

## **APPENDIX 2 – BECS response to © the Future – Developing a Copyright Agenda for the 21<sup>st</sup> Century**

### **RESPONSE FROM BRITISH EQUITY COLLECTING SOCIETY TO UK INTELLECTUAL PROPERTY OFFICE CONSULTATION: TAKING FORWARD GOWERS REVIEW OF INTELLECTUAL PROPERTY**

**4 April 2008**

#### **INTRODUCTION**

British Equity Collecting Society (BECS) is the only United Kingdom based collective management organisation for audiovisual performers. It represents the interests of its members – over 20,000 actors and other performers - in the negotiation and administration of performers' remuneration.

Rights administered via agreements with other European collecting societies include rental, private copying, cable retransmission and communication to the public rights.

Since its incorporation in 1998 BECS has distributed in excess of £10 million to performers in British film and television productions. BECS is a member of AEPO-ARTIS, an association representing audio and audiovisual collective management organisations in Europe.

BECS works to secure and distribute revenues to performers that recognise the value of performances within the increasingly diverse services now being developed through advances in technology in the digital age.

BECS works closely with Equity and supports the points made in the submission by Equity.

Nevertheless BECS' work in collecting and distributing non contractual payments due to performers provides specific experience which shows that it is both possible and practical to collect and distribute secondary payments to rights owners as a result of levy systems operating in many EU Member States.

#### **EXTENSION TO EDUCATIONAL EXCEPTIONS TO INCLUDE DISTANCE LEARNING**

**One of the questions in the Consultation Paper asks -“If section 35 is extended, should corresponding provisions of the CDPA relating to performer rights be amended?”.**

BECS represents the interests of audiovisual performers.

Many BECS members are also members of Equity. Equity is a member of the Educational Recording Agency (ERA) (which operates a certified licence scheme under the current provisions of section 35 CDPA).

Equity has indicated its support for any appropriate changes that are agreed to section 35 being matched with corresponding changes to paragraphs 6 (1) and 6(1A) Schedule 2 CDPA.

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

On this basis, BECS agrees that such a limited extension of section 35 should be mirrored by a similar extension of paragraph 6(1) and 6(1A) Schedule 2 CDPA

## **RECOMMENDATION 2**

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

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

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

Article 5.2 of the EC Copyright Directive<sup>1</sup> recognises that “Member States may provide for exceptions and limitations to the reproduction right ... (c) in respect of specific acts of reproduction made by publicly accessible educational establishments .. which are not for direct or indirect economic or commercial advantage”.

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

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

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

One way to help identify this “non-commercial activity” is to pick out the copyright exceptions that are linked to core curricular educational activities when assessing how application of educational copyright exceptions, and licensing schemes linked to them, operate in practice. The certified licensing scheme operated by the Educational Recording Agency under the existing provisions of section 35 and paragraph 6 of Schedule 2 CDPA<sup>2</sup> is good example.

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<sup>1</sup> Directive of the European Parliament and the Council of the European Union of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (2001/29/EC)

<sup>2</sup> CDPA – Copyright, Designs and Patents Act 1988 (as amended)

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

Copyright works include:-

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

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

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

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

This balance reflects Article 10 of the WIPO Copyright Treaty 1996<sup>3</sup>. It also recognises that similar provision is made within Article 16 of the WIPO Performances and Phonograms Treaty<sup>4</sup>. These provisions were in turn reflected in the provisions relating to permitted copyright exceptions and limitations set out in Article 5 of EC Directive 2001/21 concerning harmonisation of certain aspects of copyright and related rights in the information society<sup>5</sup>.

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

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<sup>3</sup> WIPO Copyright Treaty 1996 – Article 10 (1)

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

<sup>4</sup> WIPO Performances and Phonograms Treaty 1996 – Article 16(1)

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

<sup>5</sup> See Annex 2

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

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

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

## **SECTION 35 (RECORDING BY EDUCATIONAL ESTABLISHMENTS OF BROADCASTS)**

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

No.

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

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

Some “on demand services” are “made available” to the public (and to educational establishments) on terms and conditions that permit users not only to access the material electronically transmitted by the service, but also to record/reproduce the material for further use.

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

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

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

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

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

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

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

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

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

## **SECURE ENVIRONMENTS**

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

Yes, access should be subject to security measures.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

When section 35 CDPA was amended by the Copyright and Related Rights Regulations 2003 to insert for the first time provisions to recognise works being "communicated to the public by a person situated within the premises of an educational establishment provided that the communication cannot be received by any person situated outside the premises of that establishment" – rights owners involved in licensing rights against the provisions of section 35 had to assess the way in which fair compensation was to be secured for licensing both "reproduction" rights and "communication to the public" rights.

