance or from a showing or playing in public of a performance; and
- (c) the dealing is accompanied by a sufficient acknowledgement.

(2) No acknowledgement is required in connection with fair dealing for the purposes mentioned in this paragraph where this would be impossible for reasons of practicality or otherwise.

(3) Fair dealing with a recording of a qualifying performance by a pupil at an educational establishment for the purposes of private study does not infringe a performer’s rights under section 182A or the rights of a person having recording rights in relation to the performance under section 186 provided that –

- (a) the recording is not an illicit recording;
- (b) the pupil has not made the recording from a live performance or from a showing or playing in public of the performance; and
- (c) the pupil is undertaking a course of study at that establishment and the dealing is for the purposes of the course.

(4) Expressions used in this paragraph have the same meaning as in section 29 and any provision made under section 174(2) with respect to the application of that section also applies for the purposes of this paragraph..”.

5. In the heading to Section 39 (copying by librarians: parts of published works), after “published” insert “literary, dramatic or musical”.

6. After section 39 insert—

“39A Copying by librarians: parts of published sound recordings and films

(1) The librarian of a prescribed library may, if the prescribed conditions are complied with, make and supply a copy of part of a published sound recording or film from an item in the library without infringing any copyright in the work.

(2) The prescribed conditions shall include the following—

- (a) that copies are supplied only to persons satisfying the librarian that they require them for the purposes of—
 - (i) research for a non-commercial purpose, or
 - (ii) private study,and will not use them for any other purpose;

- (b) that no person is furnished with more than one copy of the same material or with a copy of more than a reasonable proportion of any work ; and
- (c) that persons to whom copies are supplied are required to pay for them a sum not less than the cost (including a contribution to the general expenses of the library) attributable to their production.”.

7. In Section 40 (restriction on production of multiple copies of the same material), for “sections 38 and 39” substitute “sections 38, 39 and 39A”.

8. —(1) Section 43 (copying by librarians or archivists: certain unpublished works) is amended as follows.

(2) In subsection (1) —

- (a) for “or musical” substitute “, musical or artistic”;
- (b) for “a document” substitute “an item”;
- (c) omit “or any illustrations accompanying it”.

(3) In subsection (2)(a), for “document” substitute “item”.

9. After section 43 insert —

“43A Copying by librarians or archivists: unpublished sound recordings and films

(1) The librarian or archivist of a prescribed library or archive may, if the prescribed conditions are complied with, make and supply a copy of the whole or part of a sound recording or film from an item in the library or archive without infringing any copyright in the work.

(2) This section does not apply if—

- (a) the work had been published before the item was deposited in the library or archive, or
- (b) the copyright owner has prohibited copying of the work,

and at the time the copy is made the librarian or archivist making it is, or ought to be, aware of that fact.

(3) The prescribed conditions shall include the following—

- (a) that copies are supplied only to persons satisfying the librarian or archivist that they require them for the purposes of—
 - (i) research for a non-commercial purpose, or
 - (ii) private study,and will not use them for any other purpose;
- (b) that no person is furnished with more than one copy of the same material; and
- (c) that persons to whom copies are supplied are required to pay for them a sum not less than the cost (including a contribution to the general expenses of the library or archive) attributable to their production.”.

10.—(1) Section 175 (meaning of publication and commercial publication) is amended as follows.

(2) In subsection (1)(b) —

- (a) for “includes,” substitute “includes— (i)”; and
- (b) at the end insert—

- “(ii) in the case of a sound recording, the issue to the public of copies of the sound recording or any part of it; and
- (iii) in the case of a film, the offer for sale or hire of copies of the film to the public or the letting on hire of copies of the film to the public or exhibitors.”.

11. —(1) Section 179 (index of defined expressions) is amended as follows.

- (2) In the list in the left hand column—
- (a) for “43”, wherever appearing, substitute “43A”;
 - (b) insert in the appropriate place “curator (in sections 37 and 42)”; and
 - (c) for “prescribed library or archive” substitute “prescribed library, archive, museum or gallery”.
- (3) In the list in the right hand column, insert “section 37(6)” between “sections 163(2) and 164(3)” and “section 3A(1)”.

12.—(1) Schedule 2 (rights in performances: permitted acts) is amended as follows.

- (2) After paragraph 6A insert—

“**6AA.** The copying of —

- (a) part of a published recording of a performance under section 39A; or
- (b) the whole or part of an unpublished recording of a performance under section 43A

does not infringe any rights conferred by this Chapter.”.

13. In the list in part 1 of Schedule 5A (permitted acts to which section 296ZE applies), insert in the appropriate place—

- (a) “section 39A (copying by librarians: parts of published sound recordings and films)”;
- and
- (b) “section 43A (copying by librarians or archivists: unpublished sound recordings and films)”.

Copying by Educational Establishments

14.—(1) Section 35 (recording by educational establishments of broadcasts) is amended as follows.

- (2) In subsection (1A) —

- (a) after “infringed” insert “by an educational establishment”;
- (b) after “premises of”, for “an” substitute “that”; and
- (c) for “cannot be received by any person situated outside the premises of that establishment”, substitute “ is made for the educational purposes of the establishment and all reasonable steps are taken to secure that only authorised persons are able to receive the communication”.

- (3) After subsection (1A) insert —

“(1B) Where an educational establishment communicates such a recording or copy to the public in circumstances such that by virtue of subsection (1A) copyright is not infringed, copyright is not infringed by an authorised person who in the course of receiving the communication for the purposes for which the authorisation was granted makes a copy of the material communicated.

(1C) In this section “authorised person”, in relation to a communication made by a person situated within the premises of an educational establishment, means a teacher or pupil at the establishment who has been authorised by or on behalf of the establishment to receive that communication.

Such authorisation may be given in relation to specified communications or to communications of a specified description.”.

- (4) In subsection (3) omit “situated outside those premises” and insert “other than an authorised person”.

15.—(1) Section 36 (reprographic copying by educational establishments of passages from published works) is amended as follows.

- (2) In the heading omit “Reprographic”.

- (3) In subsection (1)—
- (a) omit “Reprographic” ;
 - (b) before “passages” insert “(a)” ; and
 - (c) after “musical works” insert “; or (b) extracts from published sound recordings or films”.

(4) In subsection (1B) omit “Reprographic”.

(5) After subsection (1B) insert—

“(1C) Copyright is not infringed by an educational establishment where a copy of -

- (a) a passage from a published literary, dramatic or musical work ; or
- (b) an extract from a published sound recording or film,

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 that educational establishment, provided that the communication is made for the educational purposes of the establishment and all reasonable steps are taken to secure that only authorised persons are able to receive the communication.

(1D) Where an educational establishment communicates such a copy to the public in circumstances such that by virtue of subsection (1C) copyright is not infringed, copyright is not infringed by an authorised person who in the course of receiving the communication for the purposes for which the authorisation was granted makes a copy of the material communicated.

(1E) In this section “authorised person”, in relation to a communication made by a person situated within the premises of an educational establishment, means a teacher or pupil at the establishment who has been authorised by or on behalf of the establishment to receive that communication.

Such authorisation may be given in relation to specified communications or to communications of a specified description.”.

(6) In subsection (2) after “copied” insert “or communicated to the public”.

(7) In subsection (3) —

- (a) after “copying” insert “or communication to the public of copies” (in both places); and
- (b) after “copies” insert “ or communicating copies to the public”.

(8) In subsection (4)—

- (a) omit “reprographic”;
- (b) after “copying” insert “and the communication to the public of copies”;
- (c) after ”passages” insert “or extracts”; and
- (d) after “copied” insert “or communicated to the public”.

16. — (1) Schedule 2 (rights in performances: permitted acts) is amended as follows.

(2) In paragraph 6(1A)—

- (a) after “infringed” insert “by an educational establishment”;
- (b) after “premises of”, for “an” substitute “that”; and
- (c) for “cannot be received by any person situated outside the premises of that establishment”, substitute “ is made for the educational purposes of the establishment and all reasonable steps are taken to secure that only authorised persons are able to receive the communication”.

(3) After subsection (1A) insert –

“(1AA) Where an educational establishment communicates such a recording or copy to the public in circumstances such that by virtue of subsection (1A) the rights conferred by this chapter are not infringed, such rights are not infringed by an authorised person who in the course of receiving the communication for the purposes for which the authorisation was granted makes a copy of the material communicated.

(4) In subsection (2) omit “situated outside those premises.” and insert “other than an authorised person. ”.

Preservation of Cultural Heritage

17.—(1) Section 37 (libraries and archives: introductory) is amended as follows.

(2) In the heading, for “and archives” substitute “, archives, museums and galleries”.

(3) In subsection (1)—

(a) for “sections 38 to 43” substitute “sections 38 to 43A”;

(b) for “and archivists” substitute “, archivists and curators”; and

(c) for “or archive are to a library or archive” substitute “, archive, museum or gallery are to a library, archive, museum or gallery”.

(4) In subsections (2) and (6), for “or archivist” substitute “, archivist or curator”.

(5) In subsection (4), for “or archives” substitute “, archives, museums or galleries”.

(6) In subsection (6), for “sections 38 to 43” substitute “sections 38 to 43A”.

18. For section 42 (copying by librarians or archivists: replacement copies of works) substitute—

“42. Copying by librarians, archivists and curators: preservation or replacement copies

(1) It is not an infringement of copyright for the appropriate person to make a copy of a relevant item in the permanent collection of a prescribed library, archive, museum or gallery if—

(a) the copy is made in circumstances falling within subsection (2) ; and

(b) the prescribed conditions are complied with.

(2) The circumstances are that the copy is made (whether from the item itself or from a copy made by the appropriate person by virtue of this section) in order—

(a) to preserve or replace the item by placing the copy in the permanent collection in addition to or in place of the item;

(b) to enable the item to be preserved or replaced in the future, should it prove necessary to do so, by placing the copy (or a further copy made from it) in the permanent collection in addition to or in place of the item ; or

(c) to replace the item in the permanent collection of another prescribed library, archive, museum or gallery which has been lost, destroyed or damaged.

(3) A copy may be made by virtue of this section in a different medium or format from the relevant item, if the appropriate person considers the change to be necessary or expedient for the purpose for which the copy is made.

(4) In this section—

“appropriate person”, in relation to a prescribed library, archive, museum or gallery means the librarian, archivist or curator; and

“relevant item” means any item in the permanent collection, other than an item which—

(a) was placed in that collection to replace a lost, destroyed or damaged item ; and

(b) consists of a copy of an item in the permanent collection of another library, archive, museum or gallery that was made by virtue of this section for the purpose specified in subsection (2)(c).

(5) The prescribed conditions shall include provision for restricting the making of copies to cases where it is not reasonably practicable to purchase a copy of the item in question to fulfil the purpose for which a copy is required.”

