

# **Taking forward the Gowers Review of Intellectual Property**



**Response from PPA**

**April 2008**

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## **Introduction**

Communication lies at the heart of the constituency represented by PPA. Advances in technology and the ways that this promotes the opportunities for communication to interest groups, consumers, businesses and to the customers of business and interest groups, are lifeblood for the magazine media market.

But whilst opening up opportunities, the increase in ways that companies can communicate directly with individuals is increasingly “democratising content”. The fight for “eyeballs” and engagement with individuals is becoming more and more competitive.

As such, the way in which publishers attract advertising, advertising features, sponsorship and subscriptions revenues to fund their businesses are under constant pressure from “diversification” and the need to identify and increasingly understand their audiences.

At the heart of this diversification lies the content which is the key to attracting readers (and increasingly viewers and listeners) to the styles, images, brands and information who ultimately define the success of a publication or online service.

Copyright is a vital part of the intellectual property which forms the currency for investment in content. New technologies are increasingly showing the value of the archives compiled and created from careful investment in the creation of content in the past.

The right to protect this investment in copyright, and to use and promote the value of copyright archives will be absolutely vital if PPA members are to be able to play their part in the creative economy, now recognised by Government as a key part of the UK economy. The Government’s strategy paper “Creative Britain – New Talents for the New Economy “ published in February recognised that “the creative industries must move from the margins to the mainstream of economic and policy thinking, as we look to create the jobs of the future”.

Copyright is vital to rewarding those involved in these “jobs for the future”.

## **PPA**

PPA is the association for publishers and providers of consumer, customer and business media in the UK and in this role welcomes the opportunity to respond to the Intellectual Property Office consultation.

Since initially responding to the Call For Evidence from the Gowers Review of Intellectual Property in April 2006<sup>1</sup> PPA has undertaken a reassessment of the markets that its members represent. We estimate the value of consumer magazines to be around £7.2bn, and the

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<sup>1</sup> See Appendix 1

business media industry – including magazines, to be valued at £23bn, with customer magazines valued at around £800m.

However defined, the constituency forms a key part of the successful creative economy within the United Kingdom. Its success relies upon the work of writers, editors, photographers, designers, journalists, and many other creative people who ultimately earn their living from the appeal of their intellectual property.

The appeal of their work may be rewarded directly by consumers in the form of subscriptions or cover charges, or the recovery of costs through advertising, advertising features, both of which also rely for success upon the innovative intellectual property developed by advertisers and those with whom they work.

Many PPA members offer online services, including websites, online versions of print publications, podcasts and publications only available online, or through electronic transmission. Online publications also encompass consumer, business to business and contract magazines, and increasingly involve the use of new electronic rights management systems to help improve the provision of publications and services to subscribers.

In particular “on demand services” are forming an increasingly important part of the exploitation of magazine publications. Many publications created by PPA members are of specific relevance to the sections of the public affected by possible changes in the scope of copyright exceptions (e.g. those working within education).

PPA is therefore particularly concerned to see that changes in the scope of copyright exceptions do respect the Three Step Test (acknowledged by Gowers as fundamental). Copyright exceptions should only apply:-

- (a) in certain, special cases
- (b) which do not conflict with the normal exploitation of the work or the subject matter; and
- (c) which do not unreasonably prejudice the legitimate interests of the rights holder.

### **Evidence of Economic success**

This vibrant and evolving industry gains in stature and confidence as it masters the art of multi-platform communication.

#### Consumer magazines

Over the course of the last 10 years, reader expenditure has soared by 24 per cent while ad expenditure has increased by 23 per cent.