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

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

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

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

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

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

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

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

The key elements of the definition are:-

- (a) there is a network, which may be a standalone network or a virtual network (within the Internet). Generally e-mail traffic on e.g. personal e-mail accounts is not permitted;
- (b) the network is only accessible to individuals who are approved by the licensee for access;
- (c) such individuals must authenticate their identity at the time of log on and periodically thereafter by the use of passwords;
- (d) such logon and authentication must be in accordance with best practice<sup>6</sup>; and
- (e) whose conduct is subject to regulation by the educational establishment.

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

- (a) enrolled to study at the educational establishment; or
- (b) members of the academic, research or teaching staff of the educational establishment (whether on a permanent, temporary or contract basis; and who are (in either case) authorised by an officer of the educational establishment to have access to the material to be communicated by means of appropriate password and other

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<sup>6</sup> Requiring that the authentication system operates “in a manner consistent with current best practice” will help ensure that developments in security protocols and software such as Shibboleth used for “trust management” picked up by sectors within the educational world, will actually also help to improve the security arrangements in place to support observance of copyright licences (because establishments will tend to find it economic for security systems to apply across all their activities – rather than applying security developments on a piecemeal basis).

appropriate secure authentication in a manner consistent with best practice for educational establishments.

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

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

## **SECURE ENVIRONMENTS**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This should be supported :-

- (a) by appropriate application of section 36(5) CDPA<sup>7</sup> and
- (b) by the use by educational establishments of geo id software when permitting authorised users to access “Secure Networks”.

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

### **CLASSES OF WORK**

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

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

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

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

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<sup>7</sup> S 36 (5) currently provides “Were a copy which would otherwise be an infringing copy is made in accordance with this section but is subsequently dealt with, it shall be treated as an infringing copy for the purposes of that dealing, and if that dealing infringes copyright for all subsequent purposes. For this purpose “dealt with” means sold or let for hire, offered or exposed for sale or hire or communicated to the public”.

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

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

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

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

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

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

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

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

Section 35 has previously been commented on.

Section 34 (2) already provides:-

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

Further section 32 (2) already provides that :-

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

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

(b) is accompanied by sufficient acknowledgement”.

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

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

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

#### **17. What benefits would there be for educators?**

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

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

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

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

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

### **FORMAT SHIFTING EXCEPTION RECOMMENDATION 8**

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

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

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

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

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

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

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

(i) for private use; and

(ii) for ends that are neither directly nor indirectly commercial

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

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

BECS does not accept this view.

The conditions referred to in the Consultation apply to :-

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

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

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

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

The second impact is that the exception mooted will be likely to provide perceived cover for illegal activity.

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

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

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

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

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

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

Even where economic research has been undertaken linked to consumer use of commercial sound recordings, BECS does not believe that the ways in which consumers use different types of commercial sound recordings have been taken into account.

Many BECS members have performances recorded in audio books and recorded plays.

The market for the use of audio books reflects different consumer use patterns to those which apply for consumers listening to favourite music tracks.

When someone purchases an audio recording of a play, they are likely to want to listen to it on a single device. Even when someone starts listening to a play on an MP3 Player when “on the move” and then wishes to listen to a further Chapter or part of the play when at home, it is relatively easy for consumers to plug their MP3 player into a radio or other device so that the recording can be listened to through the additional device, without the need for a further copy of the recording to be made.

We elaborate on these points further in our answer to question 25 below.

## **SCOPE OF THE EXCEPTION**

### **20. Do you agree with the conditions proposed above?**

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

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

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

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

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

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

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

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

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

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

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

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

These are

Initial copy legitimately acquired

Copying must be by a natural person

For private/domestic purposes only

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

When the copying is not for direct or indirect commercial purpose

All subsequent dealing is prohibited.

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

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

Yes.

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

Consideration should be given to exempting audio recordings that comprise audio books or recordings of plays from any such provision, to recognise the different legitimate commercial interests of the contributors to such recordings, and the ways that consumers make use of such recordings.

Subject to this exclusion of audio books and recordings of plays, there are arguments that rights owners involved in the release of commercial music sound recordings have agreed that they do not wish to apply Technical Protection Measures to the specified formats because they are willing to accept consumers undertaking a recognised degree of private copying between devices (possibly subject to recouping "fair compensation for such private copying through a use it or lose it licensing regime involving third parties who, in the absence of a licence, would be liable for secondary copyright infringement when private copying takes place).

**CLASSES OF WORK**

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

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

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

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

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

This lack of economic assessment or evidence for the effect on films (and sound recordings comprising audio books and plays) is particularly damaging in view of the assumption that somehow the exception proposed is so narrow that no obligation for payment to rights holders is relevant.

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

BECS exists to exercise and enforce on behalf of audiovisual performers all and any rights to remuneration from blank tape levies or other levies on copying media or devices.

Since its incorporation nearly 10 years ago, BECS has successfully entered into agreements with collecting societies in other EU Member States to cover the collection of private copying levies falling due to British Performers as a result of the levy systems operating in these other countries.

Critics of the levy system argue that “it could not work” in the UK.

The existence of BECS, and the fact that it has been able to collect revenues due to British performers, despite not being in a position to offer reciprocation, because of the lack of recognition to payment of levies under UK law, shows that it is possible to make the levy system work.