19. — (1) Schedule 2 (rights in performances: permitted acts) is amended as follows.

(2) After paragraph 6B insert—

“6C.—(1) The rights conferred by this Chapter are not infringed if the librarian, archivist or curator of a prescribed library, archive, museum or gallery, in circumstances falling within section 42(2) and in accordance with the prescribed conditions, makes on any medium a copy of a film or sound recording from a relevant item.

(2) Expressions used in this paragraph have the same meaning as in section 42 and any provision under section 37 prescribing libraries, archives, museums or galleries, or prescribing conditions for the purposes of that section, applies also for the purposes of this paragraph.”

EXPLANATORY NOTE

(This note is not part of the Regulations)

ANNEX B

LIST OF QUESTIONS RELATING TO THE DRAFT STATUTORY INSTRUMENTS

In drawing up the draft Statutory Instruments several issues have been raised about which we would welcome your comments. You may also wish to comment on other aspects of the draft legislation.

Please note that potential amendments to secondary regulations, such as the 'prescribed conditions' referenced in Section 42, are not included within the draft Statutory Instruments, because the responses to this consultation will help determine how those secondary regulations are drafted.

RESEARCH AND PRIVATE STUDY - SECTION 29

1. Section 29(3) will apply equally to the additional works (sound recordings, film and broadcasts) as to the works originally covered by this exception.
 - a. Are there any consequences which make this impractical?
2. We propose that the law clarifies that legitimately copied extracts of sound recordings, film or broadcasts, if subsequently dealt with, would be infringing copies. We believe that the same should also be made explicit with regard to extracts already covered by section 29.
 - a. Are there any practical consequences of this that make this change unduly restrictive? If so, please state what they are.
 - b. Would this interfere with the normal things done by academics with their research and by students in the course of their studies? If so, please outline.
3. Section 29(1) specifically includes members of educational establishments who may not necessarily be on the teaching staff, but who are nevertheless carrying out research authorised by that establishment.
 - a. Are there any practical consequences of this that make this an unreasonable approach? If so, please state what they are.

EDUCATIONAL EXCEPTIONS - SECTIONS 35 AND 36

Section 35

4. Section 35(1A) currently refers to "communication to the public" on the premises of the educational establishment, but does not contain any restriction on the identity of the persons who may receive the communication. In considering how to ensure that there is some degree of control over who should receive 'communications to the public' outside the premises, the proposed amendments include the requirement that it should be to "authorised persons", which are defined as teachers and pupils. This restriction would apply to both communications which are received on the school premises and those which are received by distance learners off the premises, and so would restrict the scope of the current exception in this respect.
5. We believe that "communication to the public" would cover, for example, using a computer to show a recording of a broadcast to a group of people in a lecture hall which may engage Section 34 in addition to Section 35. Section 34(2) provides an exception in relation to the playing or showing of a sound recording or film which is already limited to an audience of teachers and pupils for the purposes of instruction.

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

- a. Do you feel this is an appropriate approach to take?
- b. What are the practical implications of this proposal?

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6. In relation to the 'communication to the public' right, we have used the term "receive" as opposed to the term "access". We are aware that "receive" implies a passive act, for example a pupil watching a communication as part of a class on a screen, whereas "access" is a more active term that could imply the pupil taking an active role in obtaining the material to view on computer at a suitable time.
- Do you believe that the term "receive" is sufficient for the needs of this exception?
 - Should the term "access" or should the terms "receive" and "access" both be used?

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

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

- Is this a reasonable assumption? How do educational establishments currently deal with this situation?
 - What approach could be taken so that the law adequately reflects access by those assisting "authorised persons" whilst ensuring that this does not widen access to those who do not require it?
8. The proposed wording of Section 35(1B) allows a pupil to make a copy of a communication solely to assist in their study, for example by making a hard copy of the material. Whilst Section 35 is directed at what educational establishments may do, we consider that, as a consequence of the extension to Section 35, it is also appropriate for the provision to directly address the activities which a pupil may lawfully undertake. Any copy which a pupil may make or communication to the public, such as by posting material on a website, which does not fall within this authorisation, will fall subject to the general provisions of the CDPA, and hence will be infringing activities.
- Does this approach strike a reasonable balance between activities which a pupil should legitimately be able to do to carry out the relevant studies and ensuring material is adequately protected from further dissemination? If not, please indicate what your concerns are and how you believe they should be tackled.

Section 36

9. We have taken the view that the term "reprographic copy" (as defined in Section 178 CDPA) seems to be too narrow to accommodate the types of digital technology employed by educational establishments, which may include remote and on-site access via computers, and the use of whiteboards. We therefore propose to remove the reference to "reprographic" in section 36 which will therefore permit any type of copying of passages extracts of the named works. We are however aware that there are various references to "reprographic" copies throughout the CDPA which may need to be examined depending on the context in which the expression is used. We have not, therefore included in the attached draft SI any consequential provisions which may result from this amendment pending the outcome of this consultation.
- What are the implications of replacing the specific term "reprographic copy" with "copy"?
 - How do we ensure that this section of the act is sufficient to permit reasonable acts of copying extracts which reflect available technologies whilst preventing inappropriate copying?

PRESERVATION BY LIBRARIES, ARCHIVES, ETC - SECTION 42


10. In contrast to the approach of some Member States, the amendments to Section 42 are not intended to place numerical limits on the number of copies of an item which may be made for preservation purposes. Instead, the focus is on specifying the scenarios under which preservation copies can be made, which are given in subsection 2 of section 42. This will not permit institutions to make copies for administrative convenience for example, but will give them a certain degree of latitude in identifying the particular circumstances under which copying for preservation purposes is appropriate. Is this the right approach?
11. There are 4 ways in which the term “library” might be understood:
- i. An institution (i.e. a body running a library)
 - ii. A place (i.e. a building containing a library)
 - iii. The library itself (i.e. a collection of the things that a library can contain).
 - iv. The library being an undertaking of some kind (see e.g. references in section 3 of the 1989 Regulations³⁵ relating to ‘conducted for profit’)

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

- a. Should libraries, archives, museums and galleries be treated as mutually exclusive for the purposes of the amended section 42 exception?
 - b. If libraries, archives, museums and galleries are not treated as being mutually exclusive, what is the impact of this approach on the prescribing of conditions³⁶ for the purpose of section 42? Does this approach only work if the prescribed conditions are the same for libraries, archives, museums and galleries?
12. What is a ‘permanent collection’? A permanent collection could be regarded as the items included for whatever purposes the collection was formed, whereas other items, such as records about the institution or its staff, may merely be ancillary to it. Over time it is possible that an ancillary item may become part of the permanent collection. For example, the personnel records of current staff would presumably not count as a ‘library’ or ‘archive’, but old records from the time an institution was founded might do.
- a. Is this kind of test appropriate? If such a test is adopted, should it be objective i.e. for what purposes was the collection in fact formed and what is in fact ancillary to the collection? Or should it be subjective i.e. what does the body running the library/archive, etc consider the purpose of the collection to be and what is considered to be ancillary to that purpose?
 - b. Does ability to preserve by electronic means have any bearing on the answers to the questions about permanent collections? If so, how?
 - c. Does the word “deposit” in the revised draft encompass all of the ways in which an item may enter a permanent collection? If not, please elaborate.
13. Should there be restrictions on subsequent use of copies lawfully made under section 42? For example, should a lawfully made copy become an infringing copy if dealt with improperly?
14. The language of section 42 distinguishes between the objects or items to be preserved and the copyright work that may be included within such an item or object. Whilst this may not be an issue in many contexts, it could have practical implications in relation to electronic items. For example, it is often likely to be the case that the original format of an electronic item itself is of little interest, and that therefore the focus of preservation activities is actually the content which that electronic item records.

35. The Copyright (Librarians and Archivists) (Copying of Copyright Material) Regulations 1989

36. The responses to this stage of the consultation will help us to assess how to add to and/or amend the ‘prescribed conditions’ which are set out in the Regulations referred to in footnote 35.

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- 
- a. In such a case, what are the practical implications of the distinction in section 42 between items and the work which the item records?
 - b. Are there any other exceptions in the CDPA which make a similar distinction, where the language may unintentionally limit the possible use of the exception, particularly as regards works recorded in electronic items?
15. The wording of the proposed amendments to section 42 are intended to cover content which may be lost because e.g. the medium in which it is recorded has or will become obsolete. Do the proposed amendments achieve this objective?
 16. We have amended the definition of “publication” in section 175 to add some further definition in relation to films and sound recordings for the purposes of new sections 39A and 43A of the Act. Does the proposed amendment of the definition have any undesirable consequences, when read in conjunction with other provisions of the Act which rely on it?

GENERAL

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



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Recommendation 9: extending the exception for copying for research and private study	72
Recommendation 10a and 10b: extending copyright exceptions relating to permitted acts for the purposes of preservation	79

Summary: Intervention & Options

Department / Agency:

Intellectual Property Office

Title:

Impact Assessment of Extending Copyright Exceptions Relating to Recording by Educational Establishments of Broadcasts

Stage: Consultation

Version: 2

Date: December 2009

Related Publications: The Gowers Review of Intellectual Property; Taking Forward the Gowers Review of Intellectual Property: Proposed Changes to Copyright Law

Available to view or download at:

http://www.hm-treasury.gov.uk/gowers_review_index.htm <http://www.ipso.gov.uk/consult-copyrightexceptions.pdf>

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What is the problem under consideration? Why is government intervention necessary?

The current copyright exception that allows educational establishments to record off-air broadcasts for educational purposes disadvantages distance learners as the exception only allows the showing of such a recording at the physical premises of the establishment. Different treatment for distance learners (including vulnerable groups) who do not study at the physical premises but who use technology to study remotely, therefore studying 'at' the premises albeit virtually, would appear unreasonable and would be inconsistent with the government's goal of promoting lifelong learning. It should be noted that the exception applies only to the extent that licensing schemes are not in place and in this case commercial licensing schemes already exist, as such the 'problem' with the current exception is that it has fallen behind the advances made to commercial licenses. Government intervention is necessary to reduce the complexity of the system and to ensure better implementation of existing measures.

What are the policy objectives and the intended effects?

The intended effect of these changes is to provide the same opportunity for on and off-site learners to view recordings of broadcasts as part of their education. Allowing educational establishments to communicate such recordings to students off-site via secure networks would facilitate greater distance learning opportunities and support the Government's wider aims of promoting lifelong learning and encouraging the development of opportunities to learn beyond the formal school day.

What policy options have been considered? Please justify any preferred option.

1. No change to copyright law.
2. Expand Section 35 to enable the showing of broadcasts to distance learners via a secure network.
3. Expand Section 35 to enable the showing of broadcasts and on-demand material to distance learners via a secure network.

Option 2 is our preferred option as it will provide the most effective balance between user and rights holder interests.

