

**RESPONSE
FROM
BRITISH EQUITY COLLECTING SOCIETY LIMITED**



**TO: UK INTELLECTUAL PROPERTY OFFICE CONSULTATION:
TAKING FORWARD GOWERS REVIEW OF
INTELLECTUAL PROPERTY: Second Stage Consultation on
Copyright Exceptions**

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 20,300 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 collected in excess of £23.5million for 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 that are 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.

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.

Research and Private Study

1. BECS collects private copying levies due to its Members collected through Societies established in many EU Member States.
2. BECS represents audio-visual performers whose work is included in films.
3. Any new copyright exceptions which allow for copying of films for private study purposes without the provision of fair compensation for rights holders potentially conflicts with the EC Copyright Directive.
This is particularly true if the provisions are not linked to use within an educational context.
4. The difference between the definition of “member” of an educational establishment relevant to draft Regulations 3 and 4 and “authorised persons” relevant to draft Regulations 14, 15 and 16 raises both legal and practical concerns. Why should a researcher who is not receiving “instruction” at an educational establishment be treated differently from a pupil if both are in effect “linked” to the same educational establishment?
5. The issues raised by the current wording of draft Regulations 3 and 4 would be better addressed in the context of the wider European debate concerning “format shifting”.
6. Draft Regulations 3 and 4 should be omitted from the proposed Statutory Instrument. This should enable any real gap in public interest to be identified after introduction of the Regulations which should enhance ease of access to works by researchers through both educational establishments and prescribed libraries.

Format Shifting

BECS welcomes the Government’s decision that it does not consider it appropriate to introduce a narrow UK-only format shift exception which might permit unlicensed private copying without fair compensation to rights holders.

However, it is thought that the Education and Library exceptions which are to be broadened under the proposed Regulations will work towards the goal of facilitating easier access to works for non-commercial educational, research and private study.

Copying by Educational Establishments

1. BECS welcomes recognition of the rights of performers, and the consideration now given to ensure that Regulation 16 brings changes to the scope of s 35 exceptions linked to copyright works in line with possible exceptions to the rights of performers.

2. Equity is a member of the Educational Recording Agency which operates a licensing scheme certified for the purposes of paragraph 6 of Schedule 2 Copyright, Designs and Patents Act (CDPA). As such, BECS’ members who are also members of Equity receive the benefit of the involvement of Equity in operation of the licensing scheme.

Through the licensing scheme fair compensation is secured to recognise the use of performances within broadcast programmes which are then recorded by or for educational establishments and subsequently used within the scope of paragraph 6 Schedule 2.

3. BECS welcomes recognition of the value of licensing scheme options for performers under paragraph 6 Schedule 2. However, the detailed changes proposed under draft Regulations 14 and 16 raise a number of practical concerns which have been addressed in the response to the consultation from the Educational Recording Agency. It is to be hoped that these concerns will be addressed before Regulations are published in final form.

4. It is important that the new Regulations do not blur proper recognition for the **separate** restricted acts of (a) communication to the public and (b) public performance of copyright works.

The act of communication to the public will be relevant when a library of recordings held by and educational establishment is made available to students and other authorised persons for access at a place and a time individually chosen by them.

This activity is quite distinct from any public performance of works which follows from and electronic communication made by or under the control of an educational establishment.

The provisions of paragraph 5 Schedule 2 CDPA define the beneficiaries of the exception which applies to :-

“performing, playing or showing work to an audience consisting of teachers and pupils at an educational establishment and other persons **directly connected with the activities of an educational establishment**”.

This group of people may be wider than the scope of “authorised persons” who may be beneficiaries of the exception under paragraph 6 Schedule 2 CDPA.

Difficulties arise from use of the words “persons directly connected to **the activities** of the establishment” when considering exceptions linked to the restricted acts of “reproduction” and “communication to the public”.

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

It is important that licences linked to any licensing scheme(s) operating under paragraph 6 Schedule 2 CDPA can be related to the non-commercial educational purposes of an educational establishment.

Reference to persons “directly connected with an educational establishment” may not recognise this important link with “educational purposes”.

Copying by librarians of the whole or part of a sound recording or film

Draft Regulation 12 proposes to insert a new provision in Schedule 2 CDPA which states that the copying of part of a published recording of a performance, or the whole of an unpublished recording, by libraries under s 39A CDPA does not infringe rights of performers. Prescribed conditions can qualify this.

BECS has some doubts over the practicalities of libraries offering researchers and those undertaking private study an effective service covering the copying of “part” of a published sound recording or film for research and study purposes. Instead, borrowing the recording or film under lending arrangements would seem more practical.

Difficulties may arise in addressing DRM which may be applied to the sound recording or film held by a library, if copying is really needed (as opposed to lending).

Copying of extracts from films and sound recordings for educational purposes under proposed changes to s 36 CDPA

1. BECS would suggest that the new extract provisions linked to sound recordings and films (and performances included within them) would be better addressed by changes to s 35 and paragraph 6 CDPA than within s 36 CDPA.