BECS welcomes the current Call for Comments from the European Commission concerning “Fair Compensation For Acts of Private Copying”, and would hope that government will take into account the results of the latest views before continuing to rule out levies as an option when seeking proper economic evidence for any format shift exception.

The network of reciprocal agreements already developed between societies such as BECS to help process payment of blank tape levies/private copying levies to performers, either:-

- (a) when the clearances required genuinely do service use in secondary markets; and/or
- (b) when the amounts of money to be paid through to individual performers are small;

operates and provides value to rights owners, to producers and to the public by providing a system for fair compensation to be paid to rights owners/performers in circumstances where third parties unilaterally provide for the copying of work in ways that it is impossible or economically practical for the rights owners to police themselves.

Against this it is important to consider the ways that technological advances are developing the relative values of the different restricted acts recognised for owners of copyright works and performances.

Some have argued that the right to consent to the “communication to the public” is really “just one right”. It is, in fact, the source for performers giving consents to the use of performances in audio-visual works in a whole range of new electronic transmission services.

Because this range of new services cannot neatly be valued or allocated into “primary” and “secondary” markets – union negotiation and collective bargaining have important roles to play – alongside any delegation of secondary rights to administration through collecting societies (and

reciprocal agreements entered into between collecting societies) to secure compensation from the exercise of this increasingly important “restricted act”..

This system for collection of revenues must remain flexible if fair compensation for performers is to be secured in the “long tail” world of online electronic services. These services have the potential to offer vast libraries of audiovisual programming on an increasingly non-exclusive basis but in innovative and imaginative ways which appeal to different audiences at different times of their lives.

In considering the introduction of any format shift exception for film, these new services must be taken into account, if the “prejudice to legitimate interests of rights owners” required by the Three Step Test is to be properly addressed.

BECS is well aware how online developments are occurring at the expense of existing markets. The structures for payment of remuneration to performers for the use of their work must recognise this.

**Securing fair compensation from private copying undertaken unilaterally by consumers without any practical way for owners to secure direct reward for the use, will become increasingly significant for performers.**

The way in which the market for VHS has been replaced by the market for DVD shows how markets evolve whilst enabling rights owners to secure a return for legitimate new use of their work.

Format shifting should not exclude audiovisual performers from being part of this evolutionary process. Currently, new video-on-demand services are challenging the DVD market. Markets must be allowed to evolve but not to the exclusion of payments for the contributors who ultimately act as the reason for viewers to choose to watch a particular film or other form of audiovisual production.

## **FORMAT**

### **26. How many format shifts should be allowed?**

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

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

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

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

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

It is submitted that section 28A CDPA (covering the making of temporary copies) should be applied for the purposes of addressing the technological process of transferring content within the scope of any permitted format shift exception<sup>8</sup>.

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

**TIMING**

**29. Should the exception apply to works:**

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

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

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

Alternatively it is suggested:-

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

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

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<sup>8</sup> S28A CDPA – Copyright in a literary work. Other than a computer program or a database, or in a dramatic, musical or artistic work, the typographical arrangement of a published edition, a sound recording or a film, is not infringed by the making of a temporary copy which is transient or incidental, which is an essential part of a technological process and the sole purpose of which is to enable .... (b) a lawful use of the work; and which has no independent economic significance.

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

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

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

### **GENERAL QUESTIONS:**

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

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

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

“Many users in the Call for Evidence outlined problems in using material for genuine academic purposes. Fair dealing for the purposes of non-commercial research and private study, permitted by section 29 of the CDPA excludes copying of sound recordings or film, which is inconsistent and adds to the cost of negotiating rights for sound recordings or films”.

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

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

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

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

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

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

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

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

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

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

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

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

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

**34. Should all types of work be covered?**

No.

Bearing in mind the way that recordings of broadcasts and sound recordings and films can be

(a) accessed by use of the section 70 time shift exception, purchase of physical copies, viewing or listening through an increasing array of on demand services, and

(b) used through such access and the availability of library services and licenses issues to educational establishments linked to section 35 CDPA;

it is not thought helpful or necessary to extend the provisions of section 29 to apply to sound recordings, films or broadcasts.

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

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

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

An expanded exception is not thought necessary.

**THE BENEFITS OF AN EXPANDED EXCEPTION QUESTIONS 37 -46.**

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

**DIGITAL RIGHTS MANAGEMENT**

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

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

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

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

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

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

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

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

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

**Questions 50-55**

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

**CARICATURE, PARODY OR PASTICHE EXCEPTION**

**RECOMMENDATION 12**

**Questions 56 – 66**

BECS has seen and endorses the response from Equity to these questions.

BECS does not believe that the introduction of a new exception is necessary.

As Equity puts it “A change to the system is unnecessary and a disproportionate response to a non-problem”.

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

Yes.

A parody is a “humorous exaggerated imitation of any author, literary work or style etc”.

The concept of imitation surely merits acknowledgement?

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