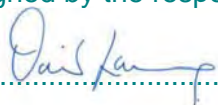
When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

5 years from the introduction of the Statutory Instrument.

Ministerial Sign-off For consultation stage two Impact Assessments:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister:



Date: 11 December 2009

Summary: Analysis & Evidence

Policy Option: 2

Description: Expand Section 35 of the CDPA to enable the showing of broadcasts to distance learners via a secure network.

COSTS	ANNUAL COSTS		Description and scale of key monetised costs by 'main affected groups' One-off costs are negligible for all groups. On-going costs are unlikely to change for rights holders represented by licensing scheme. For license operators and the education sector there will be no change.
	One-off (Transition)	Yrs	
	£ 0		
	Average Annual Cost (excluding one-off)		
	£ 0		Total Cost (PV) £ 0
Other key non-monetised costs by 'main affected groups'			

BENEFITS	ANNUAL BENEFITS		Description and scale of key monetised benefits by 'main affected groups' The one-off and on-going benefits directly related to this policy change are negligible for all groups. For the education sector, the change may serve to simplify the copyright framework and therefore realise savings in time and administration costs.
	One-off	Yrs	
	£ 0		
	Average Annual Benefit (excluding one-off)		
	£ 0		Total Benefit (PV) £ 0
Other key non-monetised benefits by 'main affected groups'			
The change may increase flexibility and widen the provision of education and also provide the security of knowing that the use of any work not covered by a licensing scheme will not be infringing.			

Key Assumptions/Sensitivities/Risks

Price Base Year	Time Period Years	Net Benefit Range (NPV) £ 0	NET BENEFIT (NPV Best estimate) £ 0
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What is the geographic coverage of the policy/option?	UK			
On what date will the policy be implemented?	2010			
Which organisation(s) will enforce the policy?	Rights holders, license operators			
What is the total annual cost of enforcement for these organisations?	£0			
Does enforcement comply with Hampton principles?	Yes			
Will implementation go beyond minimum EU requirements?	No			
What is the value of the proposed offsetting measure per year?	£0			
What is the value of changes in greenhouse gas emissions?	£0			
Will the proposal have a significant impact on competition?	No			
Cost (£-£) per organisation (excluding one-off)	Micro 0	Small 0	Medium 0	Large 0
Are any of these organisations exempt?	No	No	No	No

Impact on Admin Burdens Baseline (2005 Prices)				(Increase - Decrease)
Increase of	£ Nil	Decrease of	£ Nil	Net Impact £ Nil

Key: Annual costs and benefits: (Net) Present

Evidence Base (for summary sheets)

INTRODUCTION

A Consultation Stage Impact Assessment (IA) was prepared in January 2008. This Final IA is a follow-up to that IA; and in preparing it, we have taken account of comments and views expressed during the consultation exercise. However, it is important to stress that there is relatively little in the way of research or reliable evidence on the costs and benefits to the main affected groups of implementing these proposals. In areas where it was difficult to quantify the costs and benefits we have provided, to the fullest extent possible, a qualitative assessment of the costs and benefits to all those impacted by the proposals.

BACKGROUND

The Gowers Review identified that the education sector was making increasing use of digital technology to enhance the learning experience for students, with secure networks playing a prominent role in the emergence of distance learning. However, the current educational exceptions were written at a time when such technology was not available or at least not widely accessible to the education sector and as such the current Section 35 exception is limited to only allowing educational establishments to record and show off-air broadcasts to persons situated on the premises of the educational establishment.

In light of this, the Gowers Review recommended that changes be made to the Section 35 exception to enable distance learning students to receive and view recordings of broadcasts remotely i.e. whilst not physically present at the educational establishment, and in doing so improve access to educational materials through the use of such emerging technologies.

IMPACTS

The impact of this proposal will be limited, primarily because there are already licensing schemes in place that operate within the same distance learning parameters as the amended exception. As such the proposed amendment will not change the choice available to the various groups influenced by this proposal, rather the proposal will simply bring copyright law up-to-date with the advances already made by commercial licensing and provide an assurance to those who already have an appropriate licence, that use of a broadcast not covered by such a licence will no longer be an infringing act.

While the impact will be limited we have identified five groups that may be affected by the proposal, which are :

1. Rights holders represented by either ERA or The Open University

The Educational Recording Agency (ERA) and The Open University represent a large proportion of rights holders and their scope is far reaching, as for example ERA represent performers and rights holders in TV, music and film and its license covers all scheduled free to air broadcasts on BBC television and radio, ITV networked services, Channel 4, E4, More4 and Film4, Five Television and S4C. More specifically ERA licenses around 36,500 educational establishments covering 4.5 million primary school pupils and 3.4 million secondary school pupils. The Open University Licensed Off-Air Recording Scheme covers all Open University programming broadcast on the BBC and is used by a large proportion of the education sector, including primary, secondary, further and higher education establishments.

In terms of benefits, for rights holders who are already represented by a licensing scheme the benefits are likely to be minimal, as there are a large number of educational establishments already making use of the existing schemes and the change in the exception will not have a bearing on this in any way. With regard to costs, there appear to be no one-off costs for such rights holders. The on-going costs for rights holders represented by a license scheme will probably remain unchanged.

2. Rights holders not represented by either ERA or The Open University

This policy change is unlikely to impact this group to any great degree, as the proposed changes will not affect the choices available to rights holders primarily because rights holders not currently represented by licensing agencies will still have the opportunity to assert their rights by joining an existing scheme or through establishing new licensing schemes.

3. Licence operators

As licensing schemes permitting distance learning are already in place, the effect of the proposed changes on licence operators is likely to be limited. Although they may see an increase in revenue from additional educational establishments joining their licensing schemes, the effect is likely to be minimal given the already extensive use of these schemes by such users, so we see little impact financially or administratively for this group.

As the extended exception will sit alongside the current licenses we do not envisage any major one-off costs for license scheme operators, as most rights holders are already covered by the pre-existing licensing schemes. However, should the proposed changes encourage new members to join this group the additional costs are still likely to be marginal so we envisage no change to the on-going costs incurred by license operators specifically as a result of the changes to the exception.

4. Educational establishments/LEAs

The most significant impact for educational establishments and/or Local Education Authorities (LEAs) is likely to be intangible i.e. the change to the exception will serve to simplify the copyright framework in which the educational exceptions operate, as should they wish to make a recording of any broadcast not covered under the terms and conditions of the license they already hold, and make it available over a secure network, they will be certain that they will be doing so without infringing copyright.

We understand that the vast majority of educational establishments and LEAs already make use of the ERA and Open University licensing schemes, and as a result already pay the appropriate fees. The majority of LEAs and educational establishments are therefore unlikely to be affected by the change in the law. For the remaining LEAs and educational establishments, if they have no provision for distance learning and decide not to pay the additional fees, there will be no impact.

Realistically it seems unlikely that the introduction of the exception will have any influence on a decision as to whether or not to take up a licence which already exists. The amended exception will not change the choices available to them in this respect and the decision will still remain as to whether or not they make use of a license. As such, they will still need to assess the relative benefits of this choice against any increases in costs associated with using a licence.

However, in some circumstances the change in the law could encourage a minority of educational establishments, which do not already subscribe to the relevant licence, to make use of the licenses available thereby potentially increasing the provision of distance learning. This may result in benefits including a greater choice in the use of works, allowing for increased flexibility in teaching methods and a general expansion of educational services in line with advancements in technology. Such educational establishments will be able reach a wider body of students, including those students not able to physically attend an educational establishment, which may in turn encourage wider participation in education and the greater dissemination of knowledge within the educational arena.

5. Students and teachers

Individual students and teachers do not incur the costs of making use of the licensing schemes associated with the current exception, because the costs are borne by the educational establishment or LEA. There is no intention to change this under the proposed amendments to the exception.

Whilst students and teachers should see no adverse effects from the extension of this exception, the greatest impact felt by this group will be the beneficial provision of education to a wider body of students, particularly to the delivery of education to remote or disadvantaged students. As with the impact to educational establishments as a whole, students and teachers will benefit from increased flexibility in

teaching methods, a general expansion of educational services and if the changes encourage wider participation in education, they may benefit from the greater dissemination of knowledge.

SPECIFIC IMPACT TESTS

As licensing schemes which permit distance learning are already available, it seems unlikely that extending the current exception to cover distance learning will have any significant implications for the economy, the environment or for sustainable development. For this reason specific impact tests are not considered appropriate although there is some further discussion below, for some of the potentially more important tests.

There are likely to either no – or marginally positive effects - on broader social equality issues: there is no intention to apply the proposal to different groups in different ways, although there is the potential for some beneficial effects on those with disabilities.

- **Competition**

Changes to the exception are unlikely to influence competition or have any direct effect on commercial markets. The markets have already adapted to the changes in technology which the proposed amendments allow for, by putting in place appropriate licences to permit distance learning. It therefore seems that any further changes to the market will be minimal and, at most, only an indirect effect of the law re-aligning itself with the already established commercial licensing schemes. For example, it is possible that the proposed changes to the law may encourage those rights holders not already within existing licence schemes to join them and/or promote the introduction of new schemes, but the ability of rights holders to take either of these course of action already exists and is not changed by amendments to the exception.

- **Small Firms**

This exception is particular to the education sector and license providers, it seem unlikely that there will be any impact as a result of the proposed change for small firms. However, there are a number of small private educational establishments in the UK, although again there is likely to be no impact for this group: they will face the same choice of whether or not to make use of a licensing scheme after the extended exception as they do now with the current exception.

It seems unlikely that a change in the law will result directly in more educational establishments taking up licences which are already available to them, but in the event that that happens, it is possible that small firms within the creative industries may benefit from a greater opportunity to receive remuneration for licensing the works they own and control.

- **Disability Equality**

Distance learning is recognised as an important aspect of enabling students with disabilities to remain in the education system. To the extent that this change in the law encourages a greater take up of existing licences to enable distance learning, then this group may receive some benefit from the proposed amendments.

- **Race Equality**

There do not appear to be any direct links to the current educational exceptions and their impact on racial groups but if the general provision of education is improved through this policy change then we hope that the improved availability of education would have a positive impact on any marginalised groups.

- **Gender Equality**

The proposed changes are not gender specific, however if distance learning is an area that affects one gender more than another then the proposed changes to improve distance learning should prove to be

beneficial for these groups. In general, gender issues are somewhat under-represented in terms of information that could be usefully applied to this exception but we envisage the impact on gender equality to be positive rather than negative.