Since 1997:

- Consumers spent £397m more each year on magazines, an increase of 24 per cent
- In 2006, consumer expenditure on magazines was £2,085m

- Ad expenditure has increased from £630m in 1997 to £812m in 2006 - an increase of 29 per cent (8 per cent in real-terms)
- The number of consumer magazines published has increased by 40 per cent to 3,409 in 2007
- Total expenditure (consumer and advertiser) on consumer magazines reached £2.90bn in 2006, a rise of 23 per cent over the last decade (8.2 per cent in real-terms)
- Since 2000, advertising expenditure has increased from £750m to £812m - an increase of 8.3 per cent. Consumer expenditure has increased from £1,741m to £2,085m - an increase of 19.8 per cent
- Some 75 per cent of adults read one of the 183 consumer magazines measured on the NRS. 69 per cent of men read a consumer magazine (measured by NRS), 19 per cent more than read a national daily newspaper
- Some 82 per cent of women read a consumer magazine (measured by NRS)
- Readership of consumer magazines amongst 15-24 year olds is 84 per cent, higher than any other age group
- The magazine market is driven by a relentless churn of new titles
- The pre-tax profit margin for periodical publishers displayed a continual improvement over the three year period; rising from 6.5 per cent in 2003/04, to 8.8 per cent in 2004/05, and rising again to peak at 9.1 per cent in 2005/06
- Since 2000 the total number of copies sold has increased from 1,305m to 1,377m.

### Business to business magazines

The business media information market is dominated by magazines, online properties and face-to-face events.

Business media has become the focal point of the huge booming business communications market place with a value of more than £23bn.

There are more than 5000 business media titles published in the UK.

In 2006:

- Business media magazines and journals generated more than £8.9bn in revenue
- Online business media properties generated £2.8bn
- Face-to-face events and conferences made £2.8bn

Data taken from PPA's research report, Connecting Business 3. For a full copy of this report and detailed information on the business media industry visit [www.businessmediauk.co.uk](http://www.businessmediauk.co.uk)

### Customer Publishing Media

Representing 8 per cent of the entire marketing industry, and boasting the accolade of being the fastest growing media sector in the UK after the internet, customer publishing agencies produce publications on behalf of their clients which include companies from sectors as far ranging as automotive, retail, and financial services to charity, public sector and travel and leisure amongst many others.

The customer publishing industry has thrived in recent years with the sector now worth an estimated £788 million after seeing a 16% growth in 2006 and continual growth in 2007. The number of UK customer magazine titles was estimated at 1,300 in 2006 and 2007 has seen at least one new customer title launched every day for the first 6 months of the year.

Well-known titles include Sky the Magazine, Waitrose Food Illustrated, LandRover Onelife, Camouflage, 33 Thoughts, Toni & Guy, Ikea Family Live.

Moving with the digital revolution, many customer publishing agencies now offer 'integrated' work for their clients to meet the demands of publishing editorialised brand messages through websites and other digital formats in conjunction with their printed publications.

More and more big brands are recognising the worth of having a customer publication as part of their marketing portfolio with those enticed to the medium this year including: Bang and Olufsen, Sony, Audi, Chestertons, Shell and Royal Bank of Scotland.

## EXTENSION TO EDUCATIONAL EXCEPTIONS TO INCLUDE DISTANCE LEARNING 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. Publications created and marketed specifically at those working in education will be more likely to have "legitimate business interests" adversely affected by any widening of the scope of educational copyright exceptions, than publications primarily targeted at, for example, the tourist market.

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>2</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.

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<sup>2</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)

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 consider the copyright exceptions that are linked to more 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>3</sup> a good example.

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

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<sup>3</sup> CDPA – Copyright, Designs and Patents Act 1988 (as amended)

This balance reflects Article 10 of the WIPO Copyright Treaty 1996<sup>4</sup>. It also recognises that similar provision is made within Article 16 of the WIPO Performances and Phonograms Treaty<sup>5</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>6</sup>.

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

“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”.

PPA welcomes 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).

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<sup>4</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>5</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>6</sup> See Appendix 2

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.

PPA does 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.

PPA is aware of the ERA Plus Licence now offered by the Educational Recording Agency (for details see [www.era.org.uk](http://www.era.org.uk) ).

The steps that have been taken by ERA to define the "Authorised Users" who are entitled to accessed licensed off-air recordings whether they are on the site of an educational establishment or elsewhere within the United Kingdom are important in helping to distinguish use "by or on behalf of" educational establishments as opposed to the wider general public, or individuals undertaking research or private study independent of the activities of educational establishments.

PPA would therefore support that, for the purposes of section 35 and paragraph 6 Schedule 2 CPDA, only authorised users defined by the ERA Plus Licence scheme should be able to view off-air recordings made for educational purposes.

