TAKing Forward the Gowers Review of Intellectual Property

Proposed Changes to Copyright Exceptions
<table>
<thead>
<tr>
<th>CONTENTS</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>FOREWORD</td>
<td>1</td>
</tr>
<tr>
<td>EXECUTIVE SUMMARY</td>
<td>2</td>
</tr>
<tr>
<td>BACKGROUND – GOWERS REVIEW OF INTELLECTUAL PROPERTY</td>
<td>4</td>
</tr>
<tr>
<td>RESPONDING TO THIS CONSULTATION</td>
<td>5</td>
</tr>
<tr>
<td>THE COPYRIGHT FRAMEWORK</td>
<td>6</td>
</tr>
<tr>
<td>EDUCATIONAL EXCEPTIONS</td>
<td>8</td>
</tr>
<tr>
<td>FORMAT SHIFTING</td>
<td>15</td>
</tr>
<tr>
<td>RESEARCH</td>
<td>21</td>
</tr>
<tr>
<td>LIBRARIES AND ARCHIVES</td>
<td>28</td>
</tr>
<tr>
<td>PARODY</td>
<td>31</td>
</tr>
<tr>
<td>ANNEX A: LIST OF ORGANISATIONS TO WHICH THE CONSULTATION HAS BEEN SENT</td>
<td>37</td>
</tr>
<tr>
<td>ANNEX B: CABINET OFFICE CODE OF PRACTICE ON CONSULTATIONS</td>
<td>39</td>
</tr>
<tr>
<td>ANNEX C: PARTIAL IMPACT ASSESSMENTS</td>
<td>40</td>
</tr>
<tr>
<td>ANNEX D: GLOSSARY OF TERMS</td>
<td>84</td>
</tr>
<tr>
<td>ANNEX E: LIST OF QUESTIONS</td>
<td>85</td>
</tr>
</tbody>
</table>
Copyright underpins the success of a variety of culturally important and economically successful sectors of the UK, such as music, film, computer games, and sport. The creative industries are, for example, currently estimated to account for 7.3% of the UK economy. It is therefore essential that we maintain a strong system of copyright to ensure the continued growth of this and other important sectors.

The copyright system is one intended to provide a balance. It is important in changing technical circumstances that the balance between right holders and users be maintained.

In December 2006, Andrew Gowers reported his findings on the UK’s Intellectual Property regime. While he concluded that the system was broadly satisfactory he identified a number of areas where improvements could be made. These included modifying copyright rules to improve access to, and use of, copyright material for private individuals, students and libraries.

This consultation looks carefully at how those adjustments might be made. Identifying where the boundaries should lie is critical in ensuring that our copyright system remains fit for today’s world. A system of strong rights, accompanied by limited exceptions, will provide a framework that is valued by and protects right holders and is both understood and respected by users.

All those responding to the consultation have the opportunity to help the Government consider the optimal location of the boundaries, through the appropriate operation of any exceptions.

Lord Triesman

Parliamentary Under Secretary of State for Intellectual Property and Quality
1. The Gowers Review of Intellectual Property ("the Gowers Review") reported in December 2006. The Government announced, as part of the December Pre Budget Report, its intention to take forward the recommendations made to it.

2. A number of the recommendations from the Gowers Review suggest changes to copyright exceptions or the introduction of new exceptions. These changes concerning educational use, libraries and archives, format shifting and parody, are intended to provide more balance and flexibility in the intellectual property ("IP") system by enabling consumers to use copyright material in ways that do not damage the interests of rights holders. They are also designed to provide clarity concerning the extent of the exceptions in the face of changing technologies.

3. This consultation considers how the Gowers recommendations on exceptions to copyright might be implemented in the UK. A number of options are set out in this paper and your views are sought on the specific questions contained in each chapter and on the issues generally.

EDUCATIONAL EXCEPTIONS

4. Two changes to the educational exceptions are proposed. The first is to amend section 35 of the Copyright, Designs and Patents Act 1988 ("CDPA") which currently allows the recording and showing of broadcasts to students physically present at an educational establishment. The expanded section would allow distance learning students to receive and view these recordings remotely. The consultation paper considers the following issues:

   • Should the exception just apply to traditional broadcasts or be expanded to on-demand communications?
   • Who should have access to the recordings that are provided remotely?
   • How to ensure that material that is communicated to distance learning students is not communicated to others, including through secure environments?

5. The second proposed change is to section 36 of the CDPA which allows educational establishments to copy (usually by photocopier) passages from published works and provide hand outs to students. It is proposed that educational establishments be able to communicate such passages using interactive whiteboards and electronically to distance learners. This proposed change raises the following issues:

   • What limits should be placed on communication of material using interactive whiteboards and to distance learners? Should it be limited to secure virtual learning environments? Should regular email be allowed?
   • How would we prevent onward communication of material to persons not authorised to receive it?
   • Should the exception continue to be limited to literary, dramatic and musical works, or should teachers be able to take advantage of technologies that use a range of different works, including extracts from films, sound recordings and broadcasts?

FORMAT SHIFTING

6. It is proposed to create a new exception that would allow consumers to make a copy of a work they legally own, so that they can make the work accessible in another format for playback on a device in their lawful possession. The exception would only apply to personal or private use. The owner would not be permitted to sell, loan or give away the copy or share it more widely (for example in a file sharing system or on the internet). Multiple copying would not be allowed. The development of this exception raises the following questions:

   • What classes of works would it apply to? Sound recordings and films or works of all kinds?
   • Exactly what acts would be non-infringing? What is meant by personal and private use?
   • How many format shifts would be allowed? Should consumers be allowed to format shift to a range of playback devices and to format shift again when certain technologies become obsolete?
   • Would the exception apply to works created or purchased after the exception was introduced or would it be acceptable to format shift back catalogues?

RESEARCH AND PRIVATE STUDY

7. A number of policy issues are identified in response to the recommendation that the exception for research should be expanded to cover all forms of content, not just literary, artistic, dramatic and musical works:
• What benefits can the expanded exception be expected to deliver?
• Should the expanded exception cover both research and private study?
• Should all forms of content be covered?
• Should the exception cover all fields of study or just specific areas?
• What might be the impact of the expanded exception on rights holders and other affected parties?
• What action, if any, should be taken to address possible concerns about misuse of the expanded exception?

LIBRARIES AND ARCHIVES

8. Section 42 of the CDPA currently allows prescribed libraries or archives to make a copy of a literary, dramatic or musical work held in their permanent collection for the purpose of preservation and replacement. It is proposed that the exception be expanded to also allow copies of sound recordings, films and broadcasts to be made. It is further proposed that these prescribed bodies be able to format shift to address the problem that occurs where works are held on unstable media, and that more than a single copy be permitted where successive copying may be required to preserve permanent collections in an accessible format. This proposal raises a number of issues:

• What would be the impact on right holders, and beneficiaries, if section 42 was expanded to cover all classes of works?
• Is it necessary to place restrictions on the number of copies that can be made by prescribed bodies?
• Should the exception be available to museums and galleries as well as prescribed libraries and archives?

PARODY

9. The paper considers whether a new exception for parody should be introduced. A fair dealing style exception is proposed. The following issues arise:

• What impact would the exception have? What problem would it address? What costs or benefits would accrue to right holders and users of copyright works?
• Could an unlimited exception undermine the interests of owners of copyright in the underlying work by allowing the advertising or the endorsement of products which are contrary to the commercial interests of the copyright owners?
• Should there be a requirement to acknowledge the underlying work and its author?
• Is it necessary to have a definition of parody, caricature or pastiche?
• Should there be an exception to all exclusive rights (e.g. reproduction, communication to the public, distribution and rental) of the copyright owner or only some?
• Should the exception only apply where the underlying work has been made available to the public, and should the parody be limited to the underlying work or allow broader social commentary?

GENERAL

10. In relation to each of the proposed or expanded exceptions:

• Should the corresponding provisions of the CDPA relating to performers’ rights be amended?
• Should the beneficiaries of the exceptions be able to make use of the remedy in the CDPA where technological protection measures prevent the exercise of permitted acts?
• Do you agree with our assessments of the three step test?
• What impact would the expansion of the existing exception or introduction of a new exception have? What costs or benefits would accrue to right holders and users of copyright? Please comment on the partial impact assessments contained in Annex C and provide relevant evidence of the potential impacts of the proposed changes to copyright exceptions, including information on the financial or economic impacts.
11. The Gowers Review was commissioned by the Chancellor and the Secretaries of State for Trade and Industry, and Culture, Media and Sport in 2005. The Review was led by Andrew Gowers (former editor of the Financial Times) with assistance from a team of civil servants. The terms of reference for the Review were to consider:

- the way in which government administers the awarding of IP and its support to consumers and business;

- how well businesses are able to negotiate the complexity and expense of the IP system, including licensing and enforcement issues; and

- whether the current IP infringement framework reflects the digital environment, and whether provisions for 'fair use' by citizens are reasonable.

12. Andrew Gowers presented his report to the Government in December 2006. The Government welcomed the report and announced, as part of the December Pre Budget Report, its intention to take forward the recommendations made to it. The report and supporting documents can be viewed on the Treasury website: http://www.hm-treasury.gov.uk/independent_reviews/gowers_review_intellectual_property/gowersreview_index.cfm

13. The Gowers Review found the IP system to be performing “broadly satisfactorily”. While not in need of a radical overhaul, the Review did find that aspects of the IP system should be reformed to serve better the interests of all users (business and consumers included). A number of recommendations were made to:

- make aspects of the IP system clearer and fairer for consumers and other users of IP, by amending a number of exceptions to IP rights;

- improve the enforcement regime, with more focus on IP crime and looking at the way disputes are handled;

- reduce costs for business, by introducing streamlined processes for obtaining IP rights, greater IP awareness and innovation support services and putting more emphasis on alternative dispute resolution; and

- ensure that IP policy is strategically formulated (including the establishment of a new Strategic Advisory Board for IP Policy).

14. The recommendations affecting exceptions to copyright are part of the first category and are part of an overall package of recommendations designed to encourage greater creativity and innovation, essential to the UK economy, by ensuring that the instruments, operation and governance of the IP system is balanced, flexible and coherent. These concepts are considered further in the section “Copyright Framework”.

15. The recommendations considered in this consultation paper include changes to copyright law that will:

- enable schools and universities to make the most of digital technologies and facilitate distance learning;

- allow libraries and archives to use technology to preserve valuable material before it deteriorates or the format it is stored on becomes obsolete;

- introduce a format shifting exception to allow consumers to copy legitimately purchased content to another format, for example CD to MP3, in a manner that does not damage the interests of copyright owners; and

- provide a new exception for parody.

16. These recommendations are set out in the next section and considered in detail in the following chapters.
THE FOCUS OF THIS CONSULTATION

17. This consultation paper is solely concerned with those recommendations of the Gowers Review which were aimed at changing exceptions in UK copyright law (with the exclusion of those recommendations impacting on the European Commission, which are being pursued separately). The focus of this consultation is, therefore, specific and not directed to the UK copyright framework more generally.

18. The Gowers recommendations under consideration are:

Recommendation 2: Enable educational provisions to cover distance learning and interactive whiteboards by 2008 by amending sections 35 and 36 of the CDPA.

Recommendation 8: Introduce a limited private copying exception by 2008 for format shifting for works published after the date that the law comes into effect. There should be no accompanying levies for consumers.

Recommendation 9: Allow private copying for research to cover all forms of content. This relates to the copying, not the distribution, of media.

Recommendation 10a: Amend s.42 of the CDPA by 2008 to permit libraries to copy the master copy of all classes of work in permanent collection for archival purposes and to allow further copies to be made from the archived copy to mitigate against subsequent wear and tear.

Recommendation 10b: Enable libraries to format shift archival copies by 2008 to ensure records do not become obsolete.

Recommendation 12: Create an exception to copyright for the purpose of caricature, parody or pastiche by 2008.

HOW AND WHEN TO RESPOND

19. We welcome comments from interested parties on the issues, suggested options and specific questions identified in each chapter and on the attached impact assessments. We are particularly interested to receive evidence (including financial information where relevant) in support of your views as this will assist us in assessing the impact of the proposed changes. It is essential that we ensure that the benefits outweigh the costs of each proposal.

20. It would be appreciated if you could structure your comments by reference to the relevant Gowers recommendation. Where you refer to a specific aspect of the consultation document please provide a page number.

21. Please send responses by 8 April 2008 to:

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

Email: copyrightconsultation@ipo.gov.uk
Fax: 0044 (0) 1633 814 922
Tel: 0044 (0) 1633 814 912

22. Please note that this is stage one of a two part consultation process. There will be a further opportunity to make your views known when we consult on a draft statutory instrument in due course.

23. This consultation document has been prepared by officials at the UK Intellectual Property Office (“UK-IPO”) in consultation with other government departments. It contains a number of proposals for implementing the Gowers recommendations concerning copyright exceptions. No decisions have yet been taken by the Government on these proposals and as such the document does not constitute official government policy. The preparation of this document has also been informed by an extensive series of stakeholder meetings. We would like to thank those who contributed

WHO IS BEING CONSULTED?

24. Copies of this consultation document have been sent to the organisations listed in Annex A. Further copies, including large print and Braille versions, may be requested from the UK-IPO by contacting Joanne Holley, tel: 0044 (0) 1633 814 912; e-mail: copyrightconsultation@ipo.gov.uk

25. This consultation document has been prepared in accordance with the Government Code of Practice on Written Consultations. If you have any comments or complaints about how this consultation process is being handled, please contact the UK-IPO Consultation Co-ordinator. Information on the Code of Practice and contact details for the Consultation Co-ordinator are set out in Annex B.
Copyright exists to encourage the creation of and investment in creative works. It protects specific expression, not general ideas, and applies to literary, artistic, dramatic and musical works, sound recordings, broadcasts and films. The CDPA provides a number of exclusive rights to copyright owners, including the right to copy, communicate, distribute, perform and adapt their works. It also provides a number of exceptions to these rights to facilitate consumer access and use for socially desirable purposes, and to encourage further creativity.

In determining where the appropriate balance lies between rights and exceptions, it is a basic principle of IP policy that the result should be in the public interest. In determining what is in the public interest the Government must balance a number of often overlapping policy goals including economic, social and legal objectives and constraints.

The Gowers Review presented its recommendations using an analytical framework based on balance, coherence and flexibility. Applied to copyright this means that the necessary incentives for creativity must be balanced against the costs to consumers; flexibility is necessary to enable copyright to cope with technological and environmental changes; and copyright law must provide certainty and consistency in rights. In considering how to take forward the recommendations it is also important to assess the options against a similar policy framework.

In proposing changes to copyright exceptions we need to balance the incentives required for the creation of works against the costs to the public of monopoly market conditions, and ensure access to content for consumers and follow on innovators. Fair dealing exceptions, for example, permit certain uses of copyright material that would otherwise be infringing. These uses are clearly defined in the UK (and are different from the more general doctrine of “fair use” in the United States) and relate to research and private study, criticism and review, and news reporting.