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	Yes	No
Small Firms Impact Test	Yes	No
Legal Aid	No	No
Sustainable Development	No	No
Carbon Assessment	No	No
Other Environment	No	No
Health Impact Assessment	No	No
Race Equality	Yes	No
Disability Equality	Yes	No
Gender Equality	Yes	No
Human Rights	No	No
Rural Proofing	No	No

Summary: Intervention & Options

Department / Agency: Intellectual Property Office	Title: Impact Assessment of Extending Copyright Exceptions Relating to Reprographic Copying for Education	
Stage: Consultation	Version: 2	Date: December 2009
Related Publications: The Gowers Review of Intellectual Property; Taking Forward the Gowers Review of Intellectual Property: Proposed Changes to Copyright Law		

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Contact for enquiries: Janette McNeill

Telephone: 01633 814750

What is the problem under consideration? Why is government intervention necessary?

The current copyright exception only allows educational establishments to make reprographic copies (hand outs) of passages from published literary, dramatic or musical works which can disadvantage distance learners and limit the use of new technologies (such as interactive displays) for education purposes. Government intervention is necessary to reduce the complexity of the system and to ensure better implementation of existing measures.

What are the policy objectives and the intended effects?

The intended effect of these changes is to encourage greater use of new technologies by educational establishments by enabling them to communicate extracts from published literary, dramatic and musical works as well as from film and sound recordings to students via electronic whiteboards and secure networks. The exception would only apply if a licensing scheme is not in place. Such changes support the Government's wider aims of promoting lifelong learning and encouraging the development of opportunities to learn beyond the formal school day.

What policy options have been considered? Please justify any preferred option.

1. No change to copyright law.
2. Expand Section 36 to enable passages from published literary, dramatic and musical works to be shown via interactive displays and communicated to distance learners via a secure network.
3. As Option 2 but to also include film and sound recordings.

Option 3 is our preferred option, as it provides users with the benefit of distance learning and permits a greater range of works to be communicated.

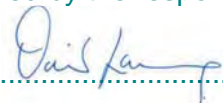
When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

5 years from the introduction of the Statutory Instrument.

Ministerial Sign-off For consultation stage two Impact Assessments:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister:



.....Date: 11 December 2009

Summary: Analysis & Evidence

Policy Option: 3

Description: Expand Section 36 of the CDPA to enable passages from published literary, dramatic and musical works and also film and sound recordings to be communicated via interactive displays and to distance learners via a secure network.

COSTS	ANNUAL COSTS		Description and scale of key monetised costs by 'main affected groups' One-off costs negligible for all groups. On-going costs are unlikely to change for rights-holders represented by a licensing scheme. For license operators and the education sector there will be no change.	
	One-off (Transition)	Yrs		
	£ 0			
	Average Annual Cost (excluding one-off)			
	£ 0		Total Cost (PV)	£ 0
Other key non-monetised costs by 'main affected groups'				

BENEFITS	ANNUAL BENEFITS		Description and scale of key monetised benefits by 'main affected groups' The monetised one-off and on-going benefits directly related to this policy change are negligible for all groups.	
	One-off	Yrs		
	£ 0			
	Average Annual Benefit (excluding one-off)			
	£ 0		Total Benefit (PV)	£ Positive but not quantifiable
Other key non-monetised benefits by 'main affected groups'				
For the education sector the change will serve to simplify the copyright framework and encourage a greater dissemination of knowledge. The change may increase flexibility and widen the provision of education and also provide the security of knowing that the use of any work not covered by a licensing scheme will not be infringing.				

Key Assumptions/Sensitivities/Risks

Price Base Year	Time Period Years	Net Benefit Range (NPV) £ 0	NET BENEFIT (NPV Best estimate) £ 0	
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What is the geographic coverage of the policy/option?		UK		
On what date will the policy be implemented?		2010		
Which organisation(s) will enforce the policy?		Rights-holders, license operators		
What is the total annual cost of enforcement for these organisations?		£ 0		
Does enforcement comply with Hampton principles?		Yes		
Will implementation go beyond minimum EU requirements?		No		
What is the value of the proposed offsetting measure per year?		£ 0		
What is the value of changes in greenhouse gas emissions?		£ 0		
Will the proposal have a significant impact on competition?		No		
Cost (£-£) per organisation (excluding one-off)	Micro 0	Small 0	Medium 0	Large 0
Are any of these organisations exempt?	No	No	No	No

Impact on Admin Burdens Baseline (2005 Prices)				(Increase - Decrease)
Increase of	£ Nil	Decrease of	£ Nil	Net Impact £ Nil

Key: Annual costs and benefits: (Net) Present

Evidence Base (for summary sheets)

INTRODUCTION

A Consultation Stage IA was prepared in January 2008. This Final IA is a follow-up to that IA; and in preparing it, we have taken account of comments and views expressed during the consultation exercise. However, it is important to stress that there is relatively little in the way of research or reliable evidence on the costs and benefits to the main affected groups of implementing these proposals. In areas where it was difficult to quantify the costs and benefits we have provided, to the fullest extent possible, a qualitative assessment of the costs and benefits to all those impacted by the proposals.

BACKGROUND

The current Section 36 exception is limited to permitting reprographic copies of passages from published literary, dramatic or musical works to be made available as class “hand outs” (usually copied by photocopier). The exception does not permit the material to be transmitted electronically, either within the classroom or outside it, and it does not allow extracts of works such as film or sound recordings to be used within the classroom or outside it. The Gowers Review identified the shortcomings in this exception and recommended that the Section 36 exception be amended to enable educational establishments to communicate copied works using interactive displays and through the use of emerging technology to distance learners.

The proposal is therefore to amend the exception to enable passages from published literary, dramatic and musical works to be shown within the classroom via interactive displays and communicated to distance learners outside the classroom via a secure network, whilst also extending the range of works that can be used in this way to film and sound recordings. It effectively deals with three separate issues that are not addressed in the current exception: 1. Enabling the use of technology within the physical educational establishment through interactive displays. 2. Using technology and secure networks to communicate material to distance learners within the non-physical educational establishment. 3. Acknowledging the education sector’s desire to make use of a broader range of works in both circumstances.

This proposal fulfils the Gowers recommendation and takes into account the need to broaden the range of material that educational establishments can use. This will enhance the learning experience for students and facilitate the use of works, in a way that is more in keeping with the technologies prevalent in the education sector. The relevant chapter of the consultation document considers these amendments more fully, including discussion of the possible inclusion of broadcasts and artistic works.

IMPACTS

The proposed changes will enable passages from the additional categories of works of film and sound recordings to be communicated by interactive displays and through secure technology within the whole educational environment (both physical and non-physical). The impact for the distance learning aspect of the proposal will be positive, as educational establishments will be able to communicate a broader range of material. Certain groups will benefit further as result of the introduction of film and sound recordings into the works covered by the exception.

While the impact will be limited overall we have identified five groups that may be affected by the proposal, which are :

1. Rights-holders represented by the Copyright Licensing Agency (CLA)

A significant number of rights-holders are represented by the CLA, for example during the financial year 2006-7 CLA distributed £47.8m to rights holders with over £9.7m for copying in schools and £9.9m for copying in Higher Education Institutions. However, the benefits for this group are likely to be minimal, as there are already a large number of educational establishments making use of the existing schemes and the introduction of an amended exception will in itself not bring about more or less copying under the schemes.

With regard to specific costs, some rights-holders have expressed concerns that by making their work available electronically they will be more vulnerable to infringement and they face the possibility of lost revenue from works transmitted outside the UK. We see no change for this group in respect to the distance learning aspect of the proposal, due to the use of secure networks which will display material but not allow copying. The introduction of film and sound recordings may require some administrative expense for rights-holders to join an existing licensing scheme or set-up up a new scheme. On-going costs for this group will probably remain constant.

2. Rights-holders not represented by the CLA

This proposal will not affect the choices already available to rights-holders, as it will still allow rights-holders who are not currently members of an existing licensing scheme the opportunity to assert their rights through joining an existing scheme or establishing new licensing schemes.

3. License operators

The CLA licensing scheme is already well used within education and as such the effect of the proposed changes may be limited, primarily because the extended exception will sit alongside the current licenses and will not in itself influence the use of the existing licensing scheme. We see little impact financially or administratively for this group. They may see an increase in revenue from additional educational establishments joining their licensing schemes in order to make use of the additional classes of works.

4. Educational establishments/LEAs

The most significant impact for educational establishments/LEAs is likely to be intangible. The change to the exception will serve to simplify the copyright framework in which the educational establishments operate. Should they wish to make copies of works, not already covered by an existing licensing scheme, available over a secure network or display, then on an electronic display they will be doing so without infringing copyright, lowering sector concerns.

We understand that the vast majority of educational establishments and LEAs already make use of the CLA license and as a result already pay the appropriate fees. The majority of LEAs and educational establishments are therefore unlikely to be affected by the change in the law. For the remaining LEAs and educational establishments, if they have no provision for distance learning and decide not to pay the additional fees, there will be no impact.

A significant benefit of the expanded exception may be benefits to the general provision of education, including greater choice in the use of works, allowing for increased flexibility in teaching methods and a general expansion of educational services in line with advancements in technology. Such educational establishments will be able reach a wider body of students, including those students not able to physically attend an educational establishment, which may in turn encourage wider participation in education and the greater dissemination of knowledge within the educational arena.

5. Students and teachers

There should be no adverse effects for students and teachers as a result of the extension of this exception. Overall, the impacts on this group should be beneficial as it broadens the provision of educational material to a wider body of students, particularly to remote students who may be disadvantaged in some way. As with the impact on educational establishments students and teachers as a whole will benefit from increased flexibility in teaching methods, a general expansion of educational services and if the changes encourage wider participation in education, they may benefit from a greater dissemination of knowledge. This may be particularly evident in the use of film and sound recordings as these additional works may serve to enrich the educational experience.

Individual students and teachers do not incur the costs associated with using the existing licensing schemes, as this is the responsibility of educational establishments and LEAs, therefore there will be no change in relation to costs to this group.

SPECIFIC IMPACT TESTS

- **Competition**

Changes to the distance learning aspect of this exception will have no direct influence on competition or the commercial market. Although not strictly a competition issue, the additional works that will be introduced into the exception may indirectly encourage the market to supply these works to education, however it is important to understand that the mechanism to allow this already exists and is not directly linked to the exception.

- **Small Firms**

As this exception is particular to the education sector and license providers, there will be no impact as a result of this change for small firms. Whilst there are a number of small private educational establishments in the UK there will be no impact for this group, as they will face the same choice of whether or not to make use of a licensing scheme after the extended exception as they do now with the current exception.

- **Disability Equality**

Given that distance learning is recognised as a vital part of enabling students with disabilities to remain in the education system, this group may benefit from the changes and an extension of the current exception will serve to benefit all involved.

- **Race Equality**

There does not appear to be any direct links to the current educational exceptions and their impact on racial groups but if the general provision of education is improved through this policy change then we hope that the improved availability of education would have a positive impact on any marginalised groups.