Such authorised users should be distinguished from the general public by ensuring that they are entitled to access the VLE through secure authentication.

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 VLE by means of appropriate password and other appropriate secure authentication in a manner consistent with best practice for educational establishments.

**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?**

It is too widely cast. 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 viewing 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 restrictions over onward transmission.

This should be supported :-

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

### **Additional Questions**

#### **If section 35 is extended, should corresponding provisions of the CDPA relating to performer rights be amended?**

Bearing in mind the way that the certified licensing scheme operated by the Educational Recording Agency under section 35 and paragraph 6 Schedule 2 currently includes representation of performers through the ERA membership of Equity, the Musicians' Union and the Incorporated Society of Musicians, to the extent that these bodies continue to support any appropriate changes that are agreed to section 35 being matched with

corresponding changes to paragraphs 6 (1) and 6(1A) Schedule 2 CDPA, it would seem helpful to both rights holders and users that amendments to section 35 are reflected by changes to the corresponding provisions in paragraph 6 Schedule 2.

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. This would enable licensed ERA Recordings to be communicated to students and teachers online within secure networks but whether they were on the premises of their educational establishment, or at home or elsewhere in the United Kingdom.

**Can the possible extension to the scope of section 35 and paragraph 6 Schedule 2 CDPA to cover the areas of communication to the public linked to the ERA Plus Licence be reconciled with the scope of exceptions permitted under Article 5 of the EC Copyright Directive?**

The copyright exceptions and limitations which support the current ERA scheme must reflect the exceptions and limitations permitted:-

- (a) to the reproduction right in the cases described in Article 5 (2) of the Copyright Directive; and
- (b) to the reproduction right and the communication to the public and making available to the public rights in the cases described in Article 5 (3) of the Copyright Directive;

Section 35 takes advantage of Article 5 (2) (c) which permits copyright exceptions or limitations:-

“in respect of specific acts of reproduction made by ...educational establishments which are not for direct or indirect economic or commercial advantage”.

In addition Article 5 (2) (e) permits copyright exceptions or limitations :-

“in respect of reproductions of broadcasts made by social institutions pursuing non-commercial purposes....**on the condition that rights holders receive fair compensation**”.

In terms of communication to the public Article 5 (3) (a) permits exceptions and limitations covering :-

“use **for the sole purposes of** illustration for teaching .....as long as the source, including the author’s name is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purposes to be achieved”.

It is submitted that this last provision highlights the importance of any exception under section 35 and paragraph 6 Schedule 2 relating only to off-air recordings of broadcasts being communicated to authorised users as illustrative materials within “educational

purposes" and not as the base for new (potentially commercial) course materials compiled, developed and promoted by educational establishments as a means of helping to attract students to undertake courses with a particular educational establishment.

## **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?**

Yes. Both geographic limits and limits of the form of "electronic communication" should be specified to ensure that reprographic copies made within the provisions of section 36 are only communicated "by or on behalf of educational establishments" to "authorised educational users" connected to the relevant establishment.

PPA is a member of the Publishers Licensing Society (PLS) established some 25 years ago by the UK publishing industry to establish voluntary collective licensing schemes, and to protect publishers' copyright and licensing interests. Whilst PLS is a not for profit organisation it has distributed over £169 million in revenue to publishers since its inception. Secondary collective copyright revenues are therefore an important source of revenue to PPA members and must be taken into account when considering the economic effect of changes to copyright exceptions to which these secondary collective licensing activities are linked.

In this connection the PLS together with the Authors' Licensing Collecting Society (ALCS) founded the Copyright Licensing Agency (CLA) in 1983.

PPA is therefore aware of the way in which CLA has developed licensing solutions that add to the scope of use permitted under section 36 CPDA.

In conjunction with representative bodies, CLA has worked to develop licensing solutions allowing educational establishments to scan hard copy material and to disseminate the digital copy so created to their students or pupils for educational purposes. In this sense, the licensing solutions already available and being developed by the CLA mean that educational establishments are able to secure relevant permissions well in excess of the one percent limit recognised by section 36 (2) ( a limit which has not been questioned by Gowers).