We also need to comply with the international legal framework (see below), take account of changes in technology and the way in which works are used, and consider government goals in a wide range of areas including economic growth and wealth creation generally, and specific policies concerning the knowledge economy, creative industry development, information technology and education. We also need to ensure that copyright law does not place unnecessary administrative burdens on business and can be understood and is respected by the general public.


The above treaties and the Copyright Directive limit the exceptions that Members States may provide within their law. They also state that all exceptions must comply with what is known as the “three step test.”

The test comprises the following three steps:

- exceptions shall be applied ‘in certain, special cases’;
- which ‘do not conflict with the normal exploitation of the work or the subject matter’; and
- ‘do not unreasonably prejudice the legitimate interests of the right holder’.

The test has been the subject of a large amount of academic comment but there is very little decided case law. The first step requires an exemption to apply in clearly defined circumstances. The second step requires the normal exploitation of the right to be judged for each exclusive right individually. The underlying aim of the test is to ensure that an excepted use should not enter into competition with the original work. In making this assessment, the potential as well as actual effect of the exception on the market would need to be considered.

See section 16(1) of the CDPA for a full list.  
Sections 29 and 30 CDPA.
need to be considered. The third step of the test involves a balancing exercise between the general interests in protecting the rights holder’s exclusive rights in a copyright work and the public interest in the exploitation of the work. The rights holder’s interests may be but are not necessarily limited to its economic interests. The report on the implementation of the Copyright Directive commissioned by the EC Commission recognises that the third step allows a balancing between the interests of rights holders and the needs of society and suggests that it is the focal point of the three step test3.

PERFORMERS’ RIGHTS

35. This consultation considers exceptions to the exclusive rights set out in section 16(1) of the CDPA4 and, in particular, to the rights of reproduction and communication. The exceptions to the rights of performers are set out separately in Schedule 2 of the CDPA. So while the consultation refers to exceptions in the main part of the Act, it is proposed that the corresponding provisions in Schedule 2 would also be amended, where appropriate.

DIGITAL RIGHTS MANAGEMENT

36. Under Article 6(4) of the Copyright Directive, Member States are required to ensure that the beneficiaries of certain exceptions are not prevented from making use of the exception by a technological protection measure or digital rights management (often collectively referred to as “DRM”). Consequently, certain exceptions under UK law are accompanied by provisions to ensure that DRM does not prevent their operation5. Where appropriate, the exceptions covered by these provisions are currently listed in Schedule 5A of the CDPA. The DRM issue is considered in relation to each of the proposals considered in this paper.

EUROPEAN CONVENTION ON HUMAN RIGHTS

37. Ministers will be required to make a statement in accordance with section 19 of the Human Rights Act 1998 that the provisions of any amending instrument are, in their view, compatible with the European Convention on Human Rights (“ECHR”). The primary relevant ECHR consideration is whether Article 1, Protocol 1 ECHR is engaged. We will need to consider this once the proposals are developed following this consultation and will comment further when we consult on the draft statutory instrument.

3  “Study on the implementation and effect in Member States law of Directive 2001/ 29/ EC on the harmonisation of certain aspects of copyright and related rights in the information society February 2007, paragraph 2.3.3)

4  “16 The acts restricted by copyright in a work
(1) The owner of the copyright in a work has……. the exclusive right to do the following acts in the United Kingdom –
(a) to copy the work (see section 17)
(b) to issue copies of the work to the public (see section 18A)
(ba) to rent or lend the work to the public (see section 18A);
(c) to perform, show or play the work in public (see section 19);
(d) to communicate the work to the public (see section 20);
(e) to make an adaptation of the work or do any of the above in relation to an adaptation (see section 21) and those acts are referred to in this Part as the “acts restricted by the copyright”.

5  Section 296ZE CDPA.
GOWERS RECOMMENDED:

Enable educational provisions to cover distance learning and interactive whiteboards by 2008 by amending sections 35 and 36 of the Copyright, Designs and Patents Act, 1988 (CDPA).

BACKGROUND

38. In recent years, the education sector has embraced digital technology as a way of enhancing the learning environment for students including the use of secure networks known as virtual learning environments (“VLE”s). This has created a population of distance learners who access learning materials away from the classroom at a place and time of their own choosing. The Government considers that access to educational material is an important element in promoting lifelong learning and that the opportunity to learn and develop beyond the formal school environment is a very welcome development.

39. In its submission to the Gowers Review, the Educational Recording Agency (“ERA”) noted that in 2005, primary and secondary schools invested £252 million in information and communications technology and that 83% of primary schools and 99% of secondary schools have broadband connections. These figures illustrate the scale of the infrastructure at the disposal of schools in the UK. However, concern has been expressed that copyright law restricts the full exploitation of this infrastructure.

40. The existing educational exceptions to copyright were crafted at a time when such technology was not available or at least not widely accessible for educational purposes. The scope of the exceptions was defined in the context of the educational environments that existed at that time.

41. Section 35 of the CDPA allows educational establishments to record broadcasts, and section 36 allows the copying of passages from published literary, dramatic and musical works as class “hand outs”. The Gowers Review recommended that such educational materials should be made available to distance learners and via interactive whiteboards. These provisions are considered in turn below starting with an outline of the existing exceptions followed by a number of key questions and the presentation of options relating to the proposed amendments for distance learning.

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6 Sections 32 to 36A of the CDPA.
SECTION 35 (RECORDING BY EDUCATIONAL ESTABLISHMENTS OF BROADCASTS)

THE EXISTING EXCEPTION

42. Section 35 allows the recording and showing of off-air broadcasts, and the copying of such a recording, by educational establishments for the non-commercial educational purposes of that establishment. Only persons situated on the premises of the establishment may be shown or hear the recordings. The recordings cannot be subsequently “dealt with”. This means they cannot be sold, let for hire or communicated from within the educational premises to any person outside those premises. The exception does not apply where there is a licensing scheme in place.

43. An educational establishment can, therefore, record a radio or television programme and show the recording to its students or allow its students to access the recording at a time of their choosing provided that the students are on the premises.

44. A “broadcast” is a copyright work in its own right distinct from any other copyright works included in it (such as a dramatic work). It is defined as an electronic transmission of visual images, sounds or other information which is transmitted for simultaneous reception by members of the public or is transmitted at a time determined by the broadcaster. Subject to certain exceptions, an internet transmission is exempted from the definition. The requirement that the transmission be for simultaneous reception by the public or for reception at a time determined solely by the broadcaster means that an “on-demand” or “on-request” transmission is not a broadcast for this purpose.

THE EXPANDED EXCEPTION

45. The proposed amendment of section 35 to cover distance learning raises a number of issues including the definition of broadcast, the class of works affected, the location of students, and the need for secure environments.

CLASSES OF WORK

46. While the Gowers Review specifically recommended expanding section 35 to allow communication of broadcasts to distance learners, it also stated that the educational exceptions should not be defined by “media”, but rather by intent, category of use and activity. Section 35 is currently defined by media and is limited to traditional style “broadcasts” (see definition of broadcast above). It does not apply to the newer and increasingly popular web-based communication technologies. Indications are that traditional broadcasters and others are increasingly making their content available on the Internet as a major distribution platform. Such availability can be in the form of webcasts that are simultaneously received by the public, and also in the form of “on-demand” (including “catch-up”) transmissions where the public choose when to watch the transmission. These often include interactive elements specific to the internet.

7 Section 35(1A).
8 Section 35(3).
9 Section 35(2). The exception does not apply to the extent that there is a licensing scheme certified by the Secretary of State. Both the Educational Recording Agency (ERA) and the Open University operate licensing schemes in this area.
10 The exception in section 35(1A) (inserted into the CDPA by the Copyright and Related Rights Regulations 2003 SI 2003/2498) is framed by reference to the definition of “communication to the public” in section 20 (which includes the making available of the work by electronic transmission in such a way that members of the public may access the recording at a place and time individually chosen by them) but applies subject to the proviso that the communication cannot be received by any person outside the premises of the educational establishment.
11 Section 1 CDPA.
12 Section 6 CDPA.
13 The Audio-Visual Media Services Directive came into force in December 2007, with a requirement that it be implemented within two years. The Directive creates a new legal category of “television-like” services available on demand, which is expected to apply to a narrow range of mass media video-on-demand providers. This would not fall within the definition of a “broadcast” for the purposes of section 35 of the CDPA. It does not have a significant impact on the issues considered by the Gowers Review and views on it are not being sought as part of this consultation.
While most internet transmissions and on-demand services themselves are not protected by copyright, these transmissions contain protected subject matter, such as sound recordings or film material. Therefore, if educational establishments wish to download and record an on-demand transmission of say, a play, to show pupils, they risk infringing copyright which exists in the dramatic work, the sound recording and any musical work contained in the transmission. An expanded section 35, limited to traditional broadcasts, could therefore prevent educational establishments benefiting from the flexibility provided by these new services. With such services becoming more widely available in the future, and occupying a similar place to traditional broadcasting, there is a case for extending section 35.

We are aware that on-demand services often replace the market for DVD sales. On-demand is, therefore, a potentially valuable revenue stream that rights holders will naturally be keen to preserve. Further, rights holders argue that on-demand services should not be brought within the scope of the educational exceptions because of the vulnerability of these works to illegitimate copying. However, where on-demand services replace the traditional broadcast service or merely complement it, it may be appropriate for educational establishments to be permitted to record and show such content at a time of their choosing. Removal of the current limitation of the scope of the exception to traditional broadcasting, would provide educational establishments with the opportunity to record works from an on-demand service that may never have been broadcast in the traditional way.

Questions:

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

SECURE ENVIRONMENTS: WHO SHOULD BE ABLE TO ACCESS THE COMMUNICATION OF THE RECORDINGS AND IN WHAT CIRCUMSTANCES?

The Gowers Review recommended that section 35 should be expanded to enable a copy of a broadcast to be communicated to students who are not located within the educational establishment. It also noted that it would be important to ensure that access to such material should not be generally available to the public and that distance learning students will need to access the material securely via a VLE.

It is, therefore, proposed that an expanded exception should place limits on who could view the recordings and how they do so.

Section 35 is currently silent on the issue of who is able to view (or, to use the terminology of section 35(1A), to “receive”) any recording made by an educational establishment, beyond the requirement that they are on the premises of the establishment. It is proposed that the ability to view the recordings be limited to “teachers and pupils at an educational establishment and other persons directly connected with the activities of the establishment”. This is consistent with the approach taken in section 34 of the CDPA, which creates an exception for performance of a work by a teacher or pupils in the course of the activities of an educational establishment. The reference to “other persons” may include a parent or class room assistant, but it is for consideration whether the category of persons permitted to view such recordings needs to be cast this wide.

It is also proposed that in order to benefit from the exception, the showing of a recording of a broadcast or of an on demand service (if the exception was to be expanded in this way) must be via a secure VLE. This would ensure that only the targeted pupils or teachers are able to access the recordings. This might be achieved by stipulating that, while access to a recording of a broadcast or of an on demand service can be via a terminal at a place (e.g. a home PC, local library or internet café) and at a time individually chosen by the teacher or pupil, such access must be password protected.

If such a requirement was to be introduced it would be necessary to determine the degree to which an educational establishment would be responsible for regulating the security of the system. For example, should the educational establishment be required to extract undertakings from such persons not to communicate such passwords to other unauthorised persons and be expected to take enforcement action for breaches of such security? Or should a lower threshold apply where educational establishments are required to take all reasonable steps to ensure that only pupils or teachers may access such recordings?

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Questions:

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- 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?

SECURE ENVIRONMENTS: WHO SHOULD BE ABLE TO ACCESS THE COMMUNICATION OF THE RECORDINGS AND IN WHAT CIRCUMSTANCES?

- Should section 35 be extended to allow educational establishments to record on-demand communications in addition to traditional broadcasts?
- 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?
54. As noted above, the exception in section 35 is available unless a licensing scheme applies. We understand that new licences would be made available to cover the expanded nature of the exception, with higher fees to reflect the broader range of permitted activity. Current licences would be expected to continue to be available at a lower price. This would avoid disadvantaging any establishment or group of establishments that do not wish to make use of a VLE environment and pay for the privilege.

55. Extending the section 35 exception to include distance learning scenarios envisaged by the Review necessarily involves communication to the public who may be located off the premises of the educational establishment. Section 35(3) currently prevents recordings of broadcasts being subsequently “dealt with” by communicating the recording to persons outside the premises. The definition of “dealt with” provided in section 35(3) will therefore require amendment to prevent such activity being an infringement. The definition will, however, need to prevent onward communication beyond a secure environment (for example, if a copy of a recording received via a secure network is downloaded onto a disk or is emailed to a third party) which it is proposed should constitute an infringement.

56. The definition of the term “educational establishment” is important as it determines the range of organisations that will benefit from the current or any extended exception. The CDPA adopts the definition of “school” from the various education statutes for England and Wales, Scotland and Northern Ireland respectively.

57. Different parts of the United Kingdom have different definitions of “school”, and in some cases the definition does not require the establishment in question to have education as its sole or main purpose. It has been suggested by the ERA that this may cause additional difficulties if the exception is extended to cover distance learning. We note, however, that the definition of “educational establishment”, which relies on the definition of “school”, is used in many of the educational exceptions. The adoption of a different definition for the purposes of Section 35 would be confusing and may, over time, become out of step with the definition of “school” in the various educational statutes. We would therefore propose to continue with the existing definition if the exception is expanded.

The definition of “dealt with” for the purposes of section 35 is available unless a licensing scheme applies. We understand that new licences would be made available to cover the expanded nature of the exception, with higher fees to reflect the broader range of permitted activity. Current licences would be expected to continue to be available at a lower price. This would avoid disadvantaging any establishment or group of establishments that do not wish to make use of a VLE environment and pay for the privilege.

Questions:

- 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?
- Who should be able to view recordings made by an educational establishment in a VLE? Is the reference to “teacher 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?
- What level of responsibility should an educational establishment have for maintaining the security of a password protected VLE?
- How should onward communication beyond a secure environment be prevented?

Other Issues

Licence Fees

Section 36 (reprographic copying by educational establishments of passages from published works)

The Existing Exception

Section 36 permits reprographic copies of passages from published literary, dramatic or musical works to be made by or on behalf of educational establishments for educational purposes. Such copying is permitted if copies are accompanied, where possible, by a sufficient acknowledgement and where the instruction is for a non-commercial purpose. Not more than one per cent of any work may be copied in any quarter. As with Section 35, the exception does not apply to the extent that a licensing scheme operates, such as that provided by the Copyright Licensing Agency (“CLA”).