- **Gender Equality**

The proposed changes are not gender specific, however if distance learning is an area that affects one gender more than another then the proposed changes to improve distance learning should prove to be beneficial for these groups.

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	Yes	No
Small Firms Impact Test	Yes	No
Legal Aid	No	No
Sustainable Development	No	No
Carbon Assessment	No	No
Other Environment	No	No
Health Impact Assessment	No	No
Race Equality	Yes	No
Disability Equality	Yes	No
Gender Equality	Yes	No
Human Rights	No	No
Rural Proofing	No	No

Summary: Intervention & Options

Department / Agency:
Intellectual Property Office

Title:
Impact Assessment of extending the exception for copying for research and private study

Stage: Consultation

Version: 2

Date: December 2009

Related Publications: The Gowers Review of Intellectual Property; Taking Forward the Gowers Review of Intellectual Property: Proposed Changes to Copyright Law

Available to view or download at:

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Contact for enquiries: Janette McNeill

Telephone: 01633 814750

What is the problem under consideration? Why is government intervention necessary?

Copyright law permits users to copy articles and small sections of literary, dramatic, musical and artistic works themselves for non commercial research or private study purposes, provided such copying amounts to fair dealing. The exception does not cover sound recordings, films or broadcasts.

Gowers proposed extending the exception to cover all types of work to remove the inconsistencies and rights clearance problems. The amendments would bring the law up-to-date with recent technological developments and make the exceptions better suited to modern methods of studying.

What are the policy objectives and the intended effects?

The objective is to prevent situations where a user needs to make a copy of a sound recording, film or broadcast, which is still in copyright, for non commercial research or study purposes, but is hindered or prevented from doing so because of the need to seek prior permission from the rights holder.

The intended effects are: wider usage of materials for scholarly activities leading to improved skills for individuals and society; minimal impact on rights holders by addressing scope for misuse.

What policy options have been considered? Please justify any preferred option.

1. No changes to the current exception.
2. Extend exception to cover copying of all works for non commercial research and private study.
3. Extend exception as for Option 2 but limit eligibility to prevent abuse.

We believe Option 3 strikes the fairest balance.

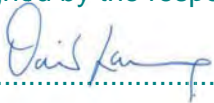
When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

5 years from the introduction of the Statutory Instrument.

Ministerial Sign-off For consultation stage two Impact Assessments:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister:



Date: 11 December 2009

Summary: Analysis & Evidence

Policy Option: 3

Description: Extend exception to cover copying of all works for non commercial research and private study but limit eligibility to prevent abuse.

COSTS	ANNUAL COSTS		Description and scale of key monetised costs by 'main affected groups'
	One-off (Transition) Yrs		
	£ 0		One-off costs difficult to quantify, but likely to be negligible for all groups. Ongoing costs for users / rights holders likely to be negligible.
	Average Annual Cost (excluding one-off)		
£ 0		Total Cost (PV)	£
Other key non-monetised costs by 'main affected groups' Some impact on libraries, archives and educational establishments and others in terms of understanding change in law.			

BENEFITS	ANNUAL BENEFITS		Description and scale of key monetised benefits by 'main affected groups'
	One-off Yrs		
	£		Reduced costs and difficulties regarding rights clearance, orphan works and travelling to designated premises. Zero or limited effect on rights holders.
	Average Annual Benefit (excluding one-off)		
£		Total Benefit (PV)	£ Positive but not quantifiable
Other key non-monetised benefits by 'main affected groups' Improved educational skills. Wider, more effective usage of materials for researchers and students. Reputational benefits to libraries as service providers.			

Key Assumptions/Sensitivities/Risks

Rights holders recognise the needs of genuine researchers, but were wary of including private study which could lead to misuse, hence limitations which should help control access and minimise potential effect on rights holders.

Price Base Year	Time Period Years	Net Benefit Range (NPV) £	NET BENEFIT (NPV Best estimate) £ Positive			
What is the geographic coverage of the policy/option?		UK				
On what date will the policy be implemented?		2010				
Which organisation(s) will enforce the policy?		Rights holders and libraries				
What is the total annual cost of enforcement for these organisations?		£				
Does enforcement comply with Hampton principles?		Yes				
Will implementation go beyond minimum EU requirements?		No				
What is the value of the proposed offsetting measure per year?		£				
What is the value of changes in greenhouse gas emissions?		£				
Will the proposal have a significant impact on competition?		No				
Cost (£-£) per organisation (excluding one-off)		Micro	Small	Medium	Large	
Are any of these organisations exempt?		No	No	No	No	
Impact on Admin Burdens Baseline (2005 Prices)					(Increase - Decrease)	
Increase of	£	Decrease of	£	Net Impact	£	

Key: Annual costs and benefits: (Net) Present

Evidence Base (for summary sheets)

INTRODUCTION

A Consultation Stage IA was prepared in January 2008. This Final IA is a follow-up to that IA; and in preparing it, we have taken account of comments and views expressed during the consultation exercise. It is important to stress that there is relatively little in the way of research or reliable evidence on the costs and benefits to the main affected groups of implementing these proposals. In areas where it was difficult to quantify the costs and benefits we have provided, to the fullest extent possible, a qualitative assessment of the costs and benefits to all those impacted by the proposals. It should be noted that libraries and scholars recognised the need for these changes, as generally, did rights holders for genuine researchers.

BACKGROUND

Currently, students and researchers wishing to copy parts of sound recordings, films and broadcasts (which are still in copyright) for scholarly purposes must request prior permission from the rights holder. This contrasts with the position with regard to literary, dramatic, musical and artistic works, for which permission is not necessary. As permission may not be obtainable if rights holders are difficult to trace, refuse to allow the use, or don't respond to requests, studies requiring use of these types of works are disadvantaged relative to those which lend themselves more readily to the use of e.g. literary works.

The proposal is to extend the current research and private study exception to allow the copying of sound recordings, films and broadcasts, but only if the student or researcher is linked to an educational establishment and undertaking a course of study or research at that establishment (The British Library estimates that 90% of copies would be made by researchers in specialist or research libraries). Literary, dramatic, musical and artistic works will be covered as now.

There will be related amendments to permit librarians and/or archivists to copy parts of works on behalf of students or researchers, and a further change will also allow archives to copy parts of unpublished artistic works. Amendments will also be made to the provisions covering performer's rights to ensure that copying of new works under the expanded exception does not infringe performer's rights or encourage illicit copying.

IMPACTS

The potential impact of the expanded exception is difficult to quantify with little robust data, even from respondents to the first consultation. Indications are given below of the potential costs and benefits relating to groups likely to be affected by the expanded exceptions, although it was recognised that the exception would generally be beneficial to education and the spread of knowledge.

1. Researchers and students

Researchers and students are likely to benefit from the expanded exception as difficulties obtaining permission to copy works i.e. tracing and contacting rights holders will be reduced. They should also benefit from reduced transaction costs in terms of obtaining permission to copy extracts, or travelling to designated locations to view/compare works because copies cannot be obtained locally (particularly relevant to older works, rare material, non-UK works and fragile material).

The potential number of individuals who would make use of the exception is difficult to predict. There are for example 6.2 million Further Education/Higher Education students who could all make use of the exception, but how many will use it depends on the nature of their research or studies. The amendments should give researchers/students the freedom to pursue studies they are most interested in

or are of most value to them, rather than limiting scholarly research/private study to subject matter where permission can or will easily and cheaply be granted.

One-off costs associated with the introduction of these changes are likely to be negligible for individuals – beyond understanding what the exception means. If copies are made by a librarian or archivist the researcher or student would need to pay, on an ongoing basis, for costs incurred by the library for carrying out the copying (as now). It is up to the researcher or student to decide whether to request copies of any extracts, and given a willingness to pay, the researcher should be gaining more than the cost of the copies from the transaction, otherwise the researcher would not undertake it.

2. Libraries and archives

It is not clear to what extent all libraries and archives will have the facilities available to copy extracts on behalf of researchers or students. Where they choose to offer such services, their decisions may – in the first instance – be dependent on whether they already have the necessary facilities to do so, in which case the impact is likely to be minimal, both immediately and on an ongoing basis.

Should a library or archive choose to extend its current copying services beyond its current capabilities, it may wish to purchase or upgrade copying equipment, computers etc, but would take into account the likely benefits to be gained by doing so; to its reputation as a service provider; to researchers and students; and to its future revenue streams. It is unlikely that a library or archive will invest in new machinery without expecting the revenues from copying to cover its costs. Such investment would therefore benefit both the library or archive as well as visiting researchers.

Some one-off administrative costs are likely for ensuring that staff are appraised of the changes to the law and how to implement them, as well as introducing revised declaration forms and guidance notes for staff and users.

On an ongoing basis, the changes to the law may encourage a greater number of requests for copies of extracts given the addition of the new type of works to the exception, including an amendment which allows copying of unpublished artistic works.

There may be some ongoing storage costs: declaration forms are currently kept for 6 years and the introduction of an additional declaration form for new works may increase overall storage costs. Generally, it would be expected that such additional costs would be offset by the fact that – as under the current exception – the cost of copying, including a contribution to the general expenses of the library, is required by the law to be paid for by the person requesting the copy.

3. Educational establishments

Many universities and colleges provide guidance on copying works, and there may be one-off administrative costs associated with updating this guidance and understanding the changes. In-house libraries for schools, colleges and universities will also face the same general costs and benefits as described above for libraries. These administrative costs are likely to be very low, and outweighed by the educational benefit, and lower transaction costs of acquiring material for the students at the institution.

4. Rights holders

The impact on rights holders should be minimal. The changes proposed to the exception are not intended to work as a substitute for legal access to a work which a researcher or student may have to pay for, but gives the opportunity to copy an extract from a work, when appropriate. As a safeguard the changes put in place certain controls identifying the circumstances under which such copying is

permitted. In the case of an unpublished artistic work, there are safeguards in place to help ensure that such copying does not take place if a copyright owner has prohibited such copying.

The one-off costs to rights holders should be minimal and are likely to be restricted to understanding the changes in the law. Whilst rights holders may benefit from reductions in the ongoing costs of administering responses to requests for permission to copy works, they may also see a reduction in any revenue where a person would previously have paid a licence fee to allow them to use music or film clips. Few, if any, such licences are currently offered, so this effect is likely to be negligible.

5. Society overall

Society overall may benefit from any improvements in education and skills which may arise from wider usage of sound recordings, films and broadcasts for scholarly purposes.

SPECIFIC IMPACT TESTS

It seems unlikely that extending the current exception to cover all works will have any significant implications for the economy, the environment or for sustainable development. For this reason specific impact tests are not considered appropriate although there is some further discussion below, for some of the potentially more important tests.

There are likely to be either no – or marginally positive - effects on broader social equality issues: there is no intention to apply the proposal to different groups in different ways.