Turning to the type of communication relevant to the section 36 exception, it is significant that 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 need to be assessed separately from the value of the reproduction right for the purposes of applying the Tree Step Test to any copyright exception involving the communication to the public right.

In addition, the way in which the communication to the public right includes both “broadcasting” and “the making available” right means that it will be important for any impact assessment to properly consider the affect of the exception on the legitimate interests of rights owners.

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?**

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

Licences already offered by the 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 CLA licence.

Such authorised users should be distinguished from the general public by ensuring that they are entitled to access any source of communication and authorised by an educational

establishment through secure authentication. The way that the CLA have 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>7</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:

- (c) enrolled to study at the educational establishment; or
- (d) 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 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 the 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**

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<sup>7</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).

**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 only for the purposes of instructions and through use of a Secure Network along the lines previously outlined should be permitted access. Please see the response to question 5 (a) above.

**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?**

It is too widely cast. Difficulties arise from use of the words “persons directly connected to the activities of the establishment”. Please see the response to question 5 (b).

**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. Please see question 6 above.

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

Primarily licence terms agreed by the educational establishment should govern restrictions on onward transmission.

This should be supported:

by appropriate application of section 36(5) CDPA<sup>8</sup> and

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<sup>8</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”.

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.

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 (some more targeted at educational markets than others) previously referred to in the submission 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 instructions; and

(b) is accompanied by sufficient acknowledgement.

When considering the wish of educational establishments to reproduce clips of films or sound recordings reprographically in course packs, bearing in mind the other legitimate sources that exist for educational access to films and sound recordings, it is hard to see how additional 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?**

PPA believes that, 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 that 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, and therefore no obligation for payment (comprising fair compensation) may arise.

As stated in its initial response to the Gowers Review <sup>9</sup> PPA believes that work to promote a better understanding of the role and the value of intellectual property to consumers and business remains a vital part of work to ensure that the intellectual property regime meets the demands of the digital age.

**However, even with the support of educational initiatives it is hard to see how replacing “private copying without licence is illegal” with “private copying of certain works in certain formats will be permissible if the copying is for private use and the other conditions described in section 86 of the Consultation Paper are all met” is actually going to make interpretation of the law more transparent or easy to understand.**

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 for both rights owners and for 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 that

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<sup>9</sup> See Appendix 1

buying legitimate copies, alongside reasons indicating a 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 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 believes that it can rely upon its interpretation of a “narrow exception” 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 on 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 use of commercial sound recordings, it would seem that the way in which consumers use different types of sound recordings has not been properly addressed.

Many publishers release commercial sound recordings in the form of audio books or readings of plays or speeches. The market for the use of such materials supports consumer use patterns which are different from those linked to use of commercial music sound recordings.

## **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.**

PPA members are increasingly creating and distributing new work using online services. This involves the creation of sound recordings and films to accompany the works created and distributed through traditional print media.

As such PPA stands by the comments in its response to the initial Gowers consultation, namely:

PPA believes that a combination of the fair dealing and other copyright exceptions and limitations already recognised within the United Kingdom, alongside new licensing solutions already within the power of rights owners, obviates the need for any broad “private use” exception to be introduced.

This does not mean that genuine non commercial private copying should be restricted. Merely that licensing solutions available to rights owners (whether collectively or individually, and with or without the use of digital rights management solutions) should be promoted and provide flexible ways of securing the “fair compensation” for rights owners recognised in Article 5(2) (b) EC Copyright Directive.

The way in which the range of exceptions and limitations already recognised, apply differently against the background of different commercial priorities for different types of copyright work (e.g. an article in a journal as opposed to a commercial sound recording), is important when considering how they all balance against the overriding “three step test” for application of any copyright exception or limitation.

**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 relates to 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?

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.

PPA would submit that just looking at the wording adopted in section 43C of the Australian Copyright Amendment Act 2006 highlights the challenges for practical enforcement.