15 Section 174 and (for further and higher education sectors) The Copyright (Educational Establishments) Order 2005 SI 2005/223 hyperlink.

16 “Sufficient acknowledgement” is defined in section 178 and means an acknowledgement identifying the work in question by its title or other description and identifying the author unless – (a) in the case of a published work, it is published anonymously or (b) in the case of an unpublished work, it is not possible to ascertain the identity of the author by reasonable enquiry.
59. Reprographic copying is defined in section 178 as copying by means of facsimile copies or involving the use of an appliance for making multiple copies and includes, in relation to a work held in electronic form, any copying by electronic means but does not include the making of a film or sound recording.

60. The current exception is therefore aimed at permitting teachers to prepare ad hoc hard copy “hand outs” for their pupils consisting of extracts from books, plays or musical works. Today, however, teachers have a range of technological aids at their disposal. Interactive whiteboards enhance the classroom learning experience and VLEs provide a flexible learning environment that has previously not existed. The Gowers Review found that the current exception does not permit extracts to be sent to distance learning students by electronic means, such as email or via a VLE because section 36 only extends to “copying” and not the act of “communicating [such copy] to the public”.

61. The Gowers Review concluded that the scope of the existing exception is too narrow in the digital age, and adopted the view presented by the Open University in its submission that educational exceptions should be defined by intent, category of use and activity, and not by media or location.

THE EXPANDED EXCEPTION

62. The expansion of the current exception for reprographic copying raises a number of issues including the impact on the exclusive right of “communication to the public”, the need for secure environments and the classes of work affected.

EXTEND SECTION 36 TO COVER THE “COMMUNICATION TO THE PUBLIC”

63. If we are to implement this recommendation it will be necessary to amend section 36 to provide an appropriately framed right of “communication to the public”. This would allow extracts of permitted works to be communicated to distance learning students and to allow the making available by electronic means of such extracts.

64. It is envisaged that such communication will take place using technology such as interactive whiteboards and possibly email. The Gowers Review emphasised that distance learning students are disadvantaged if short extracts of study material cannot be delivered to the student via email without infringing copyright. It is, however, difficult to control access to material communicated by email outside of a VLE. It is proposed, therefore, that communication, including email correspondence, only be permitted if the security measures associated with a VLE are in place.

Questions:

- Should limits be placed on the form of communication used by educational establishments to communicate extracts to distance learners?
- Should the expanded exception be limited to communication inside a VLE?
- Should communication by email outside a VLE be permitted?

SECURE ENVIRONMENTS: WHO SHOULD BE ABLE TO ACCESS THE COMMUNICATION OF THE EXTRACTS AND IN WHAT CIRCUMSTANCES?

65. If section 36 is expanded to allow passages from published literary, dramatic and musical works to be communicated to distance learners it will be important to identify clearly who can view the material and in what circumstances. To ensure consistency with other educational exceptions, it is proposed that the formulation used in section 34, namely “teachers and pupils at an educational establishment and other persons directly connected with the activities of the establishment” be adopted. As for section 35, it is proposed that the approach adopted will reflect the need for such persons to be authorised users of a secure network used to show the material in question.

66. If such a requirement was to be introduced it would be necessary to determine the degree to which an educational establishment would be responsible for regulating the security of the system. For example, should the educational establishment be required to extract undertakings from such persons not to communicate such passwords to other unauthorised persons and be expected to take enforcement action for breaches of such security? Or should a lower threshold

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17 An interactive whiteboard consists of three linked pieces of equipment; a computer, a digital projector and a touch sensitive screen which may be activated either by a pointer (such as a finger) or an electronic pen. Any software can be used in connection with an interactive whiteboard but there is custom designed software which provides the full interactive functionality of an interactive whiteboard (for example allowing the user to create electronic flip charts including text and images). The whiteboard can be used to display text from published works, or to show extracts from film or sound recordings or broadcasts.

18 As defined in section 20.
apply where educational establishments are required to take all reasonable steps to ensure that only pupils or teachers may access the material?

Questions:

• Do you agree that access should be subject to security measures, such as a requirement to enter a secure password in order to access the recording? What other security measures might be appropriate?
• Who should be able to access extracts made available by an educational establishment in a VLE? 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?
• What level of responsibility should an educational establishment have for maintaining the security of a password protected VLE?
• How should onward communication beyond a secure environment be prevented?

CLASSES OF WORK

67. In recommending that section 36 be expanded to allow communication of material to distance learners, the Gowers Review referred to “works” generally. It also stated that the educational exceptions should not be defined by “media”, but rather by intent, category of use and activity.

68. Currently, section 36 is restricted to reprographic copying of extracts from published literary, dramatic and musical works. However, educators argue that, because modern teaching methods utilise a wide range of material and not just material produced specifically for educational purposes, that copyright exceptions in the field of education should relate to all classes of work, provided they are relevant to the teaching activity. Further, the existence of and reliance upon multimedia works creates difficulties in separating out different classes of works.

69. The restriction in section 36 to literary, dramatic and musical works could, therefore, impede the ability of teachers to use technologies, such as interactive whiteboards (which may use a mixture of artistic, literary, dramatic and musical works, together with extracts from film and sound recordings and broadcasts) effectively.

Questions:

• 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?
• What consequences would such an amendment have on rights holders?
• What benefits would there be for educators?
• 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?

OTHER ISSUES

DEFINITION OF “DEALT WITH” FOR THE PURPOSES OF SECTION 36

72. Extending the section 36 exception to include distance learning environments and communicating to the public scenarios will require changes to the definition of “dealt with” provided in section 36(5) and raises issues similar to those raised in relation to the proposed extension of the section 35 exception. For example, amendment would be required to prohibit any user of the secure network from making further copies and to prohibit onward communication beyond the secure environment. The possible extension of the exception to permit transmission of extracts from published works via email raises additional concerns, for example should the transmission of an email to an incorrect address constitute an infringing copy?

EUROPEAN LAW

73. Article 5(3)(a) of the Copyright Directive allows exceptions to both the right of reproduction and the right of communication for the purpose of illustration for teaching. Recital 42 is also relevant; it states “When applying the exception
or limitation for non-commercial educational and scientific research purposes, including distance learning, the non-commercial nature of the activity in question should be determined by that activity as such. The organisational structure and the means of funding the establishment concerned are not decisive factors in this respect”.

74. Any exception must also comply with the “three step test” as discussed in the introductory section.

THE THREE STEP TEST

75. We consider that the proposed amendments to sections 35 and 36 to cover distance learning and communication of extracts via interactive whiteboards comply with the requirements of the three step test.

CERTAIN, SPECIAL CASES

76. The exceptions will only apply in clearly defined cases. The expanded section 35 will apply only to the recording and showing of broadcasts (and possibly of on-demand material), undertaken by educational establishments for non-commercial educational purposes. Section 36 will apply only to limited reprographic copying and communication to the public where such activities are undertaken by educational establishments for educational purposes. In both cases a limited number of beneficiaries and activities are clearly identified.

NO CONFLICT WITH NORMAL EXPLOITATION OF THE WORK

77. The exceptions for educational establishments will only apply to the extent that there is no licensing scheme in operation. A number of schemes already exist, namely those operated by ERA and the Open University in the broadcast area, and CLA and NLA provide licences for reprography. The proposed amendments to sections 35 and 36 will preserve this relationship between the exception and licensing schemes. As such, the exceptions operate in a way that permits normal exploitation of the work in these specifically defined areas.

DOES NOT UNREASONABLY PREJUDICE THE LEGITIMATE RIGHTS OF THE RIGHT HOLDER

78. As mentioned above, right holders will retain the ability to license their works in these areas so the expanded exceptions would not unreasonably prejudice their rights.

DIGITAL RIGHTS MANAGEMENT

79. If these changes are made to sections 35 and 36 it is proposed that the existing remedy (which applies where technological protection measures prevent the acts permitted by these sections) should also apply to the amended section 35 and 36 20.

20 Section 296ZE and Schedule 5A of the CDPA.
GOWERS RECOMMENDED:

Introduce a limited private copying exception by 2008 for format shifting for works published after the date that the law comes into effect. There should be no accompanying levies for consumers.

BACKGROUND

80. It is now commonplace for consumers to copy recorded music, and more recently films, to allow playback on different devices, such as from a CD to a MP3 player. Many within the copyright industries have accepted that this is reasonable use. Among consumers there appears to be a widespread belief that such action is already permissible; and the vast majority of those who are aware that it is not, think the current restrictions on copying for personal use are unfair. In 2006, an e-petition on the Downing Street website calling for a change in the law to allow this sort of activity attracted 3,298 signatures.

81. The current law is difficult to enforce in this area. Not only may it be difficult to justify the illegality of such activity but, because the restrictions are seen as unreasonable, they can often be damaging to the public’s perception of copyright. Many consumers simply do not understand why the act of transferring music from CDs they own to their MP3 players is illegal.

82. On 16 May 2007 the House of Commons Culture, Media and Sport Committee published its report on ‘New Media and the Creative Industries’. In considering whether the current situation was acceptable the report states:

“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. We do not believe that it is satisfactory that consumers should be advised by the industry that they can ignore certain provisions of the existing law and not others, and we believe that this must contribute towards a general lack of understanding and respect for copyright law.”

83. The report therefore recommended that the Government “draw up a new exception permitting copying within domestic premises for domestic use (including portable devices such as MP3 players and vehicles owned or regularly used by the household) but not the onward transmission of copied material”.

84. Copyright is intended to be a balanced system, providing strong rights for creators in return for reasonable use of works by consumers. A balanced system will generate a higher level of respect and understanding for copyright amongst the public. There is a need for a new exception to copyright to set a clear boundary between those activities that are acceptable, and therefore legal, and those which are unacceptable because they are damaging to rights holders and the UK’s creative industries.

THE NEW EXCEPTION

85. It is proposed to create a new exception to copyright to allow consumers to make a copy of a work they legally own, so that they can make the work accessible in another format for playback on a device in their lawful possession.

86. The exception would only apply if certain conditions are met:

• It would only apply to personal, private use. The owner would not be permitted to sell, loan, or give away the copy or share it more widely (for example in a file sharing system or on the Internet), and would not be permitted to retain the copy if he was no longer in possession of the original. This would prevent for example, the resale of CDs which have been purchased and copied. The purpose of the exception would be to allow consumers access to works they legitimately own in different formats. To allow consumers to copy works and then pass on the original could result in a loss of sales for right holders. We note, however, that a requirement to dispose of copies if originals are not retained could be difficult to enforce and be regarded as impractical or nonsensical by consumers, which would not enhance respect for the law in this area.

• Third parties, including commercial enterprises, would not be able to copy works on behalf of consumers.

• It would only permit format shifting, i.e. the copying of legitimately owned works to different formats for use on different devices. It would not include the broader range of private uses, such as multiple copying of all types of work or copying for friends and family. In particular, file sharing of music or film is not format shifting and would not fall within the scope of the exception.
87. It is further proposed that, in certain circumstances (discussed later) a consumer should be permitted to make a further copy from the copy which has been format-shifted for use on a different device in his lawful possession.

88. There are a number of variables and options to consider in the development of a format shifting exception. These include: the classes of work to which it would apply; what is meant by personal use; how many format shifts would be allowed; whether it would apply to works purchased before or after the exception comes into effect; and its application to works where DRM tools have been applied.

Questions:

- What impact would the introduction of a format shifting exception have? What costs or benefits would accrue to right holders and users of copyright works?
- Do you agree with the conditions proposed above?
- Would a requirement to 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?
- Should further conditions be imposed? If so, what are these?
- Should the non-infringing acts differ depending on the class of work concerned?

CLASSES OF WORK

89. Although the Gowers Review focussed mainly on the format shifting of music and talked a little about film, the recommendation is not limited to these classes of work. However, it is not entirely clear exactly what activities consumers undertake in relation to other works, such as artistic or literary works, which should be considered non-infringing. The analysis below (and in the attached impact assessment) concentrates on recorded music and film but we are interested in your views on whether the proposed exception should include other categories of work. We would also welcome evidence as to the likely impact of a format shifting exception relating to all categories of work. We are aware of the concerns of photographers in this area and would like to hear from other sectors.

OPTION 1: APPLY THE EXCEPTION SOLELY FOR SOUND RECORDINGS AND FILMS

90. This would have the advantage of allowing consumers to format shift the works they are most likely to want to copy from one playback device to another. Other categories of work would only be exempt insofar as they were contained within a sound recording or film. In this situation we are confident that there will be minimal impact on right holders as consumers are unlikely to buy the same work in multiple formats as the technology is available and format shifting is already occurring. The disadvantage of this option is that it may be unclear to consumers why different works may be treated differently and a number of commonplace activities, which may be considered legitimate, would remain infringements. For example, scanning a copy of wedding photograph to use as wallpaper on a home computer would remain illegal unless the photographer had given permission for this activity.

OPTION 2: APPLY THE SAME EXCEPTION TO ALL CATEGORIES OF WORK

91. This would have the advantage of allowing for a relatively simple exception to be adopted for all categories of work, providing consistency for users and rights holders. However, the impact of the exception will probably not be the same for all types of work. This will depend, for the most part, on the demand for certain types of works in different formats, which is likely to be driven by the development of new technical opportunities in the field of consumer electronics. While there is currently significant demand for recorded music in different formats, due to the wide range of playback devices, there may arguably be less use for different formats of literary or other works. This may, however, change as technology develops.

OPTION 3: APPLY DIFFERENT EXCEPTIONS FOR DIFFERENT CATEGORIES OF WORK

92. This would have the advantage of allowing the law to be tailored more closely to the needs of both consumers and right holders, ensuring that an appropriate balance is maintained in each area. Some examples of activities we may wish to consider are:
• Artistic works - it may be desirable to allow consumers to scan purchased photographs (such as wedding photographs) onto their PCs for use as 'wallpaper'. Individual art collectors often need to take photographs of artistic works for their own records, particularly for insurance purposes. This could be considered a legitimate use which should not infringe copyright.

• Literary works - it may be desirable to allow users to scan a literary work into a portable electronic reading device to read while travelling. This could be considered to be a legitimate activity which would have no impact on the right holder.

• Broadcasts – it seems reasonable to allow users to format shift broadcasts, which they have copied under the time shifting exception, solely for viewing at a more convenient time. This would allow the transfer of a broadcast to a portable viewing device or from a set top box to a video or DVD for watching on a different television in the household.

• Computer games and software – these are covered by the Directive on the Legal Protection of Computer Programs (91/250/EEC). This Directive lists the exceptions permitted for these types of work and the later copyright Directives do not change this position. Consequently, under EU law we are not permitted to create an exception for the purpose of format shifting these works. The new exception could not, therefore, apply to computer programs.