- **Competition**

There is unlikely to be any impact on competition: the proposed changes are unlikely to expand or change the market for any of the types of works, i.e. film, broadcasts or sound recordings, to which the exception will additionally apply. The nature of the changes to the exception is simply to improve the range of existing works from which researchers or students may copy extracts for scholarly purposes. The possibility that a researcher or student may wish to use an extract from a work yet to be created is remote in the extreme and therefore unlikely to promote the creation of new works.

- **Small Firms**

To the extent that small firms may be rights holders, they could see a reduction in revenue from licensing the use of extracts for research or private study purposes. However, information suggests that few rights holders license in this area so the impact is likely to be minimal.

- **Race Equality**

No obvious impact on race equality.

- **Disability Equality**

It is possible that the changes proposed may benefit users with a disability if that disability creates particular difficulties in seeking permission from rights holders to use the additional works for research or private study purposes, since the requirement to obtain prior permission is being removed.

Researchers or students with difficulties supplying a signature are likely to benefit from the proposed removal, in certain circumstances, of the requirement for a personal signature to gain access to works copied on their behalf by librarians or archivists.

- **Gender Equality**

No obvious impact on gender equality.

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	Yes	No
Small Firms Impact Test	Yes	No
Legal Aid	No	No
Sustainable Development	No	No
Carbon Assessment	No	No
Other Environment	No	No
Health Impact Assessment	No	No
Race Equality	Yes	No
Disability Equality	Yes	No
Gender Equality	Yes	No
Human Rights	No	No
Rural Proofing	No	No

Summary: Intervention & Options

Department / Agency:

Intellectual Property Office

Title:

Impact Assessment of Extending Copyright Exceptions Relating to Permitted Acts for the Purposes of Preservation

Stage: Consultation

Version: 2

Date: December 2009

Related Publications: The Gowers Review of Intellectual Property; Taking Forward the Gowers Review of Intellectual Property: Proposed Changes to Copyright Law

Available to view or download at:

http://www.hm-treasury.gov.uk/gowers_review_index.htm

<http://www.ipso.gov.uk/consult-copyrightexceptions.pdf>

Contact for enquiries: Janette McNeill

Telephone: 01633 814750

What is the problem under consideration? Why is government intervention necessary?

Some copyright protected works cannot be preserved by librarians and archivists without seeking permission from rights holders, because the current exception for preservation purposes does not extend to sound recordings, film and broadcasts. Seeking permission can be time-consuming and costly and will not necessarily achieve the desired result. The exception also does not enable format shifting into more stable media: currently only a single copy can be made, which limits the use of new technologies for preservation work. Government intervention is necessary to remove the exemptions and to ensure the efficient running of the existing measures.

What are the policy objectives and the intended effects?

The intended effect of these changes is to create a legal framework that better supports librarians and archivists in the preservation of their permanent collections and to extend this privilege to museums and galleries. This would also allow copying from unstable formats to more stable mediums thereby saving works that may otherwise have been lost. Such changes support the government's wider aims of preserving the UK's cultural heritage.

What policy options have been considered? Please justify any preferred option.

1. No change to copyright law.
 2. Amend the law to enable libraries to make multiple copies and format shift all classes of works for the purposes of preservation.
 3. As 2 above but also extended to allow museums and galleries to benefit from the exception.
- Option 3 is the preferred option as this will facilitate the preservation of as much of the UK's cultural heritage as possible.

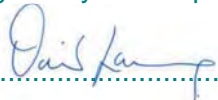
When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

5 years after Statutory Instrument.

Ministerial Sign-off For consultation stage two Impact Assessments:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister:



Date: 11 December 2009

Summary: Analysis & Evidence

Policy Option: 3

Description: Amend Section 42 of the Copyright, Designs and Patents Act 1988 to enable libraries, museums and galleries to make multiple copies and format shift all classes of works for the purposes of preservation.

COSTS	ANNUAL COSTS		Description and scale of key monetised costs by 'main affected groups' One-off costs negligible for all groups. On-going costs for preservation organisations may increase, should they choose to extend their preservation activities as a result.	
	One-off (Transition)	Yrs		
	£ 0			
	Average Annual Cost (excluding one-off)			
	£ 0		Total Cost (PV)	£ 0
Other key non-monetised costs by 'main affected groups' Preservation organisations may incur extra equipment costs should they choose to increase their preservation related activities, but certain organisations, such as the British Library, already have the necessary infrastructure.				

BENEFITS	ANNUAL BENEFITS		Description and scale of key monetised benefits by 'main affected groups' On-going benefits for preservation organisations may include a reduction in costs associated with seeking rights holders' permission, and reductions in costs associated with the ability to transfer material from one format to another before the formats become obsolete. The ability to make more than one copy for preservation purposes should also effectively act as insurance against accidental destruction by e.g. fire.	
	One-off	Yrs		
	£ 0			
	Average Annual Benefit (excluding one-off)			
	£ 0		Total Benefit (PV)	£ 0
Other key non-monetised benefits by 'main affected groups' Rights holders may benefit from reduced administration burden associated with a reduction in requests for permission. The ability of preservation organisations to preserve works more readily may also act as insurance for rights holders, should they lose or suffer from the destruction of their own material.				

Key Assumptions/Sensitivities/Risks

Right holders remuneration from licensing preservation activities by libraries, archives, museums and galleries currently is minimal.

Price Base	Time Period	Net Benefit Range (NPV)	NET BENEFIT (NPV Best estimate)	
Year	Years	£ 0	£ 0	

What is the geographic coverage of the policy/option?		UK		
On what date will the policy be implemented?		2010		
Which organisation(s) will enforce the policy?		Rights holders		
What is the total annual cost of enforcement for these organisations?		£ 0		
Does enforcement comply with Hampton principles?		Yes		
Will implementation go beyond minimum EU requirements?		No		
What is the value of the proposed offsetting measure per year?		£ 0		
What is the value of changes in greenhouse gas emissions?		£ 0		
Will the proposal have a significant impact on competition?		No		
Cost (£-£) per organisation (excluding one-off)	Micro	Small	Medium	Large
	0	0	0	0
Are any of these organisations exempt?	No	No	No	No

Impact on Admin Burdens Baseline (2005 Prices)				(Increase - Decrease)
Increase of	£ Nil	Decrease of	£ Nil	Net Impact
				£ Nil

Key: Annual costs and benefits: (Net) Present

Evidence Base (for summary sheets)

INTRODUCTION

A Consultation Stage IA was prepared in January 2008. This Final IA is a follow-up to that IA; and in preparing it, we have taken account of comments and views expressed during the consultation exercise. However, it is important to stress that there is relatively little in the way of research or reliable evidence on the costs and benefits to the main affected groups of implementing these proposals. In areas where it was difficult to quantify the costs and benefits we have provided, to the fullest extent possible, a qualitative assessment of the costs and benefits to all those impacted by the proposals.

BACKGROUND

Section 42 of the Copyright, Designs and Patents Act 1988 (CDPA) provides an exception for librarians and archivists of prescribed libraries to make a (single) copy from any item in the permanent collection of the library in order to preserve or replace a lost, stolen or damaged item, subject to certain prescribed conditions, without infringing copyright. But this exception is limited insofar as it allows the making of only a single copy and only of items that are literary, dramatic or musical works or an illustration accompanying such a work.

This proposal is intended to allow copying for preservation purposes of certain additional types of content such as artistic works, films, sound recordings and broadcasts, to permit multiple copies to be made, to permit format shifting, and to permit copies of all works to be made, for preservation purposes. In addition, the proposal is to extend the scope of organisations that the exception applies to so that it would also cover museums and galleries.

The intended effect of these changes is to improve the ability of librarians and archivists of prescribed libraries, and of museum and gallery curators to preserve or replace items in their permanent collections by allowing the taking of multiple copies and to copy to different formats. Such changes will permit the use of new technologies, which by design, require the making of more than one copy and allow items from a permanent collection to be shifted to a more durable format and also to be further shifted to new formats as advances in technology make current formats obsolete and/or where new formats provide improved storage and preservation conditions. Currently, such activities would be in breach of any copyright that subsists in the item. Such changes support the government's wider aims of preserving the UK's cultural heritage.

IMPACTS

The following groups would be affected by such changes:

1. Prescribed libraries

These organisations would benefit in that the changes to allow more than a single copy, to allow format shifting and to allow copying of all classes of works will create an environment where they are better able to preserve or replace works in their permanent collections by:

- copying, for example, from an unstable and deteriorating format to a more stable format, and being able to do so in a more timely fashion, before formats become obsolete. This will be particularly useful for digital works be the formats of which may become obsolete in a relatively short period of time after publication and well before copyright expires. The British Library has indicated that the costs of transferring material from current formats e.g. CDs is relatively low - approximately £19 per hour – whereas transferring content from older formats can be very expensive as expertise, techniques and the equipment to carry out such transfers become rarer and more costly. It gives the examples of old 78 rpm records, at an approximate cost of £490 per hour to transfer, with even the relatively more recent media of vinyl LPs costing approximately £211 per hour.

- copying works that previously could not be copied without the rights holders' permission. The changes should remove the administrative costs associated with seeking permission, which include establishing who owns the copyright in the first place (where that is possible), and the costs of writing to (and in some cases chasing up) the copyright owners.
- making as many copies as is required for the purposes of preservation, and hence being able to transfer from one format to another as technology develops and preservation facilities improve.

Organisations which currently have the facilities to preserve material will in effect be able to make better/more efficient/more continuous use of it, as they can more readily preserve materials rather than seeking permission which may or may not be forthcoming.

Once permanent collections have been preserved or replaced, opportunities will exist, subject to the appropriate licensing arrangements, to make permanent collections more accessible to the users of the organisation, presenting new and more diverse opportunities to bring the content of permanent collections into the consciousness of the public, if permission is received from the rights holders. Such opportunities may include new business models currently not possible such as remote access to permanent collections.

In relation to costs for these organisations, the one-off costs are likely to be relatively low relating to, for example, the understanding of the changes in the law. Such changes may encourage preservation organisations to seek to extend the range, or increase the volume, of material they preserve, potentially encouraging the purchasing of additional or different equipment or services to do so, but in general this will be a matter of policy for the organisation concerned rather than a direct impact of the law.

In relation to ongoing costs, a possible indirect result of the ability to preserve material more freely may be that preservation organisations choose to preserve more material in any given year. This potential increase in total costs may however be offset by the expected reduction in the costs per item.

2. Rights owners whose works form part of the permanent collections of prescribed libraries

The direct benefits to rights holders are not likely to be significant: they will be freed of the administrative burdens of dealing with requests for permission to preserve works they own. More indirectly, they may benefit from the 'insurance' effect such preservation may afford. For example, the potential to exploit material, for which they own the copyright but which they no longer have in their possession, if libraries/archives are effectively able to preserve it on their behalf.