"COPYRIGHT ACT 1968 - SECT 43C

Reproducing works in books, newspapers and periodical publications in different form for private use

(1) This section applies if:

(a) the owner of a book, newspaper or periodical publication makes from it a reproduction (the main copy ) of a work contained in the book, newspaper or periodical publication; and

(b) the main copy is made for his or her private and domestic use instead of the work as contained in the book, newspaper or periodical publication; and

(c) the main copy embodies the work in a form different from the form in which the work is embodied in the book, newspaper or periodical publication; and

(d) the book, newspaper or periodical publication itself is not an infringing copy of either the work or a published edition of the work; and

(e) at the time the owner makes the main copy, he or she has not made, and is not making, another copy that embodies the work in a form substantially identical to the form of the main copy.

For this purpose, disregard a temporary reproduction of the work incidentally made as a necessary part of the technical process of making the main copy.

(2) The making of the main copy is not an infringement of copyright in the work or a published edition of the work.

Dealing with main copy may make it an infringing copy

(3) Subsection (2) is taken never to have applied if the main copy is:

(a) sold; or

(b) let for hire; or

(c) by way of trade offered or exposed for sale or hire; or

(d) distributed for the purpose of trade or otherwise.

Note: If the main copy is dealt with as described in subsection (3), then copyright may be infringed not only by the making of the main copy but also by the dealing with the main copy.

(4) To avoid doubt, paragraph (3)(d) does not apply to a loan of the main copy by the lender to a member of the lender's family or household for the member's private and domestic use.

Reproducing work from main copy may infringe copyright

(5) Subsection (2) does not prevent the main copy from being an infringing copy for the purpose of working out whether this section applies again in relation to the making of another reproduction of the work from the main copy.

Disposal of book etc. may make the main copy an infringing copy".

The complexity of the above provisions, when compared to the licensing and permissions available through individual publishers and representative bodies such as the CLA and the Newspaper Licensing Society, is obvious.

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 sound recordings when sold in recognised physical formats. (e.g.CD).

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

Subject to this exclusion of audio books/magazines and recordings of plays, there are arguments that rights owners have agreed that they do not wish to apply Technical Protection measures to specified formats because they are willing to accept consumers undertaking a recognised degree of private copying (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).

**It is therefore the view of PPA that the Option 1 question has 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 effect on films 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.

**PPA does not believe that any format shift exception is required over and above a possible exception applied to specified physical formats of commercially released music sound recordings supported by appropriate arrangements to ensure that fair compensation flows to rights owners to recognise the economic effect of the private copying permitted within any exception.**

The online world is increasing the importance of video on demand services to PPA members. In this context PPA members are increasingly owners of films and sound recordings as they make use of podcasts and other audio and audiovisual devices to help enhance the publications made available on line. Many such services will offer “always available” library opportunities for materials included in the services to be seen when and where people wish to see them.

It is hard to see how a format shift exception that is difficult to police will not conflict with the normal exploitation of films and other interactive magazine style services in this new online world.

Consumers will obtain clearer information and choices of the terms and conditions for accessing materials both in physical formats and when made available online if new business models are allowed to develop which support different choices of when where and how to access material.

This is made all the more true if rights owners are to be denied the right to secure fair compensation for such “format shift/private copying” through the application of levies.

**If films, audio books/magazines or printed publications are to be included in any format shift exception then the UK must reconsider the application of licensing arrangements to provide for fair compensation to rights owners if there is any genuine intention to promote new creative industry business models.**

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

For PPA members it would undermine the way in which businesses are building choice and opportunity of access to materials through a currently increasing range of electronic delivery systems.

PPA members wish to promote their work and encourage customers and business users of all kinds to choose when where and how they wish to access materials, but on terms that realistically allow investors in the content to recoup their investment.

It must be remembered that many PPA members are involved in publications with small but clearly defined target audiences. The economic effect of a format shift exception that is difficult to police (and therefore as easy to abuse as the current law) will have an adverse effect on rights owners and work to the longer term detriment of specialist interest groups, since investment in specialist publications will reduce due to economic pressures.

## **FORMAT**

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

PPA believes that 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 changes in technology in the future by permitting repeated format shifting is likely to be particularly counterproductive as rights owners and consumers start to look at the ways in which relative value of the “reproduction right” and the “communication to the public” right in copyright material shift as the restricted act through exercise of which the 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 from 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>10</sup>.

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<sup>10</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

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

## **Digital Rights Management**

In addition, recognition that any exception will not affect right holders' ability to incorporate Digital Rights Management (whether technical protection measures or rights management information systems) into their work is of vital importance to PPA members.