94. While users will be allowed to make only one copy of a work for use on a different device, users will be able to copy a work sequentially without restriction to allow for developing technology, for example where formats and playback devices become obsolete and consumers replace an old player with a newer version. Currently, users might wish to copy from CDs to MP3 players, but in the future they are likely to need to copy from their MP3 onto another device. It is proposed that a consumer should be permitted to repeatedly shift content for use on different devices they own, provided they still retain possession of their original (and legitimate) copy.

95. Such an exception would also allow for the fact that the technological process of transferring content might result in more than one copy being made in the same format. For example, consumers may have to create an MP3 file on their PC in the process of transferring the recording to their portable MP3 player. Users would be permitted to copy onto any device they own but only for their own personal use.

Questions:
• 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?
• What impact would the introduction of a format shifting exception have on particular sectors of the creative industries?
• How many format shifts should be allowed?
• Should the exception allow additional format shifts to take account of changing technology?
• Should more than one copy be allowed to address the technological process of transferring content?

TIMING

96. The Gowers Review suggested that this exception only apply to works published after the date of the law coming into effect, but there are a number of options.

OPTION 1: ALLOW FORMAT SHIFTING OF WORKS PUBLISHED AFTER THE EXCEPTION TAKES EFFECT

97. This option has the advantage of allowing right holders to take account of the fact that their work may be copied in fixing the sale price of their original work. It is also a transparent option for right holders as they are fully aware of the law at the time they publish their work and can accept that part of the bargain of having a copyright is that individuals may, in very limited circumstances, make copies of that work.
98. However, this option has a number of difficulties. It would cause confusion for consumers at a time when we are aiming to clarify the law. Typically, consumers currently believe that being prevented from making copies of legitimately purchased work for private use is unfair and nonsensical. They are likely to view this option similarly. It would be difficult for users to identify the publication date for a work they purchase after the law change and it would be difficult for right holders to enforce.

99. The Gowers Review further suggested that collecting societies might wish to offer a block licence to allow consumers to format shift back catalogues legitimately. Our discussions with stakeholders have suggested that this would not be a practical option. Introducing a licence would carry administrative costs for the collecting societies involved and take-up of the licences is likely to be very low. It seems unlikely that many consumers would seek a licence for something they firmly believe should be freely permitted. However, the collecting societies involved may wish to consider this option in more detail.

OPTION 2: ALLOW FORMAT SHIFTING OF WORKS PURCHASED AFTER THE EXCEPTION TAKES EFFECT

100. This is likely to be more readily understood by consumers. However, as time goes on, many consumers will be unaware of the date on which the law changed and may be unsure as to exactly when they purchased the work they now wish to format shift. Again, this would cause confusion and would be impossible for right holders to enforce and so is likely to be viewed by consumers as nonsensical.

OPTION 3: ALLOW FORMAT SHIFTING OF WORKS COPIED AFTER THE EXCEPTION TAKES EFFECT

101. This has the advantage of being clear. It would not legalise any format shifting that took place prior to the exception’s taking effect. However, it would mean that consumers would now have a clear view of what they are permitted to do under copyright law. We consider option three to be the most appropriate option.

Questions:

- Should the exception apply to works:
  - published after the date the law changes;
  - purchased after the date the law changes; or
  - copied after the date the law changes?
- What would be the practical implications of the above options?
- Can you think of any alternatives?
106. The Gowers Review says that, if right holders wish to receive additional revenue to allow for format shifting, this could be incorporated into the sale price of the original. This would allow the relevant industries to price their works at an appropriate level, taking account of the fact that consumers will be permitted to make copies solely for personal use. It is possible that this is already considered in certain businesses. As the Gowers Review says, certain sectors of the music industry have accepted that private copying takes place and the British Phonographic Industry has said publicly that it would not sue for infringement in this situation.

107. We are aware that many countries in Europe choose to operate levy systems to provide fair compensation to rights holders for exceptions, not solely for format shifting. The UK does not propose to introduce such a system. The majority of countries in Europe have far wider private copying exceptions than the format shifting exception proposed here. Some allow unlimited numbers of copies to be made for any private purpose, which could then be circulated to friends and family. Clearly this could lead to a loss in revenue for right holders, as it would result in copies being made which would be a substitution for a sale, and this is why these countries have decided that it is fair to provide a compensation scheme.

108. We do not consider that levies are a good option for the UK. A levy system would involve placing an additional charge on certain equipment. The range of devices and recording media which attract levies varies from one country to another but, typically, includes blank CDs, DVDs and computer hard drives. Under some systems the range of devices is very wide, encompassing items such as mobile telephones. It would not be appropriate for consumers to be forced to pay more money for buying items which may never be used to copy copyright works. For instance many consumers have home computers and buy CDs for storing their own documents and photographs. These activities do not infringe copyright. Yet these users could be required to pay a levy on both the computer and the blank CDs. There are also a number of other groups that would be affected by the introduction of a levy. The visually impaired often use computers and recording systems to aid their communications. It would be unfair to expect these users to pay a copyright levy merely because they need to use equipment which may be used for copying.

THE THREE STEP TEST

109. Many other countries have, or are planning to introduce, an exception for private copying. These include the majority of European countries, Australia, New Zealand and the USA. These are all considered fully compliant with the Berne three step test. We are of the view that the format shifting exception proposed in this paper is also compliant, as set out below.

CERTAIN, SPECIAL CASES

110. The exception would apply only to limit copying, by private individuals for non-commercial purposes. The beneficiaries and activities included would be clearly identified.

NO CONFLICT WITH NORMAL EXPLOITATION OF THE WORK

111. It is acknowledged that consumers are currently format shifting works and it is difficult for right holders to license such use, unless they were willing to offer a free licence, or sue for infringement in such cases. Indeed certain sectors of the creative industries have openly said they would never attempt to sue for infringement by private copying. This supports the argument that format shifting would not conflict with normal exploitation of the work.

112. Additionally we do not consider that consumers would buy the same work in multiple formats to allow use on a number of devices, given the availability of format shifting-enabling technology to consumers at no or little extra cost. Survey results have also shown that consumers would be willing to pay more for recorded music that they are able to format shift in contrast to recorded music they can only play back on a single device. Again this supports the argument that there would be no conflict with normal exploitation. Furthermore, a right holder may use technological protection measures to prevent users availing themselves of the exception.
DOES NOT UNREASONABLY PREJUDICE THE LEGITIMATE RIGHTS OF THE RIGHT HOLDER

113. Some right holders have argued that they will lose sales if consumers were permitted to format shift. We do not consider this to be the case. Consumers would be unlikely to buy the same work twice and, under the new exception, would not be permitted to distribute copies to others, or to keep the copy and dispose of the original. As the proposed scope of the exception would not allow a copy to be made as a substitute for a sale of the work we do not consider that the exception unreasonably prejudices right holders. Format shifting in defined circumstances would not upset the balance between the interests of rights holders and the public interest in the use of the work.

DIGITAL RIGHTS MANAGEMENT

114. The exception would not affect right holders’ ability to incorporate DRM or technological protection measures into their work. A number of online business models are emerging which allow consumers to pay differing prices according to whether they wish to be able to copy the work they have purchased. For example, we are aware that EMI has agreed to sell its catalogue through Apple’s iTunes®, free from DRM protection offering consumers the choice of paying a higher price for a high quality, DRM free product. The film industry is also developing similar models. These models adopt the principle suggested by the Gowers Review that industry could include in their sale price a cost for the ability to copy. These are legitimate practices offering the choice to consumers, and it is not proposed that their development be limited. The exception would not confer any right to circumvent DRM or technological protection measures.

115. The Department for Business, Enterprise and Regulatory Reform has been charged with investigating the possibility of providing consumer guidance on DRM systems through a labelling convention, also a recommendation of the Gowers Review.
EXTENDING THE EXCEPTION FOR COPYING FOR RESEARCH AND PRIVATE STUDY

RECOMMENDATION 9

GOWERS RECOMMENDED:

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

BACKGROUND

116. A number of respondents to the call for evidence in the Gowers Review raised specific issues about the scope of the current exception on research and private study.

117. The Review found that the current arrangements could be causing problems in using materials for genuine academic purposes and that the current arrangements (which do not cover sound recordings and film) are inconsistent. Concern was also voiced about the impact on the overall cost of negotiating rights for sound recordings and film. To address these issues it recommended extending the current exception for research to cover all forms of content.

THE EXISTING EXCEPTION

118. Section 29 of the CDPA 1988 currently provides that:

- ‘fair dealing’ with certain works for the purposes of research for a non-commercial purpose does not infringe any copyright in the work provided that it is accompanied, where possible, by a sufficient acknowledgement21; and

- ‘fair dealing’ with certain works for the purpose of private study does not infringe any copyright in the work22.

119. In addition to an individual making a copy for themselves, others may make a copy for them, subject to certain requirements23. In particular, the person doing the copying must not know or have reason to believe that copies of substantially the same material may be provided to more than one person at substantially the same time for the same purpose.

120. These exceptions apply only to certain categories of works, namely literary, artistic, dramatic and musical works. An exception also exists for the typographical layout of published works. The most notable absences from the current list are sound recordings, films and broadcasts.

121. The current legislation does not define in detail what copying may be carried out for research and/or private study. This is left for the courts to interpret, recognising that the answer will inevitably depend on the facts of the case. Factors which may be relevant in considering whether a particular act of copying represents ‘fair dealing’ include:

- how much of the work was copied;
- why the copy was necessary; and
- how the copy has subsequently been used.

122. Guidance is commonly issued by universities advising their students on the extent to which they can make copies of materials for research and private study purposes.

123. In most instances researchers and private students will only be able to make a single copy for their own individual research or study, with no copying for wider dissemination. The inclusion of extracts in assignments submitted for marking may be acceptable for non-commercial research (and is envisaged by section 29 through the requirement for sufficient acknowledgement, where possible). However, whether such inclusion is fair will depend on the circumstances of the case. Wider communication of any extracts, including publishing the copy or any assignment including the copy on an intranet or on the internet are unlikely to be considered a ‘fair dealing’ with the work.

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21 Section 29(1) CDPA 1988
22 Section 29(1C) CDPA 1988
23 Section 29(3) CDPA 1988 and see paragraph 122 below as regards librarians.
124. The legislation does not define ‘research’ or ‘private study’ but specifies only that ‘research’ must be non-commercial and that ‘private study’ must not be for direct or indirect commercial purposes\(^24\). Indeed, in many instances, activities relating to a particular course of study might well be considered to be both ‘research’ and an act of ‘private study’. UK legislation does not specify that ‘research’ or ‘private study’ must link to a formal qualification, although such a link is likely in most cases.

125. The current framework places a number of responsibilities on librarians copying works on behalf of a researcher or student. Librarians must satisfy themselves that a copy is for research or private study and will not be used for any other purpose, that the researcher’s or student’s requirement for a copy is not related to any similar requirement of another person, that only one copy is provided and that the copy is paid for\(^25\). In many cases proof of registration on a course of study will be required and a declaration will be signed.

126. All of the arrangements described above reflect the requirements of EU copyright law. Further to this where researchers and students are prevented from copying a literary, dramatic, artistic or musical work due to the presence of digital rights management measures they may make a ‘Notice of Complaint’ to the Secretary of State\(^26\).

EXPERIENCE FROM OTHER JURISDICTIONS

127. Other jurisdictions with copyright regimes similar to our own – most notably Australia and Canada - do allow for copying of sound recordings, films etc in equivalent situations\(^27\).

128. We are not aware of any particular problems being experienced within these jurisdictions in terms of widespread copying for entertainment or other purposes or with onward communication of a copied work. We intend to continue to draw upon the experiences of these jurisdictions as we further develop our policy proposals in this area.

THE EXPANDED EXCEPTION

129. This is a complicated issue and further information is required on some of the key policy questions before a way forward can be identified. Three general policy approaches have been identified, but there is no preferred option at this stage:

- broaden the exception so that researchers and students are able to copy sound recordings, film and broadcasts whenever such use would represent ‘fair dealing’ with the work;
- broaden the exception in a limited way with boundaries to address potential concerns about misuse and the impact of such misuse on rights holders. For example, the expansion could be restricted to researchers and students registered with an academic institution, or who are taking specific courses and/or who are linked to a specific academic institution; or
- do not broaden the exception, but address the issue of access to sound recordings, films and broadcasts some other way.

130. The recommendation made by the Gowers Review in this area were fairly broad brush and leaves a number of questions to be resolved concerning the appropriate scope and form of any amended exception for research and private study.

131. It is not clear whether the Gowers Review intended to distinguish between research and private study. The main body of the report refers to problems in both areas, but recommendation 9 refers solely to research. In taking forward this work we need to consider whether there is a need to take a different approach in relation to these two activities and, if so, how in practice it could be delivered. Similarly, there are questions about the types of works that ought to be covered by the expanded exception as the report refers specifically to issues associated with sound recordings and film but the recommendation refers to all types of work.

132. In considering options for implementation we have identified a number of broad questions that need to be considered and on which views are being sought.

133. In considering which policy approach to pursue we need to focus on these key questions and understand the expected impact of any changes on rights holders, on researchers and students and on other affected parties. An initial impact assessment is included in Annex C of this document. This impact assessment will be developed further as the policy process progresses.

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\(^{24}\) Section 29(1) CDPA 1998 and section 178 CDPA 1988.

\(^{25}\) The prescribed conditions which permit copying are set out in a statutory instrument made under section 40 CDPA 1988 http://www.opsi.gov.uk/si/si1989/Uksi_19891212_en_1.htm

\(^{26}\) Section 296ZE CDPA 1988.

\(^{27}\) In some cases restrictions apply regarding copying these types of work for research and study purposes, for example regarding the amount of particular types of work which can be copied.
General questions:

- What impact would the expansion of the exception for research and private study have?
- What benefits can the expanded exception be expected to deliver?
- What might be the impact of the expanded exception on rights holders and other affected parties?
- Should the expanded exception cover both research and private study?
- Should all types of work be covered?
- Should the expanded exception cover all fields of study or just specific areas?
- What action, if any, should be taken to address possible concerns about misuse of the expanded exception?

Questions

- Do researchers and students experience difficulties getting permission to make copies today?
- Are areas of research and study not being pursued as a result of issues regarding permissions for film, sound recordings and broadcasts?
- What benefits might an expanded exception deliver for researchers and students, for educational establishments and research institutions and for society overall?

THE BENEFITS OF AN EXPANDED EXCEPTION

134. Extending the current exception to cover all forms of content could allow researchers and students to access and make use of materials in ways in which they would not previously have been able to use them without gaining the rights holders’ permission. Particular beneficiaries of such an extension might include those studying in the areas of music, film and the media, where many of their sources and materials will be sound recordings or audiovisual materials.

135. Another key area where researchers and students might benefit is in carrying out research into methods of restoring or preserving archived material, where copies of film may need to be taken in order to experiment with new processes and technologies.

136. Researchers and students may also, in certain fields, need to carry out a close (and repeated) examination of a particular piece of video documentary evidence, for example for historical research into a particular event.