Opportunities will exist for rights holders to obtain increased revenues from improved exploitation opportunities that will arise from, for example, works in permanent collections being format shifted into digital form. This will present opportunities for a library to make the work available to view both on its premises and elsewhere such as via the Internet and for such "making available" to be licensed providing benefits to rights holders.

Specific one-off costs for rights holders are likely to be limited to those associated with understanding the changes in the law. There may however be ongoing costs to rights holders who were previously able to seek remuneration for licensing the preservation of materials in which they own copyright, as they will no longer be able to do so. It is not clear though how frequently such requests are made to rights holders under the current exception and therefore how much this is likely to change under the new system. Some rights holders of the additional works to which the exception will apply (film, sound recordings, broadcasts) have suggested that they receive little income from licensing preservation for such works and are therefore unlikely to suffer from major costs as a result of the changes.

There is a concern amongst some rights holders that increased ease of access will result in works being copied and disseminated without the permission of the rights holder. This risk is connected to the available technology rather than acts of preservation. The change in the law is not intended to permit broader dissemination of works.

3. Museums and galleries

Such organisations do not currently benefit from this exception and are unable to preserve or replace works in their permanent collections by copying, without first obtaining the permission of the rights holder. Extending the exception in such a way as to permit museums and galleries to copy works for these purposes will create an environment which would assist in creating a more enduring collection and reduce or even eliminate the possibility of many works being lost from the cultural heritage forever as may be the case with, for example, film which is stored on unstable media.

If museums and galleries currently wish to preserve in-copyright material they must seek permission from rights holders. The proposed removal of requirement to seek permission is therefore likely to benefit them in a similar way as the libraries and archives above.

4. Users of libraries, archives, museums and galleries

Users of libraries will, in some limited circumstances defined in the CDPA 1988, be able to view copies of works, rather than the original work itself which may not be accessible because it was too fragile or vulnerable to be displayed.

The potential will exist to make access to works in permanent collections more freely available to users via the Internet for example, subject to the relevant license agreements being in place.

Users of museums and galleries will benefit from the more efficient preservation of the cultural heritage where collections are preserved rather than being lost through degradation of the media upon which the work is stored.

SPECIFIC IMPACT TESTS

It seems unlikely that extending the current exception to permit the better preservation of works by certain organisations will have any significant implications for the economy, the environment or for sustainable development. For this reason specific impact tests are not considered appropriate although there is some further discussion below, for some of the potentially more important tests.

There are likely to either no – or marginally positive effects - on broader social equality issues: there is no intention to apply the proposal to different groups in different ways, although there may be some indirect beneficial effects on those with disabilities.

• Competition

We expect that this proposal will have insignificant implications for competition because the number and range of rights holders involved will remain unaffected as will the relative attractiveness of libraries to users. Although we propose a broadening of the exception to bring museums and galleries within it, this is unlikely to impact on competition in the affected sectors. The potential for rights holders to obtain increased downstream revenues, from licensing broader access to the preserved works, will be the same for all rights holders involved.

• Small Firms Impact Test

We do not believe this would have an impact on small firms as it is intended to facilitate better preservation of works in the collections of libraries, archives, museums and galleries, which will continue to be acquired in the same way as now – either by donation, bequeathing or by purchasing.

• Race equality

No known differential impacts by race.

• Disability equality

We do not believe there will be any direct impacts on those with disabilities. It is however possible that as a result of improvements in preservation, more organisations covered by the exception may choose to take up licences from rights holders to enable off-site access to their copyright collections. This in turn may be of particular benefit to those who cannot easily gain physical access to library premises for example.

- **Gender equality**

No known differential impacts by gender.

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	Yes	No
Small Firms Impact Test	Yes	No
Legal Aid	No	No
Sustainable Development	No	No
Carbon Assessment	No	No
Other Environment	No	No
Health Impact Assessment	No	No
Race Equality	Yes	No
Disability Equality	Yes	No
Gender Equality	Yes	No
Human Rights	No	No
Rural Proofing	No	No

We conduct our consultations according to the Code of Practice on Consultation³⁷ issued by the Department for Business Innovation and Skills (BIS).

THE CONSULTATION CRITERIA

Criterion 1, When to consult

Formal consultation should take place at a stage when there is scope to influence the policy outcome.

Criterion 2, Duration of consultation exercises

Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.

Criterion 3, Clarity of scope and impact

Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.

Criterion 4, Accessibility of consultation exercises

Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.

Criterion 5, The burden of consultation

Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.

Criterion 6, Responsiveness of consultation exercises

Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.

Criterion 7, Capacity to consult

Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience. These criteria should be reproduced in consultation documents.

³⁷ <http://www.berr.gov.uk/files/file47158.pdf>

COMMENTS ABOUT THE CONSULTATION PROCESS

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation is being conducted, please contact the Office's Consultation Co-ordinator:

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ANNEX E

LIST OF ORGANISATIONS WHICH HAVE BEEN NOTIFIED ABOUT THE CONSULTATION*

ACID (Anti Copying in Design)

Advertisers Association

Advertising Producers Association

Advertising Standards Authority

AIM (Association of Independent Music)

Alfreton & District Heritage Trust

Alliance Against IP Theft

Alternative Investigations Management Ltd

Anti-Counterfeiting Group

Arqiva

Art Libraries Society UK & Ireland

Arts and Humanities Research Council (ARHC)

Arts Council of England

Arts Council of Northern Ireland

Arts Council of Wales

Arts Institute at Bournemouth

Ashby de la Zouch Museum

Ashurst LLP (City of London Law Society (CLLS))

Association for Learning Technology (ALT)

Association for University Research and Industry Links (AURIL)

Association of Art Historians and the Visual Resources Committee of ARLIS/UK & Ireland: the Art Libraries Society

Association of Chief Police Officers

Association of Colleges

Association of Heads of University Administrators

Association of Independent Music

Association of Learned and Professional Society Publishers (ALPSP)

Association of Photographers Ltd (AOP)

Association of the British Pharmaceutical Industry (ABPI)

Association of United Recording Artists

Authors' Licensing and Collecting Society (ALCS)

Bakewell Old House Museum

Bar Council

Beaminster Museum Trust

BECTA

Berkley Electronic Press

Berwin Leighton Paisner LLP

Bibliographical Society

Biggar Museum Trust

Biotechnology and Biological Sciences Research Council

Black Country Living Museum

Booz and Company

Bournemouth Borough Council / Russell-Cotes Art Gallery and Museum

Bournemouth University

BPI (British Recorded Music Industry) Limited

Bridgeman Art Library

British Academy

British Academy of Composers & Songwriters

British Art Market Federation

British Association of Picture Libraries & Agencies (BAPLA)

British Association of Record Dealers

British Broadcasting Corporation (BBC)

British Chamber of Commerce

British Computer Society

British Copyright Council (BCC)

British Dental Association

British Educational and Communications Technology Agency

British Educational Suppliers Association

British Equity Collecting Society Limited (BECS)

British Film Institute (BFI)

British Geological Survey

British Horseracing Board

British Hospitality Association

British Institute of Professional Photography

British Interactive Media Association

British Library

British Literary and Artistic Copyright Association

British Optical Association Museum (College of Optometrists)

British Psychological Society

British Screen Advisory Council (BSAC)

British Sky Broadcasting Ltd (Sky)

British Sociological Association

British Telecommunications PLC

British Universities Film & Video Council (BUFVC)

British Video Association (BVA)

British Web Design and Marketing Association

Broadcasting Entertainment Cinematograph & Theatre Union (BECTU)

Brunel University	Department of Enterprise, Trade and Investment (Northern Ireland)
Business Application Software Developers Association	Department of Finance and Personnel (Northern Ireland)
Business in the Community	Design and Artists Copyright Society (DACS)
Business Software Alliance (BSA)	Digital Content Forum
Cabinet Office	Digital Media Project
Cambridge & County Folk Museum	Digital Preservation Coalition
Cambridge University Library	Directors & Producers Rights Society
CARAD (Community Arts Rhayader and District) / Community Museum Development	Doncaster Museum Service
Cardiff Museum Project / Cardiff Council	Dorset County Museum
Carpet Museum Trust	Doshisha University, Japan
Caspian Publisher	Droitwich Spa Town Council
Caudwell's Mill Trust Ltd	Dundee Heritage Trust
Centre for Ecology and Hydrology	Durham University
Ceredigion County Council	Economic History Society
Channel 5 Broadcasting	Educational Recording Agency Limited (ERA)
Channel Four Television	Educational Software Publishers Association
CHARM - AHRC Research Centre for the History and Analysis of Recorded Music	Elgar Birthplace Museum
Chartered Institute of Journalists	Engineering & Physical Sciences Research Council
Chartered Institute of Library & Information Professionals	Enterprise UK
Chartered Institute of Library & Information Professionals in Scotland	Entertainment and Leisure Software Publishers Association (ELSPA)
Chartered Institute of Library & Information Professionals in Wales	Equity
Chartered Society of Designers	EUROCOPYA
Christian Copyright Licensing International (Europe)	European Federation of Journalists
Churchill Archives Centre	European Informatics Market (EURIM)
Cinema Exhibitors Association	European Publishers Council
City University, London	Eyam Museum Limited
Collections Trust	Farrer & Co (law firm)
Commercial Radio Companies Association	FCO - Ireland
Confederation of British Industry	Federation Against Copyright Theft
Convention of Scottish Local Authorities (COSLA)	Federation Against Software Theft
Copyright Licensing Agency Ltd (CLA)	Federation of Museums and Galleries in Wales (Welsh Federation)
Copyright Promotions Licensing Group	Federation of Small Businesses
Council for Industry and Higher Education	Film Distributors Association
CyMAL (Museums Archives and Libraries Wales)	First Garden City Heritage Museum / Letchworth Garden City Heritage Foundation
Data Publishers Association	FOCAL International (Federation of Commercial Audiovisual Libraries)
Defence Procurement Agency	Foundation for Science and Technology
Department for Business, Innovation and Skills	Freshfields, Bruckhaus, Deringer
Department for Children, Schools and Families	Friends of the National Libraries
Department of Culture Arts and Leisure Libraries Branch - Northern Ireland	Glasgow Caledonian University
Department of Culture Media and Sport	Google
Department of Culture, Arts and Leisure (DCL)	Guardian Media Group

Guild HE

Gwynedd Council / Gwynedd Museum & Art Gallery, Bangor

Gwynedd Museums and Galleries Service (Federation of Museums and Galleries in Wales - Welsh Federation)

HE Academy

Herefordshire Council / Herefordshire Museum and Art Gallery

Higher Education Funding Council for England

Higher Education Funding Council for Wales

Historical Association

HM Revenue & Customs

HM Treasury

Hook Norton Village Museum

IFPI (International Federation of the Phonographic Industry)