In February this year, PPA responded to the Commission Communication on Creative Content Online<sup>11</sup>.

The response sets out PPA views on the importance of rights management information systems (supported when appropriate with the use of technical protection measures) in the context of developing new online business models.

It is hoped that careful consideration will be given to the effect of publishing industry initiatives such as ACAP (Automated Content Access Protocol).

ACAP is being developed as an open industry standard to enable the providers of all types of content (including but not limited to, publishers) to communicate permissions information (relating to access and to the use of that content) in a form that can be easily recognised and interpreted by a search engine (or other intermediary or aggregation service), so that the operator of the service is enabled systematically to comply with the individual publisher's policies.

ACAP is expected to provide a technical framework that will allow publishers worldwide to express access and use policies in a language that machines can read and understand.

As such the permissions "blockages" that have encouraged some of the Gowers recommendations for increasing the scope of copyright exceptions will be reduced or removed.

## **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**

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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.

<sup>11</sup> See Appendix 3.

- 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 time 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.

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”.

PPA agrees with this last view, but therefore submits 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 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 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.

Where genuine researchers are analysing old films to consider ways of preserving them, the British Film Institute and other already make material available when a researcher is able to confirm their status and the legitimacy of their request.

This may be the sort of limited special case, where the Three Step Test could be satisfied were an exception introduced.

**Beyond this it is difficult to understand what research and private study would actually be assisted by expanding the fair dealing provisions of section 29 to refer to sound recordings films and broadcasts.**

### **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

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.

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

The expanded exception will create a new area of possible confusion between the scope of “fair dealing” and other copyright exceptions that already facilitate the use of sound recordings, films and broadcasts in an educational and research context.

The Consultation Paper rightly acknowledges this concern and the importance of not blurring the boundaries between the “fair dealing” exceptions in section 29 and those in sections 35 and 36 (relating to educational establishments).

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 when 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) made or held under the ERA Licence will be available to the individual for the purposes of private study.

Consequently it may be appropriate to more formally link 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 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 accessed by:-

(a) use of the section 70 time shift exception, purchase of physical copies and 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?**

### **THE BENEFITS OF AN EXPANDED EXCEPTION**

#### **37. Do researchers and students experience difficulties getting permission to make copies today?**

PPA is not aware of undue difficulties being experienced in researchers and students being able to view or listen tot sound recordings, films or broadcasts for non commercial research, or private study which is neither directly nor indirectly commercial.

**38. Are areas of research and study not being pursued as a result of issues regarding permissions for film, sound recordings and broadcasts?**

PPA is not aware of any.

**39. What benefits might an expanded exception deliver for researchers and students, for educational establishments and research institutions and for society overall?**

There do not appear to be any obvious benefits from the change. Where problems do arise, there are existing alternatives through which both access to and use of sound recordings, films and broadcasts can be secured.

**SCOPE OF THE EXPANDED EXCEPTION: RESEARCH AND PRIVATE STUDY**

**40. Are there reasons why the expanded exception should be limited to 'research' rather than covering both research and private study?**

There are reasons why "research" and "private study" should continue to be addressed separately.

It is important that any impact assessment considers the way in which exceptions which apply to educational establishments (particularly those relevant under section 35 and paragraph 6 Schedule 2 CDPA ) already facilitate both access and educational/private study use of sound recordings, films and broadcasts.

Where non-commercial research is being undertaken by an individual independently of any educational establishment, it is submitted that an economic case remains to be made for researchers to be able to use sound recordings, films and broadcasts within their research which is neither directly nor indirectly for a commercial purpose.

**41. If the expanded exception is limited to 'research' is it necessary to set a clear boundary between research and private study in order to avoid confusion?**

PPA do not believe that attempting to distinguish "research" and "private study" in every circumstance will serve any real social advantage. However, linking the private study exception to those who are connected with educational establishments may be helpful to distinguish "private study" activities from the general leisure activities of individuals.

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

- 42. Are there reasons why the expanded exception should not apply to all works i.e. including films sound recordings and broadcasts?**

Yes. It is not accepted that any economic case, or real demand for the expansion has been established.