137. An expanded exception in this area may mean that research and study can occur in the future which would not have occurred otherwise, for example, because the cost or complexity of seeking permission today would be a barrier. Alternatively, where the copying would have taken place today (with the necessary permission being sought), an expanded exception may mean that the copying can occur with greater ease or with reduced transaction costs. There may also be a wider benefit to society from the expanded exception if greater access to materials leads to enhanced knowledge and skills.

SCOPE OF THE EXPANDED EXCEPTION: RESEARCH AND PRIVATE STUDY

138. As noted above, while the wording of Recommendation 9 refers only to research the discussion within the main text of the Gowers Review refers to problems being experienced in relation to both research and private study. In principle we do not see why people should be able to copy an extract from a film when it is needed for the purposes of non-commercial "research" (provided it would be considered ‘fair dealing’ to do so) but not when it is required for ‘private study’. Both are scholarly pursuits and may even overlap in some cases.

139. In fact, creating such a distinction between research and private study in this area might result in significant uncertainty for scholars and rights holders as to whether an act constitutes an act of research or an act of private study. Nevertheless, as discussed below, there may be other reasons for choosing to limit the scope, most notably to address concerns about the possible misuse of the expanded exception, based on the argument that ‘private study’ is likely to cover a broader range of activities than “research” and could even encapsulate hobbies and general interests.

Questions

- Are there reasons why the expanded exception should be limited to ‘research’ rather than covering both research and private study?
- 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?
SCENE OF THE EXPANDED EXCEPTION: CLASSES OF WORKS TO BE COVERED

140. The current exception covers all works except sound recordings, films and broadcasts. It is necessary to consider whether the expanded exception for all remaining works is required or whether it should be limited to certain types of work.

141. The general principle behind the expanded exception recommended in the Gowers Review is that researchers and students should be able to make copies of any type of work provided that it is required for genuinely academic and non-commercial purposes and that its use constitutes ‘fair dealing’. When considered with reference to the general principle, we are currently unaware of any reason why the expanded exception should cover some works but not others.

145. As such there does not seem to be any reason, in principle, for restricting eligibility to certain areas of study, although such a restriction may be appropriate to address concerns about the scope for misuse of this expanded exception which is discussed below.

Questions:

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

THE SCOPE FOR MISUSE OF THE EXPANDED EXCEPTION

146. It is possible that some people may seek to abuse the expanded exception and rely on it to copy works which they wish to hear or view for entertainment purposes rather than to advance their research or study in a particular field. Such an action would clearly be outside the scope of the expanded exception but given the open and undefined nature of both ‘research’ and ‘private study’ there may be concerns that people could argue that the works were required for legitimate purposes. Also is there a risk that the expanded exception could be used to circumvent the licence requirement under sections 35 and 36.

147. Rights holders are likely to be particularly concerned about the need to address such behaviour given the potential impact of such copying on rights holders, for example through lost sales.

148. While intentional misuse of any new exception is clearly an issue to be addressed we also need to consider the extent to which people might misunderstand the expanded exception and produce copies which would not be considered to be ‘fair dealing’. For example, by copying more of a work than was needed or by copying to improve the presentation of their research or study (as opposed to copying something required as part of the actual research or study).

Question:

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

SCENE OF THE EXPANDED EXCEPTION: FIELDS OF STUDY

142. In the vast array of subject matter being researched and studied today, some subjects might seem to rely more heavily on materials based on film, broadcasts and sound recordings. For example, students who are studying subjects that are primarily text-based or practical such as law, economics, medicine or science may be considered to have less need for materials based on films, sounds recordings and broadcasts than students who are studying music or film technologies.

143. However, while it is likely that researchers and students in certain fields of study will derive far greater benefit from the expanded exception than others this does not mean that we should limit the application of the expanded exception to only cover certain fields of study.

144. In all instances the question of whether a person is able to make a copy will depend on whether such actions would represent ‘fair dealing’ with the work. An approach which is flexible and does not restrict eligibility to specified subjects or courses would seem to be consistent with the general principle underlying the recommendation for change in this area.

In instances where copying done under the new exception would be considered to be ‘fair dealing’ the impact on the interests of the rights holders is likely to be limited (leaving aside any issues of digital rights management for now). There may be some lost sales where people would have purchased an entire CD or track or DVD in order to make use of a small extract although such purchases are likely to represent a small proportion of overall sales.
POSSIBLE ACTIONS TO TACKLE CONCERNS ABOUT MISUSE OF THE EXPANDED EXCEPTION

GUIDELINES ON THE SCOPE OF THE NEW EXCEPTION

149. Provision for ‘fair dealing’ does not include detailed rules and procedures explaining what will or will not be acceptable. People wishing to rely on the expanded exception will need to think carefully about: why they need to make the copy; how much of the work they actually need to copy; and their intended use of the copy, in the same way that they need to think about these things today when copying literary and other works.

150. Case law and guidance does exist today, in relation to literary and other works. However this is a complex area of law and these precedents may not necessarily help as they are often specific to the circumstances of the case as well as to the type of material being used. It is fair to expect that there may, at least initially, be some confusion and uncertainty amongst researchers and students about what is permitted under the expanded exception.

151. The issue of whether something constitutes ‘fair dealing’ is correctly a matter for the courts to consider on the facts of a particular case. However, it might be helpful for us to develop some illustrative guidelines in this area explaining what issues need to be considered when someone is contemplating copying a work.

LIMITING THE EXPANDED EXCEPTION TO REQUIRE A FORMAL LINK TO A COURSE OF STUDY/RESEARCH ESTABLISHMENT

152. An expanded exception for ‘private study’ could raise particular concerns, as private study might encapsulate hobbies or other interests and not be limited solely to studies linked to a particular course. Such an interpretation could mean that large numbers of people, for example with general interests in particular genres of music, seek to rely on the exception to make copies of works in order to ‘study’ them. While this may be the case today in respect of the works currently covered by the exception it is important to consider whether the extension of the exception to cover new works requires a new approach.

153. This may be a particular issue in instances where a person is asking another, such as a librarian, to make a copy on their behalf. Libraries hold a considerable amount of works, including increasing numbers of sound recordings, films and broadcasts, and we cannot expect that they will have the resources or capacity to make detailed judgements about a person’s claims that a copy is required for research or study purposes. Again these issues exist today but we need to consider whether the nature of the works covered by the expanded exception means that there is a need for further action.

154. One possibility might be to restrict the expanded exception to people who are registered and teaching or studying at an educational establishment.

LIMITING THE AMOUNT OF A WORK THAT CAN BE COPIED UNDER THE EXPANDED EXCEPTION

155. ‘Fair dealing’ with a work will in most instances involve part of rather than the whole work. This may reduce the attractiveness of such copying for entertainment purposes and thus the risk of such copying taking place.

156. Even though entire works are unlikely to be copied, the exact amount of a work which can be copied is not prescribed and there is, therefore, likely to be some uncertainty about how much of a work can be copied. Furthermore, in some instances an extract from a work may constitute a separate piece of entertainment, for example a track from a sound recording or a comedy sketch from a particular show. It follows that copying for entertainment purposes may remain attractive even if an entire album or programme cannot be copied.

157. Uncertainty about how much of a work can be copied may also raise cause particular issues for librarians and others who may be asked to make copies on a person’s behalf.

158. As noted above, the amount of a work that can be copied will constitute ‘fair dealing’ with a work will inevitably depend on the circumstances of the case. However, the amount of a work that can be copied will constitute ‘fair dealing’ with a work will inevitably depend on the circumstances of the case. Over time common practices and case law will provide some guidance as to what is likely to be considered ‘fair dealing’, although in the meantime illustrative guidelines may provide some assistance.

159. In taking forward this work we will need to consider whether the particular nature of the works covered by the expanded exception and the risk of intentional or mistaken misuse means that some limits on copying are necessary.
160. We do not consider at the moment that it would be appropriate to set absolute limits in the legislation, although we recognise that such an approach has been adopted in other jurisdictions that have exceptions in this area. However, one possible option might be to place an upper limit on the amount of copying that will constitute ‘fair dealing’ for example by precluding the copying of an entire musical track.

LIMITING THE EXPANDED EXCEPTION TO PARTICULAR COURSES OR EDUCATIONAL ESTABLISHMENTS

161. Further work on the possible impact on rights holders of an expanded exception is required. If the likely impact on rights holders is great, it may be necessary to consider restricting the scope of the exception to certain areas of study where there is a pressing need for action.

162. If such an approach were to be adopted we would need to consider carefully what areas of study or institutions should be covered. We would also need to take care not to blur the boundaries between the exceptions in section 29 and those in sections 35 and 36 (relating to educational establishments). In most instances, researchers or students may be able to make use of material simply through viewing it – even if that means viewing it dozens of times in order to study a particular aspect of the work. In others they may still be able to carry out their research or study but the scope of that research or study would be limited in some way. In some cases however, such as research into techniques for restoring old archive film, the inability to make that copy will mean that the research cannot be carried out. Consequently, an alternative might be to limit the new exception to those registered at particular educational institutions, for example those that specialise in restoration.

163. Listing particular areas of study or institutions might however create further issues. For example, such a list might be seen to encourage researchers and students studying a listed subject or at a listed institution to freely make copies of all works which they wish to research or study, without considering whether they need to make a copy to achieve the result they are seeking. This approach might also be considered to be quite an inflexible tool which is unresponsive to evolving fields of study or which might fail to include key areas where an exception could deliver benefits.

Questions:

- 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?
- 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?

DIGITAL RIGHTS MANAGEMENT

164. The issue of DRM is a significant one for rights holders in this area. The current exceptions for ‘research’ and ‘private study’ both provide for ‘Notices of Complaint’ to be made to the Secretary of State under section 296ZE of the CDPA where a person has been prevented from copying a work which they would otherwise be entitled to copy under section 29 because of DRM being applied to a work.

165. We are obliged by EC law to provide a DRM workaround arrangement for copies required for the purposes of scientific research. Therefore, any expanded exception that covers films, sound recordings and broadcasts will, as a minimum, need to include a DRM workaround applicable to the area of scientific research. Our current view is that use of the existing notice of complaint procedure would be the best approach.

166. The key question to be answered in this area is whether the DRM workaround solution should be applied more broadly to cover all researchers and students seeking to make a copy under the expanded exception. A decision not to apply the DRM workaround in this area would essentially mean that some researchers and students who would otherwise be able to make a copy for academic purposes under section 29 as amended will be prevented from doing so. This may limit the benefits delivered by the expanded exception.

167. Rights holders have considerable concerns about DRM workarounds, in particular in areas such as format shifting, due to their impact on business models adopted by rights holders. However, in the area of ‘research’ and ‘private study’ there may be an argument that the impact on existing business models is considerably less – given the limited nature of the exception in terms of the purposes for which copies are made, the amount of material being copied and the use that can be made of copies.
Questions:

- 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?
- What impact might a broad DRM workaround have on rights holders?
- 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?

168. That said, we need to consider the possible impact of a DRM workaround carefully. DRM’s are a legitimate and acceptable tool used by rights holders and are increasingly being used to support new business models. A broad DRM workaround approach could have a considerable impact on rights holders, in particular in terms of the costs and time involved in dealing with requests for a ‘copy’ of an extract of a protected work. Concerns regarding the misuse of copies, if significant, might mean that rights holders need to devote considerable time and effort to investigating requests in order to understand whether the work is really required. This could have considerable cost implications. A decision to not conduct such checks due to the expected cost of them might similarly have a significant impact.

EUROPEAN LAW

169. We will need to ensure that any changes made to the current exception are compatible with our EC law obligations and with international conventions on copyright. Our preliminary view is that the general approaches examined in this chapter would comply with the three step test, but further work would be required once a decision has been made on the most appropriate option.
AMENDMENT OF LIBRARY PRIVILEGE EXCEPTIONS TO EXTEND PERMITTED ACTS FOR THE PURPOSES OF PRESERVATION
RECOMMENDATION 10A AND 10B

GOWERS RECOMMENDED:

Recommendation 10a: Amend s.42 of the CDPA by 2008 to permit libraries to copy the master copy of all classes of work in permanent collection for archival purposes and to allow further copies to be made from the archived copy to mitigate against subsequent wear and tear.

Recommendation 10b: Enable libraries to format shift archival copies by 2008 to ensure records do not become obsolete.

BACKGROUND

170. Subject to certain conditions, section 42 allows “prescribed libraries” or archives to make a copy of a literary, dramatic or musical work held in their permanent collections for the purposes of preservation or replacement without infringing copyright. These provisions are intended to assist libraries and archives who may wish to minimise wear and tear of fragile items or to replace lost, destroyed or damaged items in their permanent collections.

171. The Gowers Review noted that the current arrangements are more stringent than in many other countries in so far as they relate to the classes of works that can be copied, the number of copies that can be made and also the ability to format shift. Currently, the classes of work within the scope of section 42 do not include sound recordings, films or broadcasts. These limitations create practical problems for prescribed organisations with an interest in preserving content that is stored on unstable media such as film that deteriorates with age. This is further exacerbated by an inability to format shift to a more stable medium.

172. The restriction on prescribed bodies to the taking of a single copy has become critical as technological developments provide opportunities to improve the preservation process, but such developments involve the making of additional copies. The Gowers Review gave the example of opening a document on screen, which gives rise to an additional copy and called for a principle of “reasonableness” to apply when this issue is reviewed.

THE EXPANDED EXCEPTION

173. If section 42 is expanded as suggested in the Gowers Review the intention would be to retain the underlying purpose of the exception, namely to aid the process of preservation or replacement of items in permanent collections where it is not reasonably practicable to purchase a copy. The exception would not be broadened for any other purpose.

174. The implementation of the Gowers Review recommendations raises a number of issues, including the classes of work affected, format shifting and the number of copies allowed. The issue of extending the scope of the organisations covered by the exception is also discussed.

Question:

• 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 works?

CLASSES OF WORK

175. The current exception is restricted to the making of a copy of a literary, dramatic or musical work for the purposes of preservation or replacement, subject to certain conditions. The classes of work covered reflect the available technologies and the requirements of libraries at the time of drafting the exception. The Gowers Review noted that the position in relation to library privilege exceptions is now out of step with other territories and has a detrimental effect upon libraries’ abilities to preserve the UK’s rich cultural heritage. Gowers therefore recommended that this section be extended to cover all classes of work, including sound recordings, films and broadcasts.

176. It is important for any amendment to maintain the current levels of protection for rights holders. We consider that this can be achieved, while also providing a framework for prescribed organisations that will enable them better to fulfil their duties of care for their permanent collections.