2. In its response to the IPO 2008 Consultation – Taking Forward the Gowers Review of Intellectual Property – Proposed Changes to Copyright Exceptions and in particular the

proposal to extend s 36 to cover additional works (including sound recordings and film), BECS made the following points:-

A. The different genres of works (some more targeted at educational use than others) must be considered when addressing the consequences of applying section 36 to any additional types of copyright work.

B. 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).

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

D. 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 34 (2) (and paragraph 5 of Schedule 2) already provide:-

“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”.

E. 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 in reprographic form within 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).

BECS believes that all these points remain valid today.

3. BECS welcomes the fact that the latest Consultation recognises that it would be inappropriate to amend the s 36 exception to incorporate broadcasts or artistic works.

4. Whilst users responding to the earlier Consultation were in favour of seeing extract use apply to as broad a range of material as possible, it is important to consider how Gowers Recommendation 2 was aimed at making educational provisions specifically “to cover distance learning and interactive whiteboards”.

In this context, and in the context of seeing how copying of short educational non-commercial extracts from sound recordings and films might practically benefit students, it is important to consider:

(a) how the use of sound recordings and films which have been included within a broadcast is covered by the existing provisions of s 35 and paragraph 6 Schedule 2 CDPA;

(b) how Digital Rights Management applied to copies of films and sound recordings which are legitimately marketed other than in the form of a broadcast might raise practical “work around” concerns which are disproportionate to the benefits that could be derived from a new provisions which might permit not more than 1% of a sound recording or film to be copied or communicated electronically to “authorised persons” in any one quarter; and

(c) how relatively easy it is for educational establishments to acquire legitimate copies of sound recordings and films. Such legitimately acquired copies can then be shown to pupils for the purposes of instruction, within the scope of the exception provided by s 34 CDPA.

Under s 35 (and the ERA Licence Scheme operated under that provision) there is no requirement that an educational establishment has to copy or communicate to students the whole of a recording. Extracts from recordings can be used for the non commercial educational purposes of an educational establishment.

The use of software in schools such as that offered by ClickView enables extracts from off-air recordings of broadcasts to be identified, labelled and stored in online “libraries” for easy access by teachers to assist both white board presentations in the classroom and viewing by students in the context of homework (when they access this as an “authorised person” under the provisions of s 35 CDPA).

Contrary to this, the current provisions of s 36 are not really practical for application to sound recordings and films.

Draft Regulation 15 (3) proposes to amend s 36 (1) CDPA in order that it reads:-

“Copies of

(a) passages from published literary, dramatic, or musical works ; **or**

(b) extracts from published sound recordings and films

may, to the extent permitted by this section, be made by or on behalf of an educational establishment for the purposes of instruction without infringing any

copyright in the work; provided that they are accompanied by a sufficient acknowledgement and the instruction is for a non-commercial purpose”.

5. A concern arises about clearance issues for works **included in** a sound recording or film that is to be used under the above provision.

The fact that artistic works are not covered by the provisions will need to be addressed of limited extract use is to cover extracts from sound recordings, films and works (other than artistic works or broadcasts) included in them.

6. “Underlying works” relevant to an extract from a sound recording or film (including rights of performers) have to be addressed if an educational establishment wishes to make use of “not more than one per cent” of any work may be copied or communicated to the public by or on behalf of an establishment by virtue of the s 36 provisions.

If not, any possible practical benefit for an establishment seeking to rely upon the exception is surely going to be minimal?

7. To avoid difficulties in assessing whether any “extract” satisfies the “one per cent” rule for all the relevant works involved in an extract, it is submitted that the new provisions linked to any use of sound recordings and films would be better linked with the provisions of s 35 and paragraph 6 of Schedule 2 CDPA.

This would have the benefit of encouraging all the rights owners involved in licence schemes linked to s 35 and paragraph 6 Schedule 2 to extend or add new licence options to the arrangements which already service the use of sound recordings and films which comprise extracts resulting from recordings of broadcasts.

8. In general terms, where every student needs a copy of a sound recording or a film, then copies should be bought by the educational establishment or individual students in CD or DVD or via online download in the same way as when every student needs a copy of a particular book.

If extracts need to be highlighted from such copies, the DRM workaround issues will need to be addressed.

If the licence scheme options already applicable under s 35 and paragraph 6 Schedule 2 were applied to licensing the use of defined “extracts” with a duration that is in excess of a 1% limit (but not overriding or restricting use of 1% without a licence if all the practical difficulties of identifying underlying works and applying the duration test independently to each work) it is suggested that such new scheme would have the benefit of creating greater certainty of use for educational establishments and enable sources of legitimate sound recordings and films to be identified for non-commercial educational use.

By way of example, owners of films which are television programmes and sound recordings which are radio programmes might be accessed from on demand streams that are made available to educational establishments which take out licences, on the basis that the unrestricted download is only to be used for the purposes of identifying and copying and subsequently communicating to the public permitted extracts within the scope of the educational licence.

Parody, Caricature and Pastiche

In its response to the IPO 2008 Consultation – Taking Forward the Gowers Review of Intellectual Property – Proposed Changes to Copyright Exceptions BECS supported the view that there was no need or requirement to change the current approach to parody, caricature and pastiche in the United Kingdom. BECS therefore welcomes the decision announced in the Consultation not to pursue a change.

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