## **SCOPE OF THE EXPANDED EXCEPTION: FIELDS OF STUDY**

- 43. Is there a pressing need for action in particular areas of research or fields of study where current progress is being constrained by the current exception?**

In specialist cases, such as researchers looking into means of preserving films, there may be a need for industry action/co-operation to be encouraged through more public availability of research access information through museums and libraries.

- 44. Should the expanded exception apply to all areas of research and study?**

It is important that section 29 and its application to research continues to apply only to research by individuals for purposes which are neither directly nor indirectly commercial. In addition where works are used, they must continue to be given sufficient acknowledgement.

## **THE SCOPE FOR MISUSE OF THE EXPANDED EXCEPTION**

- 45. Is it necessary to limit the scope of the expanded exception to prevent intentional misuse? If so how should it be limited? For example, would guidance on fair dealing be useful? Should there be a formal link to a course of study or research establishment?**

Assessing whether use amounts to "fair dealing" within the scope of section 29 CDPA should remain a matter for the courts.

The response to question 32 above sets out possible links between any private study exception and an individual being connected to an educational establishment. Such a link would be helpful.

**46. Are steps needed to make the boundaries of the expanded exception clear to researchers and students so as to prevent misunderstanding? If so, what steps should be taken?**

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?**

To date PPA 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”.

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

In particular, but 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?**

The answers to question 30-42 above include suggestions for the possible development of the current provisions of section 29.

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

### **50. What impact would the expansion of the exception for libraries and archives have? What costs or benefits would accrue to right holders and users of copyright?**

Any expansion should be limited to the making of copies solely and exclusively for the purposes of preservation.

However, care must be taken that legitimate incentives for preservation of archives are not introduced in a way that establishes links between “preservation” and “permitted access” through libraries.

The concept of copies being made to “mitigate against subsequent wear and tear” must be applied in terms of wear and tear within permitted library use for prescribed purposes.

## **CLASSES OF WORK**

### **51. What are the consequences, for rights holders and beneficiaries, of extending section 42 to cover all classes of works?**

## **NUMBER OF COPIES**

### **52. Is it necessary to restrict the number of copies made for preservation purposes?**

It would seem unnecessary to restrict the number of copies being made genuinely for archival **preservation** purposes. However, if such copying were to take place in ways that led to libraries making copies available to the public in terms that competed with publishers licensing the use of their works for access outside the premises of libraries, it is submitted that such use would fail to comply with the Three Step Test (in that it would prejudice the legitimate interests of publishers).

### **53. If so, why, and how many copies should be permitted?**

## **SCOPE OF ORGANISATION COVERED**

### **54. What would be the impact on rights holders if section 42 was extended to cover museums and galleries?**

The response given to questions 52 are the key to any extension being given to allow for archival preservation within museums or galleries. The possible commercial prejudice to the interests of artistic works and photographs is a particular issue, if this is taken further.

**55. What types of museums and galleries should be included? What criteria should they meet to qualify?**

## **CARICATURE, PARODY OR PASTICHE EXCEPTION**

### **RECOMMENDATION 12**

**56. What impact would the introduction of an exception for parody have? What costs or benefits would accrue to right holders and users of copyright?**

PPA does not believe that there is any shortage of caricature, parody or pastiche within the UK publishing sector. It therefore seems that there is no need for the UK to take advantage of the option open to it under Article 5(3) (k) EC Copyright Directive.

Trying to introduce a new exception could well create more problems than it would solve.

## **FAIR DEALING**

**57. Could an unlimited exception undermine the interests of owners of copyright in the underlying work by allowing advertising or the endorsement of products which are contrary to their commercial interests?**

Yes.

**57. If so, would framing the exception as a 'fair dealing' exception address the problem adequately?**

Not applicable.

## **ACKNOWLEDGEMENT**

**58. Should the 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".

## **DEFINITIONS**

### **59. Is the ordinary meaning of the terms caricature, parody and pastiche sufficient?**

PPA does not believe that additional statutory definitions are necessary or appropriate.

## **CLASSES OF WORK**

PPA does not believe that a case has been made for the introduction of any new exception relating to caricature, parody or pastiche and therefore does not propose to respond further to questions 61 -66.

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