Question:

• What are the consequences, for rights holders and beneficiaries, of extending section 42 to cover all classes of works?
FORMAT SHIFTING

177. Particular problems have been identified with works held on unstable media, such as films and sound recordings. This might be regarded as a compelling reason to allow a copy to be made to another more stable format to preserve these works and avoid losing them permanently. In addition, it is now common practice for libraries to use modern storage techniques that utilise digital environments. Such techniques usually require the provision of back-up copies, which for security reasons, are often in electronic and hard copy form. For these reasons there is an identifiable need to format shift. Further, technological advancements may result in current formats becoming obsolete and create a requirement to allow successive format shifting as technology develops, and to allow libraries to maintain their permanent collections in a way that is relevant for the future.

NUMBER OF COPIES

178. Sometimes it is desirable to copy a work in a permanent collection where the original is deteriorating because of wear and tear. The current limitation in section 42 to the making of “a (single) copy” seems incompatible with any ongoing process of preservation which may involve indefinite successive copying to preserve permanent collections in an accessible format. Some countries limit the number of copies of works which may be made. The USA allows a maximum of three copies. However, many other countries have no such limit. Other countries, such as New Zealand, limit the number of copies libraries can make only to the extent that they cannot exceed the number of originals legally owned in their permanent collections.

179. In its submission to the Gowers Review, the British Library explained how digital backup copies are commonly used to ensure the security of their collections. Best practice for digital data storage is to hold a number of copies on mirror servers to ensure that works are not lost if one digital copy is lost or corrupted. This argument tends to support the view that a library should be permitted to make and hold more than one copy of an original work in its permanent collection. The issue becomes more acute where works are of high cultural importance and where only one copy ever existed e.g. manuscripts of literary and political figures. It would not appear sensible to impose a limit on the number of copies of such work if made for preservation purposes.

180. There is, however, the possibility that a digital copy of a work that has been format shifted for preservation purposes could have an impact on the revenue of right holders, because it lends itself to more purposes than the original. For example, a digital copy might be made available on inter-library loan, where the fragile original may not have been, which may have resulted in originals being purchased by other institutions.

Questions:

• Is it necessary to restrict the number of copies made for preservation purposes?
• If so, why, and how many copies should be permitted?

SCOPE OF ORGANISATION COVERED

181. In addition to the issues raised in the Gowers Review, we wish to open a discussion on the merits of extending the scope of organisations covered by the exception. The current exception permits a “librarian or archivist of a prescribed library or archive” to make a copy for preservation purposes without infringing copyright. It has been suggested by representatives of cultural institutions that the scope of organisation covered by the exception should be widened so as to include museums and galleries. The Gowers Review recognised the value and importance of preserving collections and it has been argued that it is a natural and important step to recognise the role museums and galleries play in the preservation of our cultural heritage by permitting preservation copying. Museums and galleries face similar issues to “prescribed libraries and archives” and hold works in their permanent collections that are recorded on unstable media or are suffering from degradation resulting from wear and tear. In order to avoid losing these works permanently they would greatly benefit from being able to format shift or otherwise copy in order to preserve the integrity of their permanent collections. This would not seem to harm rights holders’ interests.

Question:

• What would be the impact on rights holders if section 42 was extended to cover museums and galleries?
• What types of museums and galleries should be included? What criteria should they meet to qualify?
EUROPEAN LAW

182. Specific acts of reproduction by publicly accessible libraries, museums and archives are permitted acts allowed in Article 5.1(c) of the Copyright Directive. Any exception must also comply with the “three step test” as set out in Article 5(5).

THE THREE STEP TEST

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

CERTAIN, SPECIAL CASES

184. Section 42 is limited to a prescribed library or archive making a copy from any item in its permanent collection in order to preserve or replace the item or to replace an item in the permanent collection of another library. The proposed amendments to this section will not alter the fact that a limited number of beneficiaries and activities are clearly identified.

NO CONFLICT WITH NORMAL EXPLOITATION OF THE WORK

185. Section 42 permits copying only for the purpose of preserving or replacing items in permanent collections. Such copying is further limited by section 42(2) which stipulates that such copying can only take place where it is not reasonably practicable to purchase a copy of the item in question to fulfil that purpose. Such limitations prevent the act of copying permitted under this section from impacting upon the normal exploitation of the work. The proposed amendments to section 42 would preserve this position.

DOES NOT UNREASONABLY PREJUDICE THE LEGITIMATE RIGHTS OF THE RIGHT HOLDER

186. As mentioned above, section 42 will only allow copying, if certain prescribed conditions are met, for the purposes of preservation or replacement of an item in a permanent collection and then only when it is not reasonably practicable to purchase a copy. The exception would not, therefore, unreasonably prejudice the rights of rights holders.

DIGITAL RIGHTS MANAGEMENT

187. If the exception for libraries and archives is expanded, it is proposed that prescribed bodies will be able to submit a notice of complaint to the Secretary of State where they have been prevented from copying a work they would be entitled to copy under the exception because of a DRM being placed on the work.
GOWERS RECOMMENDED:

Create an exception to copyright for the purpose of caricature, parody or pastiche by 2008.

BACKGROUND

188. Caricature, parody and pastiche are not terms currently included within UK copyright law. The Oxford English Dictionary defines each term as follows:

- Caricature:
  - a grotesque usually comically exaggerated representation especially of a person
  - ridiculously poor imitation or version

- Parody:
  - humorous exaggerated imitation of an author, literary work or style, etc
  - feeble imitation, travesty

- Pastiche:
  - picture or musical composition from or imitating various sources
  - literary or other work composed in the style of a well known author, etc

189. These terms are all defined in slightly different ways but all can include an element of imitation, and may incorporate, to a greater or lesser extent, elements of the original work. The whole point of these types of works is that they should 'conjure up' the original work upon which they are based.

190. Given the close relationship between caricature, parody and pastiche, for the purposes of this consultation ‘parody’ is generally used collectively as shorthand for all three.

191. This recommendation took many commentators by surprise given the apparently strong tradition in the UK of this kind of creativity. Parody, in particular, continues to flourish under the current system. If this is the case, does anything need to change? The evidence published in support of the recommendation was fairly limited in its scope. Many believe any problems in this area are minimal or simply require consent and/or licensing from the rights holders, as with most other uses of copyright works. For the rights holders, use of their work, or a part of it, for the purposes of parody, can be a sensitive issue. For example, they do not necessarily mandate collecting societies, who act on their behalf, to license uses of their work in the form of parody because they prefer to have more direct control on a case by case basis. Nevertheless, we understand that in many cases, for example in the area of music, permission is given to use works, with appropriate remuneration agreed between the parties. Where permission is not given, there may be a good reason. For example, a composer recently refused a request to make a parody of one of his musical works because, at the time, he was on tour trying to break into the very market in which the parody was to have been launched. At such a critical point in his career, it was important that the focus was on his original work, which could otherwise have been in direct competition with a parody of itself.

192. A parody will not infringe copyright if its use of existing copyright material is not substantial or if the treatment of the work falls within the fair dealing defences such as those for criticism or review. Some old case law suggests that, even where the use is substantial, if a parody is original it does not infringe copyright in the earlier work on which it is based. This approach has not been followed in more recent cases which have held that a parody which reproduces a substantial part of an earlier work does infringe copyright. Some have seen this lack of an exception for parody as a restriction on an important part of the UK’s culture.

29 e.g. Joy Music Ltd v Sunday Pictorial Newspapers Ltd [1960] 2 QB 60

30 Schweppes Ltd and Others v Wellingtons Ltd [1984] FSR 210, referenced with approval in Williamson Music Ltd v Pearson Partnership Ltd [1987] FSR 97
193. Since the Gowers Review it has been drawn to our attention that in certain areas the lack of an exception does cause some problems. We are aware, for example, of a case of a public institution which, having bought an artistic work, found itself subject to potential legal action despite having, as it believed, the right to make reproductions of the artwork. In this case the artwork turned out to be or include a parody of a previous work. Others have drawn to our attention problems experienced in securing the right to use a newly acquired work and, in some cases, have decided not to pursue a project on the basis of potential infringement. Some museums and galleries are particularly concerned about modern art and we have had indications that some have adopted acquisition policies based not on the quality of the works themselves but at least in part on the potential likelihood of infringement of copyright. Supporters of this new exception believe that the current lack of an exception may be having an adverse effect on support – particularly by the larger institutions - for the creative arts within the UK.

194. Given the anecdotal nature of the evidence in support of this exception, we are particularly interested in gathering evidence on its potential impact, especially its economic implications.

**Question:**

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

**TREATMENT OF PARODY IN OTHER JURISDICTIONS**

195. The recently published study\(^{31}\) on the implementation of the Copyright Directive included information on whether or not Member States’ laws permitted parody. A number of member states - Belgium, France, Lithuania, Luxembourg, Malta, the Netherlands, Poland and Spain - expressly include a parody exception under their copyright law. In Italy the scope of the exception is narrower in that caricatures, parody and pastiche must conform to the requirements of an exception for quotations. The law in some other member states operates in such a way that a new work which is derivative or transformative of existing copyright material can either make free use of that copyright or is not treated as infringing. For example, the Nordic countries consider transformative uses, in general, as a creation of a new work for which consent from the rights holder is not required.

196. The varying approaches of EU Member States to parody can be demonstrated by looking at a couple of examples. France has a specific exception which covers parody, pastiche and caricature, subject to the proviso that the rules of the genre are observed\(^{32}\). Germany has a more general approach within a ‘free use’ provision which allows an independent work created by the free use of the work of another to be exploited without the consent of the author of the used work, if certain conditions are met. These include a requirement that there is a certain distance between the original and the new work. It does not however apply to musical works where a melody has been recognisably borrowed from the work and used as the basis for a new work\(^{33}\).

197. Common law countries have a different approach and permit use of copyright material in parody if that use constitutes fair dealing or fair use. For example, Australia has recently introduced a specific exception for parody or satire which constitutes ‘fair dealing’. In the USA a parody may not be an infringement where it falls within the scope of the ‘fair use’ doctrine.

**THE NEW EXCEPTION**

198. We discuss below whether a new exception for parody should be introduced in the form of a “fair dealing” exception. We also consider a number of other issues arising in connection with the development of an exception for parody. These include the definition of parody, the classes of work that would be covered by the exception, the exclusive rights that would be affected by the exception, whether the underlying work should be in the public eye, the degree to which the parody must relate to the underlying work, moral rights and whether the exception would apply to parodies of works created before the exception comes into force.

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\(^{33}\) Law on Author’s Rights and Related Rights, of September 1965, (later consolidated), Article 24(1) and 24(2)
FAIR DEALING

199. Limiting the scope of the exception to fair dealing with the underlying work may help to address concerns about advertising and endorsement. For example, an unlimited exception could permit the use of a parody in a commercial context such as advertising, thereby permitting the endorsement of products which run counter to the commercial interests of the right holder in the underlying work being parodied. However a commercially competing use of the copyright material may not be within a fair dealing exception.

200. Generally, the current fair dealing exceptions only apply if there is sufficient acknowledgement of the underlying work and its author. A parody may rely on the ability of the audience to make the link to the underlying work being parodied, without specific indications to that work. As a result any requirement to include a sufficient acknowledgement is likely to undercut the usefulness of an exemption for parody. We propose that there will be no requirement to provide sufficient acknowledgement for the exception to apply.

DEFINITIONS

201. The Copyright Directive does not include any definitions of what caricature, parody or pastiche are, but given the availability of dictionary definitions, it does not seem necessary to try and define them within the new exception. It would be up to the courts to determine any nuances of definition. Nor does it seem appropriate to exclude one type of activity (e.g. parody) from the exception when caricature, parody and pastiche are so clearly interrelated.

202. There is also no intention to include any other type of comedic or imitative activity within the scope of the exception.

Question:

- Is the ordinary meaning of the terms caricature, parody and pastiche sufficient?

CLASSES OF WORK

203. The Copyright Directive makes no reference to the class of works, such as literary or artistic works, which may be covered by this exception, and there seems to be no obvious reason for excluding particular works. It is, therefore, proposed that the exception make no distinction between classes of work and that it should cover them all in the same way.

Question:

- Is there any reason for excluding particular classes of work from the exception?

THE RIGHTS AFFECTED

204. The scope of the Copyright Directive includes the acts of distribution, communication to the public and the reproduction of works, and it is therefore clear that any parody exception may apply to these exclusive rights. The Copyright Directive does not refer to the public performance, of works, but if the parody exception is to be workable, it should cover these activities too. They are covered by the Rental Directive which permits certain exceptions if they mirror exceptions provided for literary and artistic works. We consider that the proposed exemption for parody is consistent with the requirements of the Rental and Lending Directive.

Question:

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

WORK PUBLICLY AVAILABLE?

205. To be recognisable as a parody, a new work relies to some extent on the knowledge of its audience of the original work. This implies that the underlying work should have been in the public eye, at least to some degree.
PARODY ONLY OF THE UNDERLYING WORK?

206. The exemption might be framed so as to apply only when the parody relates to the specific underlying copyright work (for example, to make fun of the author). Alternatively, the exemption could permit use of the underlying work for the purposes of a parody commenting on wider social issues (for example to use a popular children’s book in a campaign about smoking). This second approach is consistent with the interpretation of the fair dealing exemptions for the use of criticism and review and also for news reporting.

Question:

• Should the exception explicitly state that it only applies where the underlying work has been made available to the public?

OPTION 1: INCLUDE WITHIN THE EXCEPTION A SPECIFIC REFERENCE TO THE UNDERLYING WORK

207. This option enables the rights holders in the underlying work to retain some control over a parody which is aimed more widely than at the work being parodied. However, it could also be difficult for potential parodists to draw the line between the two different types of parody and to confine themselves only to certain types which they believe are protected by the new exception. This could be potentially too limiting.

OPTION 2: OMIT ALL REFERENCE TO UNDERLYING WORKS (AS THE COPYRIGHT DIRECTIVE DOES)

208. This option would result in the rights holder in the underlying work having less influence over the way his or her work is used under the exception. However, it would have the benefit of establishing a simple form of parody exception and would be consistent with the approach taken to fair dealing provisions for the purposes of criticism and review.

Question:

• Should the exception only apply where the parody relates specifically to the underlying work?

MORAL RIGHTS

209. Concerns have been raised that any new exception for parody should be counterbalanced by amendments to strengthen the UK’s moral rights provisions, to avoid misuse or abuse of the work being parodied. The laws of other countries with exceptions for parody have varying approaches to the protection of moral rights. At one end of the spectrum, France is generally acknowledged to have relatively broad moral rights protection covering all types of work, while at the other extreme US law has moral rights which apply only to visual arts, relying on other laws such as unfair competition, defamation, contract and privacy to provide the necessary additional protections. The UK’s legislation contains enforceable moral rights provisions but other options, such as passing off, trade mark infringement, or an action for injurious falsehood may be used to protect business reputations and an action for defamation may also be used to protect the reputation of an individual.

210. We do not consider it either necessary or appropriate to strengthen the current moral rights regime, and any such amendments could be seen to undermine any new exception.