Image Blonformatics Research Group

Imperial College London

Imperial War Museum

Incorporated Society of Musicians

Independent Publishers Guild

Information & Communications Industry Association

Information Commissioner's Office

Institute of Conservation (Icon)

Institute of Directors

Institute of Practitioners in Advertising

Intellect

Intellectual Property Foresight Forum, University of Edinburgh

Intellectual Property Institute

Intellectual Property Unit Department of Enterprise, Trade and Employment - Rep Ireland

International Association of Music Libraries, Archives and Documentation Centres (IMAL UK & Irl)

International Association of Scientific, Technical, and Medical Publishers - STM

International Visual Communication Association

Internet Advertising Bureau

Internet Service Providers Association (UK)

Internet Watch Foundation

Isle of Wight Council

ITV Network Limited

Jewish Museum / Museum of Jewish Life

Johnson Press

Joint Information Systems Committee (JISC)

Kings College London

Lancashire County Council / Lancashire Museums

Lancaster University

Lanman Museum, The Castle Framlingsham Suffolk

Laurence Kaye Solicitors

Law Society of England & Wales

Law Society of Northern Ireland

Law Society of Scotland (Intellectual Property Sub-Committee)

Learndirect

Learning & Teaching, Scotland

Learning and Skills Council

Leicester Arts and Museum Services

Leicester City Council

Leicestershire County Council

Lewes Castle & Museum / Sussex Archaeological Society

Libraries and Archives Copyright Alliance (LACA) / Chartered Institute of Librarians & Information Professionals (CILIP)

Library and Museum of Freemasonry

Licensing Executives Society, Britain & Ireland

Lincolnshire County Council

Local Government Association

London Libraries Development Agency

London School of Economics and Political Science

London School of Hygiene & Tropical Medicine (Library & Archives Service)

Macmillan

Macrovision UK Ltd

Manchester City Galleries / Manchester City Council

Manchester Metropolitan University

Mansfield Museum, Nottinghamshire

Media Standards Trust

Media, Communications and Cultural Studies Association (MeCCSA)

Medical Research Council

Meteorological Office

Microsoft

Midlands Federation of Museums and Art Galleries

Mills Archive Trust

Mobile Brand Group

Mobile Data Association

Motion Picture Association (MPA)

Motion Picture Licensing Company

Museum Documentation Association

Museum of Army Chaplaincy

Museum of Domestic Design & Architecture (MoDA)

Museums Archives and Libraries Wales
 Museums Copyright Group
 Museums Galleries Scotland
 Museums Libraries and Archives Council (MLA)
 Music Business Group
 Music Choice Europe
 Music Users Council of Europe
 Musicians' Union
 Narberth Museum Bookshop & Research Office
 National Archives
 National Archives of Scotland
 National Consumer Council
 National Council on Archives
 National Education Network
 National Library for the Blind
 National Library of Scotland
 National Library of Wales
 National Maritime Museum
 National Museum & Galleries of Wales (Federation of Museums & Galleries in Wales)
 National Museums Directors' Conference
 National Museums Northern Ireland
 National Portrait Gallery
 National Union of Journalists (NUJ)
 National Union of Students
 Natural Environment Research Council
 Natural History Museum
 NBC Universal
 Newry and Mourne Museum
 News International Group
 Newspaper Licensing Agency (NLA)
 Newspaper Publishing Association
 Newspaper Society
 North Hertfordshire District Council (Museums Service)
 Northern Ireland Council for Voluntary Action
 Northern Ireland Museums Council
 Nottingham Castle Museum and Art Gallery / Nottingham City Museums and Galleries
 NPL
 Ofcom
 Office of Public Sector Information
 Office of the First Minister and Deputy First Minister (Northern Ireland)
 Open Rights Group
 Open University

Own-it (Intellectual Property Advice for Creative Businesses)
 Oxford Internet Institute University of Oxford
 Oxford University Library Services
 Oxford University Press
 Palan Music Publishing
 Parliamentary Information Services
 Periodical Publishers Association (PPA)
 Phonographic Performance Limited (PPL) & Video Performance Limited (VPL)
 Political Studies Association
 PPA Scotland
 Press Association
 Producers Alliance for Cinema & Television (PACT)
 PRS for Music
 Public Lending Right Office
 Publishers Association
 Publishers Licensing Society
 Publishing Scotland
 Purbeck Mineral and Mining Museum
 Queen Mary, University of London
 REACT Services (UK) Ltd
 Reading Museum Service
 Reed Business International
 Reed Elsevier
 Research Councils UK (RCUK)
 Research Information Network (RIN) / Economic and Social Research Council
 Research Libraries UK (RLUK)
 Reuters
 Rivers Consultancy
 Robert Gordon University
 Roehampton University (LRC)
 Royal Academy of Engineering
 Royal Agricultural College, Cirencester
 Royal College of Physicians
 Royal College of Surgeons of England
 Royal Geographical Society
 Royal Historical Society
 Royal Holloway College
 Royal Music Association
 Royal National Institute for the Deaf
 Royal National Institute of Blind People (RNIB)
 Royal Scottish Academy
 Royal Society
 Royal Society of Arts

Royal Society of Chemistry
Royal Society of Medicine
Royal Statistical Society
Royal Town Planning Institute
Rugby Borough Council / Art Gallery and Museum
Russell Group of Universities
Scholarly Publishing and Academic Resources Coalition
School of Oriental and African Studies (SOAS)
Science and Technology Facilities Council
Scottish Arts Council
Scottish Consumer Council
Scottish Council for Voluntary Organisations
Scottish Library and Information Council & Chartered Institute of Library and Information Professionals Scotland (CILIP in Scotland)
Scottish Office
Sector Skills Council (SSC) for Creative Media (Skillset)
Share the Vision (RNIB)
Sheffield Industrial Museums Trust
Sherston Publishing Group
Shetland Museum & Archives
Sianel Pedwar Cymru - S4C
Sleaford Museum Trust
Social Research Association
Society for Computers and Law
Society of Archivists
Society of Chief Librarians (SCL)
Society of College, National and University Libraries (SCONUL)
Special Libraries Association (SLA)
Specialist Publishers Association
Spencer Cave Consulting and Arcaid
Stockport Metropolitan Borough Council
Strategic Copyright Alliance / Joint Information Systems Committee (JISC)
Swansea University
TASI (Institute for Learning and Research Technology, University of Bristol)
Tate
Telegraph Group
Thomson Reuters
TIGA
Time Warner Europe
TMPDF - Trademarks, Patents and Designs Federation
Tobar an Dualchais

Trading Standards Institute
Trinity College Dublin
Trinity College, Carmarthen
Trinity Mirror
UK Association of Online Publishers
UK Film Council
UK Media Monitoring Association
UK Music
UKOLN
Universities and Colleges Information Systems Association
Universities UK
University and College Union
University College London (UCL - SHERPA)
University College London (UCL)
University for Industry
University of Aberdeen (Queen Mother Library)
University of Birmingham
University of Bradford
University of Bristol
University of Buckingham
University of Cambridge
University of Cumbria
University of Derby
University of East Anglia, Norwich
University of Glamorgan
University of Hertfordshire
University of Leeds
University of Leeds (Library)
University of Liverpool (Library)
University of London Research Library Services (ULRLS)
University of Manchester
University of Melbourne
University of Nottingham
University of Salford
University of Sheffield (Library)
University of St Andrew's
University of Surrey
University of Sussex
University of the West of England, Bristol
University of Ulster
University of Warwick
University of Westminster
University of Wolverhampton

Wakefield Access and Culture Services / City of
Wakefield Metropolitan District Council

Wales Office

Wallace Collection

Wardown Museum

Wardown Park Museum, Luton

Warwick University

Waterfront Partnership

Wellcome Trust

Welsh Assembly Government

Welsh Book Council

Welsh Local Government Association

Welsh Publishers Circle

Welwyn Hatfield Museum Service / Welwyn Hatfield
Council

Which?

Wisbech and Fenland Museum

Woodhall Spa Cottage Museum

Worcester County Museum

Worcestershire County Council

Writers Guild of Great Britain

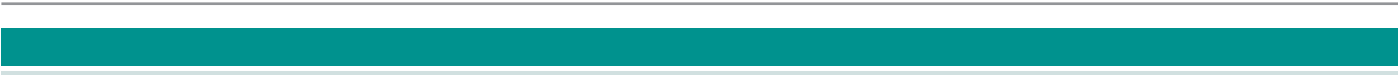
Yell Group

*The consultation document was also sent to
various individuals

ANNEX F

GLOSSARY OF TERMS

Caricature	Commonly: a grotesque usually comically exaggerated representation especially of a person; or a ridiculously poor imitation or version
CD	Compact Disc
CDPA	Copyright Designs and Patents Act 1988, as amended
“the Directive”	European Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society (2001/29/EC), also known as “the Copyright Directive”, “Information Society Directive” or “InfoSoc Directive”
Distance learning	A method of learning which involves learners accessing learning materials away from the classroom at a place and time of their own choosing
DCMS	Department of Culture, Media and Sport.
DRM	Digital Rights Management
DVD	Digital Versatile Disc
EC	European Community
Educational establishment	Broadly, any school or other description of educational establishment specified by order of the Secretary of State
ERA	Educational Recording Agency
EU	European Union
Format shifting	The copying of legitimately owned works in a different format for use on different devices
Gowers Review	Andrew Gowers Review of Intellectual Property Commissioned by the UK Government
IA	Impact Assessment
Interactive whiteboard	A screen used with a computer and projector to create a touch sensitive screen display including, for example, text and images
LEA	Local Education Authority
IP	Intellectual Property
Moral rights	Rights conferred by Chapter IV of the Copyright Designs and Patents Act 1988 including the right to be identified as the author of a work, the right to object to derogatory treatment of a work and the right not to have a work falsely attributed
MP3	MPEG-1 Audio Layer 3 – a digital compression format
On-demand services	A transmission which can be accessed as required at a time determined by the consumer
Parody	Commonly: a humorous exaggerated imitation of an author, literary work or style etc; or a feeble imitation, travesty
Pastiche	Commonly: a picture or musical composition from or imitating various sources; or a literary or other work composed in the style of a well known author, etc
Permanent collection	Broadly, a collection of works permanently housed in a library, gallery or museum etc, but see Annex B, question 11.
Prescribed library	All libraries within the UK for certain purposes – see The Copyright (Librarians and Archivists)(Copying of Copyright Material) Regulations 1989
Rental and Lending Right	Council Directive (92/100/EEC) on rental right and lending right and on certain rights related to copyright in the field of intellectual property as consolidated into 2006/116/EC
TPMs	Technological Prevention Measures
Three-step test	Test found in e.g. Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works that imposes constraints on exceptions to exclusive rights under national copyright laws
VLEs	Virtual Learning Environments



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