

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

Submission to the UK Intellectual Property Office

**UK Film Council**

March 2010

## EXECUTIVE SUMMARY

1. The UK Film Council is the Government-backed lead agency for film in the UK ensuring that the economic, cultural and educational aspects of film are effectively represented at home and abroad. The Board of Directors, appointed by the Secretary of State for Culture, Media and Sport, oversees the work of the UK Film Council and provides advice to the Government on film.
2. The British Film Institute (BFI), which is funded by the UK Film Council to deliver cultural and educational activities focused on film and the moving image has made a separate submission to this consultation. The arguments made in this submission are complementary to those made by the BFI.
3. The UK Film Council broadly welcome the proposals for new exceptions set out in this document, as they will help to enhance public access and address some of the issues faced by cultural and educational institutions in seeking to broaden such access to moving image material. The proposals, in the round, will help to ensure copyright legislation is better adapted to the digital age.
4. However, we cannot support the proposal to expand the Section 29 exception for research and private study to cover film as currently drafted. The wording is far too loosely drawn and could have the effect of making infringing copies widely available – which we do not believe is the intention and which is clearly not consistent with the provisions to curb copyright infringement contained within the Government’s Digital Economy Bill.
5. While we broadly welcome the expanded educational exception we also believe that the definition of “educational establishment” should include archives. This would mean that archives could act in the same way as “libraries” within educational establishments enabling recognised teachers and pupils of educational establishments also to sign up as “authorised persons” to gain access to recognised archive libraries.
6. Among other things, we think that this is consistent with the Government’s commitment to stimulate lifelong learning. The kind of material which be made available, for example, with the help of moving image archives – such as the content in the BFI’s Screenonline initiative - has clear educational benefits, reflecting the fact that the public purposes of archives are as much focussed on access as on preservation.
7. We strongly support the proposal to amend the Copyright, Designs and Patents Act (CDPA) to permit libraries and archives to make copies of the master copies which they hold. This reflects the realities of the digital world in which there is a need to ensure that copies do not become unusable as a consequence of technologies becoming obsolescent.
8. We are aware that some stakeholders are saying that the proposed arrangements to cover the use of extracts from films for educational purposes would be better linked with Section 35 of the CPDA rather than Section 36. The UK Film Council believes that the concerns raised by these stakeholders are legitimate ones and that the Government should take account of them.
9. We support the Government’s view that there is no rationale for introducing a format-shifting exception in the UK at the present time.

10. We agree that there is no discernible benefit from introducing an exception for the purposes of covering parody, caricature and pastiche.

## Responses to the specific questions set out in Annexe B of the consultation

### 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?

*The UK Film Council supports the principle that those engaged in legitimate research and study should have maximum access on a legitimate basis to material including films. However we are extremely concerned that the two tier system for defining the people who might seek to apply the defence of "fair dealing" with literary, dramatic and musical works on the one hand and sound recordings and films on the other, may raise practical problems. In practice it would be difficult for libraries to police those who are officially "members of educational establishments" and so the new exception would allow people to claim that they were engaged in research and private study even if this was not their primary objective.*

*In particular we are concerned that this lack of clarity and the provisions under European law which require DRM workarounds to be made available in relation to exceptions could lead to people seeking to secure access to unprotected copies for activities which have nothing to do with legitimate research and private study.*

*Equally, it our understanding that the absence in the provision of arrangements for "fair compensation" for rights owners linked to copying for "private study" conflicts with the EC Copyright Directive.*

*We therefore support the BFI's proposal that the legislation should provide for a trusted intermediary to be nominated by the Secretary of State. As the BFI suggests this trusted intermediary would receive unprotected audiovisual works to ensure that copying for research is done in a secure environment, and put in place measures to validate the use is within the terms of the exception.*

*For the purposes of facilitating access to the broadest range of relevant material, legal certainty and ensuring a robust regime that protects that needs of rightsholders, it might be desirable to define as trusted intermediaries those bodies which are already permitted by statute to make recordings of broadcasts and cable programmes for archival purposes –which includes the British Film Institute, the British Library and the National Library of Wales. This would also reflect the fact that these bodies already play an important role in education.*

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.

*We support this important clarification of the law and we do not believe it would be unduly restrictive or interfere in legitimate academic work.*

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.