211. Any new parody exception would not be intended to affect the creator’s ability or right to take legal action where his work is being subjected to derogatory treatment. Although a parody may not receive the approval of the author of the work being parodied, the parody would not necessarily impact on either the honour or reputation of the author: works the subject of parodies are perhaps more likely to be those of important authors and well known works with established reputations, otherwise the parody loses its meaning.

212. In respect of the right of attribution, that is the right to be identified as the author of the work, section 79(4) lists certain exceptions which apply where certain uses of works do not infringe economic rights (e.g. fair dealing for the purposes of reporting current events). In many cases, a parody may not incorporate enough of the underlying work to require the protection of the parody exception, but where it does, it would not seem appropriate to require that the author of the underlying work be named as the creator of the new work. As discussed above, it is proposed that there will be no requirement to provide sufficient acknowledgement of the underlying work for the exemption to apply. To ensure that the right of attribution is not applied in inappropriate circumstances, we propose that the list in section 79(4) be extended to cover the new exemption for parody.

213. In a similar vein, but in relation to false attribution, the author of the underlying work should be able to protect him or herself from being inappropriately named as the author of a parody over which he or she has had little control. Therefore we do not intend to amend the right against false attribution contained in section 84 of the CDPA.

34 E.g. Pro Sieben Media AG v Carlton UK Television Limited [1999] FSR 610
214. As the proposed exception concerns an act permitted in relation to copyright works, it will fall within Chapter III of the CDPA 1988 (as amended). Section 28(1) of the Act will therefore apply to the new exemption so that those who seek to create parodies will have to ensure that they do not transgress other potentially applicable laws such as those relating to passing off or defamation. The Gowers report made no recommendation to amend these laws.

TIMING

215. One of the Gowers recommendations suggests that any changes to the scope of protection should not be made retrospectively. This approach is consistent with the general rule that laws should not have retrospective effect, so any new exception for parody would only apply to parodies made after such a law came into effect. The exception would apply whether the work being parodied existed before or came into being after any legislative change.

EUROPEAN LAW

216. Article 5(3)(k) of the Copyright Directive allows Member States to provide for exceptions to and limitations of the reproduction right and the right of communication to the public in relation to the use of copyright material for the purposes of caricature, parody or pastiche. Article 5(4) allows Member States to extend the exception or limitation to the right of distribution referred to in Article 4 of the Directive.

217. In addition, Article 10(2) of the Rental Directive allows Member States to provide for certain limitations in relation to performance and performers’ rights, as long as they mirror those provided for in relation to the protection of copyright in literary and artistic works. Such limitations are also subject to the three step test set out in Article 10(3) of the Rental Directive.

Questions:

- Is there any reason why section 79(4) should not be extended to exempt parodies from the right of attribution?
- Is there any reason why section 84 should be amended to exempt parodies from the right of false attribution?

THE THREE STEP TEST

218. Many other countries have an exception which covers caricature, parody and/or pastiche (considered above) and there seems to be no reason in principle why the UK should not introduce such an exception. We consider that a ‘fair dealing’ exception for parody, as proposed in this paper, is consistent with all three steps of the test.

CERTAIN, SPECIAL CASES

219. This exception is intended only to apply to works created for the specific purposes of parody and which will, in addition, have to fall within the terms of the fair dealing provision. Any works created for other purposes will not be covered.

NO CONFLICT WITH NORMAL EXPLOITATION OF THE WORK

220. The nature of the type of new work created under this exception is such that it is unlikely to conflict with the normal exploitation of the original work. A newly created parody of another work is unlikely to be a substitute for the other, and indeed it could be argued that for a parody to be fully appreciated, the original must be reasonably well known and therefore have its own market in the first place.

DOES NOT UNREASONABLY PREJUDICE THE LEGITIMATE RIGHTS OF THE RIGHT HOLDER

221. Those whose works are well enough known to be the potential subject of parody may argue that they should be able to control such use to enable them to protect a potential source of revenue. It is difficult to quantify the economic impact on any specific right holder, but generally a more well known work is likely to be secure enough in its own markets so that any prejudice suffered is likely to be minimal. It is indeed possible that the parody may have the effect of enhancing the market for the original work. Although any new exception from the right to control access to a work has the potential to prejudice the rights holder, it seems unlikely that the impact of such an exception will constitute unreasonable prejudice, especially taking into account the fair dealing requirement. More importantly, parody – as a form of comment – is an important part of the tradition of freedom of speech which contributes to the cultural diversity of the UK. As such it can be regarded as a case in which the public interest lies in allowing the free use of the underlying work.
DIGITAL RIGHTS MANAGEMENT

222. The Copyright Directive is silent about the treatment of works covered by this exception and their relationship to the protection of DRM or rights management information. We propose that a parody exception, if introduced, should not affect the right holder’s ability to incorporate DRM or technological protection measures into their work. Accordingly the new section would not be included within Schedule 5A.
## ANNEX A
### LIST OF ORGANISATIONS TO WHICH THE CONSULTATION HAS BEEN SENT

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<tr>
<th>Advertising Producers Association</th>
<th>British Web Design and Marketing Association</th>
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<tr>
<td>Alliance Against IP Theft</td>
<td>Broadcasting, Entertainment, Cinematograph &amp; Theatre Union</td>
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<tr>
<td>Alternative Investigations Management Ltd</td>
<td>Business Application Software Developers Association</td>
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<td>Anti Copying in Design</td>
<td>Business in the Community</td>
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<td>Anti-Counterfeiting Group</td>
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<td>Arts Council of England</td>
<td>Cabinet Office</td>
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<td>Arts Council of Northern Ireland</td>
<td>Channel Four Television</td>
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<td>Arts Council of Wales</td>
<td>Channel 5 Broadcasting</td>
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<tr>
<td>Association for Learning Technology</td>
<td>Chartered Institute of Journalists</td>
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<tr>
<td>Association of the British Pharmaceutical Industry</td>
<td>Chartered Institute of Library &amp; Information Professionals</td>
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<tr>
<td>Association of Chief Police Officers</td>
<td>Chartered Institute of Library &amp; Information Professionals in Scotland</td>
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<tr>
<td>Association of Colleges</td>
<td>Chartered Institute of Library &amp; Information Professionals in Wales</td>
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<td>Association of Heads of University Administrators</td>
<td>Chartered Society of Designers</td>
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<td>Association of Independent Music</td>
<td>Christian Copyright Licensing International (Europe)</td>
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<td>Association of Learned and Professional Society Publishers</td>
<td>Cinema Exhibitors Association</td>
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<td>Association of Online Publishers UK</td>
<td>Commercial Radio Companies Association</td>
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<td>Association of Photographers</td>
<td>Confederation of British Industry</td>
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<td>Association of United Recording Artists</td>
<td>Consortium of University Research Libraries</td>
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<td>Authors’ Licensing &amp; Collecting Society</td>
<td>Consumers Association</td>
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<td>Bar Council</td>
<td>Convention of Scottish Local Authorities</td>
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<td>BECTA</td>
<td>Copyright Licensing Agency</td>
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<td>Copyright Promotions Licensing Group</td>
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<td>Bridgemans</td>
<td>CyMAL</td>
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<td>British Academy of Composers &amp; Songwriters</td>
<td>Defence Procurement Agency</td>
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<td>British Art Market Federation</td>
<td>Department for Business, Enterprise &amp; Regulatory Reform</td>
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<td>British Association of Picture Libraries &amp; Agencies</td>
<td>Department for Children, Schools and Families</td>
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<td>British Association of Record Dealers</td>
<td>Department of Culture Media &amp; Sport</td>
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<td>British Broadcasting Corporation</td>
<td>Design &amp; Artists Copyright Society</td>
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<td>British Chamber of Commerce</td>
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<td>British Computer Society</td>
<td>Directors &amp; Producers Rights Society</td>
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<td>British Equity Collecting Society</td>
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<td>Freshfields, Bruckhaus, Deringer</td>
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THE SIX CONSULTATION CRITERIA

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.

2. Be clear about what your proposals are, who may be affected, what questions are being asked and the timescale for responses.

3. Ensure that your consultation is clear, concise and widely accessible.

4. Give feedback regarding the responses received and how the consultation process influenced the policy.

5. Monitor your department’s effectiveness at consultation, including through the use of a designated consultation coordinator.

6. Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.

COMMENTS ABOUT THE CONSULTATION PROCESS

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

Geoff Miller
Consultation Co-ordinator
UK Intellectual Property Office
Concept House
Cardiff Road
Newport
South Wales
NP10 8QQ

E-mail: consultations@ipo.gov.uk
Fax: 0044 (0)1633 814232
Tel: 0044 (0)1633 811195
ANNEX C
PARTIAL IMPACT ASSESSMENTS OF:

EXTENDING COPYRIGHT EXCEPTIONS RELATING TO RECORDING BY EDUCATIONAL ESTABLISHMENTS OF BROADCASTS – RECOMMENDATION 2 41

EXTENDING COPYRIGHT EXCEPTIONS RELATING TO REPROGRAPHIC COPYING FOR EDUCATION – RECOMMENDATION 2 47

A PROPOSAL TO INTRODUCE A COPYRIGHT EXCEPTION FOR FORMAT SHIFTING – RECOMMENDATION 8 53

EXTENDING THE EXCEPTION FOR COPYING FOR RESEARCH AND PRIVATE STUDY – RECOMMENDATION 9 64

EXTENDING COPYRIGHT EXCEPTIONS RELATING TO PERMITTED ACTS FOR THE PURPOSES OF PRESERVATION – RECOMMENDATIONS 10A AND 10B 70

A PROPOSAL TO INTRODUCE A COPYRIGHT EXCEPTION FOR PARODY, CARICATURE AND PASTICHE – RECOMMENDATION 12 77
Summary: Intervention & Options

Department /Agency: UK Intellectual Property Office

Title: Impact Assessment of Extending Copyright Exceptions Relating to recording by educational establishments of broadcasts

Stage: Consultation
Version: 1
Date: 31 October 2007


Available to view or download at: http://www.hm-treasury.gov.uk/independent_reviews/gowers_review_intellectual_property/

Contact for enquiries: Joanne Holley
Telephone: 01633 814912

What is the problem under consideration? Why is government intervention necessary?
The copyright exception that allows educational establishments to record off-air broadcasts for educational purposes, disadvantages distance learners as the exception only allows the showing of such a recording at the premises of the establishment. Different treatment for distance learners (including vulnerable groups) seems unreasonable and is inconsistent with the Government's goal of promoting lifelong learning.

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

What policy options have been considered? Please justify any preferred option.
1. No change to copyright law.
2. Expand Section 35 of the Copyright, Designs and Patents Act 1988 ("CDPA") to enable the showing of broadcasts to distance learners via a VLE.
3. Expand Section 35 of the CDPA to enable the showing of broadcasts and on-demand material via a VLE.
4. As 2, but not limited to a VLE.
5. As 3, but not limited to a VLE.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects? As policy development is at an early stage, no date for review has been set.

Ministerial Sign-off For consultation stage Impact Assessments:

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

Signed by the responsible Minister:

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<table>
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<tr>
<th><strong>Policy Option:</strong></th>
<th><strong>Description:</strong> Extend Copyright Exceptions Relating to Education to Include Distance Learning</th>
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### ANNUAL COSTS

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<th>Description and scale of key monetised costs by ‘main affected groups’</th>
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<tr>
<td>One-off (Transition) Yrs</td>
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<td>Average Annual Cost (excluding one-off)</td>
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<th><strong>Total Cost (PV)</strong></th>
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Other key non-monetised costs by ‘main affected groups’

### ANNUAL BENEFITS

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<th>Description and scale of key monetised benefits by ‘main affected groups’</th>
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<td>One-off Yrs</td>
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<td>Average Annual Benefit (excluding one-off)</td>
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<th><strong>Total Benefit (PV)</strong></th>
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Other key non-monetised benefits by ‘main affected groups’

### Key Assumptions/Sensitivities/Risks

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

<table>
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</table>

### Impact on Admin Burdens Baseline (2005 Prices)

| Increase of | £ | Decrease of | £ | Net Impact | £ |

**Key:** Annual costs and benefits: Constant Prices (Net) Present Value
## Summary: Analysis & Evidence

### Policy Option: 1

**Description:** No change to copyright law

### ANNUAL COSTS

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**Total Cost (PV) £**

**Other key non-monetised costs** by 'main affected groups'

### ANNUAL BENEFITS

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**Total Benefit (PV) £**

**Other key non-monetised benefits** by 'main affected groups'

### Key Assumptions/Sensitivities/Risks

### ANNUAL BENEFITS

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<th>Price Base Year</th>
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<th>NET BENEFIT (NPV Best estimate) £</th>
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What is the geographic coverage of the policy/option? UK
On what date will the policy be implemented? 2009
Which organisation(s) will enforce the policy? Rights holders
What is the total annual cost of enforcement for these organisations? £
Does enforcement comply with Hampton principles? Yes/No
Will implementation go beyond minimum EU requirements? Yes/No
What is the value of the proposed offsetting measure per year? £
What is the value of changes in greenhouse gas emissions? £
Will the proposal have a significant impact on competition? Yes/No
Annual cost (£-£) per organisation (excluding one-off) Micro Small Medium Large
Are any of these organisations exempt? No No N/A N/A

### Impact on Admin Burdens Baseline (2005 Prices) (Increase - Decrease)

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<th>Increase of £</th>
<th>Decrease of £</th>
<th>Net Impact £</th>
</tr>
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**Key:** Annual costs and benefits: Constant Prices (Net) Present Value
Background

Section 35 of the Copyright, Designs and Patents Act 1988 (“CDPA”) provides an exception for educational establishments to record off-air broadcasts for educational purposes without infringing copyright. The exception does not apply if, or to the extent that a licensing scheme, certified by the Secretary of State, is in operation. Two organisations currently operate such a scheme. The first of these is the Educational Recording Agency (ERA) who represents many major broadcasters and rights holders representatives such as the BBC, Channel 4, Channel 5, the ITV network, The Performing Rights Society, the Authors’ Licensing and Collecting Society Limited etc. The second is the Open University. Information supplied by ERA illustrates that they provide licensing to around 36,500 educational establishments. Much of this was achieved through a method of blanket licensing and 171 of the 176 local education authorities in England and Wales utilised this blanket scheme. In addition, all primary and secondary schools in both Scotland and Northern Ireland are covered by such schemes. Numerous individual licenses are also issued to universities, colleges, independent schools, language and nursing colleges etc.

The Problem

Currently, the exception is limited insofar as the showing of such a recording must only take place at the premises of the establishment. Such a limitation does not allow a recording to be viewed off the premises through a “virtual learning environment” or VLE, for example. The independent Gowers Review of Intellectual Property received a number of responses to its call for evidence that raised this issue and called for the Government to modernise the CDPA. Based on these submissions, the Gowers Review team made the recommendation that Section 35, CDPA should be amended and the Government has agreed to take this recommendation forward.