*As stated in answer to Question 1 above we would wish a mechanism to be put in place that would ensure that all persons utilising the exception do so in a way that does not provide a loophole for infringing activity.*

## **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?

*No. We are concerned that the definition of an educational establishment is too narrow, and does not, for example, take account of the Government's commitment to lifelong learning.*

*For this reason we strongly support the BFI's proposal that be included in the legislation for the Secretary of State to provide for designated educational functions of museums, galleries and archives to be able to benefit from the same exceptions as formal educational institutions. As the BFI suggests the regulations, to which nominated organisations would have to adhere, would be enforceable to ensure no leakage of the provision.*

b. What are the practical implications of this proposal?

*See answer to 5 (a) above.*

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

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

*We believe that the term "access" is more appropriate in a digital age when engagement with moving image material is increasingly interactive rather than simply a matter of passive reception.*

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

*As stated above, we prefer the term "access."*

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.

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

*See answer to b. below.*

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

*We believe that it is an important matter of principle that all those entitled to make use of an exception are able to do so including, for example, the disabled. We believe that the proposed approach is sufficiently flexible to enable this.*

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.

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

*Yes, we believe that this approach strikes a reasonable balance. While legitimate access for learning is at the core of the exception, it is crucial to ensure that the exception is defined in such a way as to clearly prevent infringing activity.*

## **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.

- a. What are the implications of replacing the specific term “reprographic copy” with “copy”?

*We agree with the proposal to replace the existing terminology with “copy” as this reflects the transition to a fully digital world in which copies may be virtual rather than physical.*

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

*Effective oversight by the appropriate institution will be crucial in managing this and clear obligations should be placed on those institutions in this regard.*

#### **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?

*No. We agree with the BFI that a restrictive definition limited to “preservation” in the narrowest sense would be too tightly drawn. It is important that film archives, for example, have sufficient flexibility to make copies that are available for legitimate public access in a form that is optimal for those purposes (i.e. eliminating scratched prints and so on) and not solely for the purposes of preservation. This reflects the fact that the public purposes of archives are increasingly focussed on access as well as preservation. However, the wording also needs to make clear that the legislation is not intended to permit the making of infringing copies in any way. Copying for the educational purposes would we trust be covered by any s35 or s 36 licence granted to archives by third party rights holders.*

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 Regulations relating to 'conducted for profit')

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

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

*We believe that in a digital age, the lines between the nature of different institutions and the kinds of collections are becoming increasingly blurred, although not entirely negated. It would be preferable to try and find an overarching definition which encapsulates the various organisations which are intended as the object of the exception rather than treating different types of body as mutually exclusive. However, because of the way that exceptions apply differently to "prescribed libraries" on the one hand and "educational establishments" on the other care needs to be taken to allocate any "new" bodies, such as archives, to one of these two.*

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

*The UK Film Council is not sufficiently close to the detail as regards libraries, museums and galleries to offer a view.*

- 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?

*The definition should be left to the individual body running the library/archive as they are best placed to draw up the most appropriate definition. In addition, at a time of rapid technological change it would be unwise to draw up a definition which could rapidly become out of date.*

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

*See answer to 12.a above.*

- 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.

*The use of the word "capture" in addition to "deposit" might be appropriate for moving image archives since in some instances archives may be legally entitled to hold material that is captured by electronic means rather than simply deposited.*

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?

*Yes, there should be such restrictions. A lawfully made copy should, for example, clearly become an infringing copy if it was dealt commercially.*

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.

- 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?

*It is the content which is under the aegis of the copyright regime, which is the primary of focus of preservation activities and the language of Section 42 should reflect this.*

- 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?

*The UK Film Council is not sufficiently close to the detail to respond to this.*

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?

*We support the purpose of the proposed amendments but have set out our views on specific elements of it above.*

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?

*We are concerned that the revised definition of section 175 "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.", does not, for example, appear to cover such digital publication as the act of streaming . This is because streaming does not necessarily involve offering the film "for sale or hire" to the public but in some cases lets them access it for free. The same might be said of screening the film on advertiser-supported television platforms. We would urge the UK IPO to consider whether the language therefore requires amendment. However, this would also require the UK IPO to consider whether other parts of the Copyright Designs and Patents Act also need revision to make them consistent with the above change.*

## **GENERAL**

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

*We are not aware of any but we are anxious to see the legislation appear on the statute book as soon as possible as it is now over 3 years since the Gowers Review, which set out the thinking which informs the proposed changes to the exceptions, was published.*