The Policy Objective

The intended effect of these changes is to allow educational establishments to communicate recordings of broadcasts to authorised persons such as students via a secure network to off-site locations, without copyright in the broadcasts being infringed. Such changes support the government’s wider aims of promoting lifelong learning and encouraging the development of opportunities to learn beyond the formal school day. It is expected that the majority of educational establishments who currently make use of the licensing schemes operating in this area, will also wish to benefit from any expanded scheme developed to take advantage of the broader exception.

Impacts

Four distinct groups would be affected by such changes:

1. Rights owners whose interests are represented by either ERA or the Open University

Such rights holders will benefit from the likelihood of increased revenues resulting from extended licensing schemes and also increased certainty that their rights were not being infringed by educational establishments.

2. Rights owners who are not represented by either ERA or the Open University

Any rights holder who is not a member of the existing licensing schemes, but who wishes to assert their rights in this area, will remain free to establish their own licensing scheme or join one of the existing schemes.

3. Educational establishments/education authorities

Those educational organisations wishing to make recordings of broadcasts available over a secure network such as a VLE will be able to do so without infringing copyright. However, the work undertaken by the ERA (before the Gowers Review) on the possible extension their licensing scheme to VLEs
indicates that such extended licences will come at a higher price for educational establishments. ERA had proposed that such an extended licence would result in a tariff 50% higher than the tariff for the current licence.

Another consequence of extending this exception to permit educational establishments to communicate recordings of broadcasts over a VLE is to, in effect, indemnify such establishments from possible copyright infringements. As the legislation is currently drafted, even if a licence scheme were to operate that permitted the communication of recordings of broadcasts over a VLE, any works communicated that were not covered by the licence scheme would be an infringement of any rights that subsist in those works. An extension of the exception would allow the communication of such recordings to the extent that no license scheme existed, therefore permitting the educational establishment to communicate the broadcast without fear of conducting an infringing act.

4. Students and teachers

Extending this exception to permit the making available of recordings of broadcasts will particularly benefit those students who suffer from disabilities that prevent them attending the educational establishment, those that work from remote locations and those that require flexibility because of work or family commitments.

Specific Impact Tests

It is too early in the policy process to assess the specific impact tests. While we expect that this proposal will have insignificant implications for competition (because the number and range of rights holders involved will remain unaffected, and educational establishments will benefit equally from the proposal), no impact on race and gender equality, and a positive impact on equality (as it permits educational establishments to make broadcast material available in a more diverse range of circumstances thereby improving access to such material for the purposes of education), we need to consider further evidence before confirming these conclusions.

Request for evidence

As policy development is at a preliminary stage it is not been possible to prepare a comprehensive impact assessment or to estimate quantitatively the costs and benefits of the proposals. We seek evidence on matters such as:

- The percentage of broadcasts currently used by educational establishments that are covered by licensing schemes;
- The demand for using recordings of broadcasts in distance learning;
- The demand for distance learning generally and whether it is growing;
- Which social groups make the most use of distance learning? Are certain vulnerable groups disproportionately represented?
- What licensing schemes will be introduced as a direct result of expanding the exception, and the estimated administrative costs for those operating the licence schemes?
- The impact of using broadcasts for teaching on education outcomes;
- The price sensitivity of smaller educational establishments to prices of licence schemes;
Specific Impact Tests: Checklist

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

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

<table>
<thead>
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<th>Type of testing undertaken</th>
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<td>Rural Proofing</td>
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**Summary: Intervention & Options**

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<tr>
<td>UK Intellectual Property Office</td>
<td>Impact Assessment of Extending Copyright Exceptions Relating to Reprographic Copying for Education</td>
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<tr>
<td>Consultation</td>
<td>1</td>
<td>31 October 2007</td>
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**Available to view or download at:**
http://www.hm-treasury.gov.uk/independent_reviews/gowers_review_intellectual_property/

**Contact for enquiries:** Joanne Holley  
**Telephone:** 01633814912

**What is the problem under consideration? Why is government intervention necessary?**
The copyright exception that only allows educational establishments to make reprographic copies (hand outs) of passages from published literary, dramatic or musical works can disadvantage distance learners and limit the use of new technologies (such as interactive whiteboards) for education purposes.

**What are the policy objectives and the intended effects?**
The intended effect of these changes is to encourage greater use of new technologies by educational establishments by enabling them to communicate passages from published literary, dramatic and musical works to students via electronic whiteboards and virtual learning environments. The exception would only apply if a licensing scheme is not in place. Such changes support the government’s wider aims of promoting lifelong learning and encouraging the development of opportunities to learn beyond the formal school day.

**What policy options have been considered? Please justify any preferred option.**
1. Expand Section 36 of the Copyright, Designs and Patents Act 1988 to enable passages from published literary, dramatic or musical works to be communicated via interactive whiteboards and to distance learners via VLEs.
2. As above but to enable passages of all classes of works to be communicated.
3. As 1, but where communication to distance learners is not limited to via VLEs.
4. As 2, but where communication to distance learners is not limited to via VLEs.

Options 1 and 2 offer a way of delivering material in a controlled and secure environment.

**When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?**
As policy development is at an early stage, no date for review has been set.

**Ministerial Sign-off**

For consultation stage Impact Assessments:

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

Signed by the responsible Minister:

.............................................................................................................Date:
<table>
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<th>Summary: Analysis &amp; Evidence</th>
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<td><strong>Policy Option:</strong></td>
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### ANNUAL COSTS

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<th>Costs</th>
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**Description and scale of key monetised costs by ‘main affected groups’**

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**Description and scale of key monetised benefits by ‘main affected groups’**

### Key Assumptions/Sensitivities/Risks

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**What is the geographic coverage of the policy/option?** United Kingdom

**What is the total annual cost of enforcement for these organisations?** £

**Does enforcement comply with Hampton principles?** Yes/No

**Will the proposal have a significant impact on competition?** Yes/No

**Are any of these organisations exempt?** No No N/A N/A

**Impact on Admin Burdens Baseline (2005 Prices) (Increase - Decrease)**

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**Key:**
- Annual costs and benefits: Constant Prices
- (Net) Present Value
### Summary: Analysis & Evidence

**Policy Option:** No change to copyright law

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Other key non-monetised costs by 'main affected groups'

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Evidence Base (for summary sheets)

[Use this space (with a recommended maximum of 30 pages) to set out the evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Ensure that the information is organised in such a way as to explain clearly the summary information on the preceding pages of this form.]

Background
Copyright law permits reprographic copies of passages from published literary, dramatic or musical works to be made by educational establishments for educational purposes. The exception does not apply to the extent that a licensing scheme operates, such as that provided by the Copyright Licensing Agency ("CLA").

The Problem
Currently, the exception permits teachers to prepare ad hoc hard copy "hand outs" for their pupils consisting of extracts from books, plays or musical works. It does not cover making such copies available through technological aids such as interactive whiteboards and Virtual Learning Environments ("VLEs"). The independent Gowers Review of Intellectual Property received a number of responses to its call for evidence that raised this issue and called for the Government to modernise the Copyright, Designs and Patents Act 1988 ("CDPA"). Based on these submissions, the Gowers Review team made the recommendation that Section 36 of CDPA should be amended and the Government agreed to take this recommendation forward.

The Policy Objective
The intended effect of these changes is to allow educational establishments to communicate extracts of works to authorised persons such as students via a secure network to off-site locations, without copyright in the works being infringed and also allow teachers to display such extracts on an interactive whiteboard. Such changes support the government's wider aims of promoting lifelong learning and encouraging the development of opportunities to learn beyond the formal school day. It is expected that the majority of educational establishments who currently make use of the licensing schemes operating in this area, will also wish to benefit from any expanded scheme developed to take advantage of the broader exception.

Impacts
Four distinct groups would be affected by such changes:

1. Rights owners whose interests are represented by the Copyright Licensing Agency (CLA)
Such rights holders will benefit from the likelihood of increased revenues resulting from extended licensing schemes and also increased certainty that their rights were not being infringed by educational establishments.

Rights holders have concerns that by making copyright works available electronically, they will become more vulnerable to unauthorised copying and onward transmission. There is also a concern that educational establishments will extend its communications to students overseas where UK law would not extend.

2. Rights owners who are not represented by the CLA
Any rights holder who is not a member of the existing licensing schemes, but who wishes to assert their rights in this area, will remain free to establish their own licensing scheme or join the existing scheme.

3. Educational establishments/education authorities
Those educational organisations wishing to make copies of works available over a secure network such as a VLE or display on an electronic whiteboard will be able to do so without infringing copyright but the extension of licenses to cover this type of use will invariably attract an additional cost. The CLA has undertaken some work relating to trialling licenses for digital copying in the educational sector which may lead to a broadening of their scheme. This will invariably lead to an additional cost for educational establishments, but no estimates are currently available.

Another consequence of extending this exception to permit educational establishments to communicate extracts of works over a VLE is to, in effect, indemnify such establishments from possible copyright
infringements. As the legislation is currently drafted, even if a licence scheme were to operate that permitted such communications, any works communicated that were not covered by a licence scheme would be an infringement of any rights that subsist in those works. An extension of the exception would allow the communication of such extracts to the extent that no license scheme existed, therefore permitting the educational establishment to communicate extracts of works without fear of conducting an infringing act.

4. Students and teachers

Extending this exception to permit the making available of extracts of works will particularly benefit those students who suffer from disabilities that prevent them attending the educational establishment, those that work from remote locations and those that require flexibility because of work or family commitments.

Specific Impact Tests

This proposal will have insignificant implications for competition because the number and range of rights holders involved will remain unaffected. Educational establishments will benefit equally from the proposal and will not affect the current balance of competition that exists in education. The proposal will have no impact upon rights holders’ incentives to continue to be creative.

In relation to race and gender equality, this proposal has no impact. In relation to disability equality, the proposal has a positive impact as it permits educational establishments to make passages of works available in a more diverse range of circumstances thereby improving access to such material for the purposes of education.

Request for evidence

As policy development is at a preliminary stage it is not been possible to prepare a comprehensive impact assessment or to estimate quantitatively the costs and benefits of the proposals. We seek evidence on matters such as:

- The percentage of extracts of published works currently used by educational establishments that are covered by licensing schemes;
- The demand for communicating extracts of published works digitally to distance learners, and for displaying such extracts on interactive whiteboards;
- The demand for distance learning generally and whether it is growing;
- Which social groups make the most use of distance learning? Are certain vulnerable groups disproportionately represented?
- What licensing schemes will be introduced as a direct result of expanding the exception, and the estimated administrative costs for those operating the licence schemes?
- The impact on education outcomes; and
- The price sensitivity of smaller educational establishments to prices of licence schemes.
Specific Impact Tests: Checklist

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

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

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<td>UK Intellectual Property Office</td>
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<td></td>
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<table>
<thead>
<tr>
<th>Contact for enquiries:</th>
<th>Telephone:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Joanne Holley</td>
<td>01633 814912</td>
</tr>
</tbody>
</table>

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

Copyright law does not allow the practice of “format shifting”. Yet many consumers currently copy music they have legitimately purchased on a CD to an MP3 player without realising it is not permitted. Others question the fact that an act which is considered to be reasonable, including by the music industry, is illegal. This is creating a lack of respect for copyright which is seen as too rigid and not adapting to the needs of both right holders and consumers. Copyright provides rights that go beyond what is necessary to incentivise future creative activity - an exception is needed.

### What are the policy objectives and the intended effects?

To introduce an exception into copyright law allowing consumers to copy legitimately owned copyright works into other formats for their own personal use, increasing consumer benefit without causing significant income loss to investors in creative activity. This would, for example, allow consumers to copy films and sound recordings from one format to another for playback on different devices. Depending on the results of the consultation, format shifting might also be considered in respect of other types of work such as books, art works and photographs.

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

1. No change to copyright law;
2. Allow format shifting for all works;
3. Allow format shifting for sound recordings and film only;
4. As for options 2 or 3 and applying to works published after the date the exception is introduced, or purchased after that date, or applying to works regardless of when they are purchased or published.

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

As policy development is at an early stage, no date for review has been set.

### Ministerial Sign-off

For consultation stage Impact Assessments:

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

Signed by the responsible Minister:

........................................................................................................................................................................Date:
**Summary: Analysis & Evidence**

**Policy Option:** 3  
**Description:** Format shifting for sound recordings and films

<table>
<thead>
<tr>
<th>ANNUAL COSTS</th>
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<tbody>
<tr>
<td><strong>One-off (Transition) Yrs</strong></td>
<td></td>
</tr>
<tr>
<td>£100,000</td>
<td></td>
</tr>
<tr>
<td><strong>Average Annual Cost (excluding one-off)</strong></td>
<td></td>
</tr>
<tr>
<td>£</td>
<td></td>
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</tbody>
</table>

**ANNUAL BENEFITS**

| Description and scale of key monetised costs by 'main affected groups.' Estimating quantitatively any effects that format shifting may have on the music or film industry is not possible within the scope of this partial impact assessment. However, there is a one-off cost for awareness raising in respect of the changes to the law. |

<table>
<thead>
<tr>
<th>One-off Yrs</th>
<th>£</th>
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**ANNUAL BENEFITS**

| Description and scale of key monetised benefits by 'main affected groups.' As for costs, accurate information is not available at this stage of the policy process. |

<table>
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<tr>
<th>One-off</th>
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Other key non-monetised costs by ‘main affected groups’

Other key non-monetised benefits by ‘main affected groups’ Consumers will be able to listen or view content in different formats, taking advantage of different playback devices, without breaking the law. Greater respect for copyright law should result.

**Key Assumptions/Sensitivities/Risks**

Policing or enforcing the current restriction on format shifting is virtually impossible. Private format shifting constitutes largely additional demand driven by new playback devices using different digital formats. As such, it does not substitute for previously existing demand for purchased music recordings.

**Price Base Year**

**Time Period Years**

**Net Benefit Range (NPV)**

**NET BENEFIT (NPV Best estimate)**

<table>
<thead>
<tr>
<th>What is the geographic coverage of the policy/option?</th>
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<tbody>
<tr>
<td>On what date will the policy be implemented?</td>
<td>2009</td>
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<tr>
<td>Which organisation(s) will enforce the policy?</td>
<td>Right holders</td>
</tr>
<tr>
<td>What is the total annual cost of enforcement for these organisations?</td>
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</tr>
<tr>
<td>Does enforcement comply with Hampton principles?</td>
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<tr>
<td>Will implementation go beyond minimum EU requirements?</td>
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</tr>
<tr>
<td>What is the value of the proposed offsetting measure per year?</td>
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</tr>
<tr>
<td>What is the value of changes in greenhouse gas emissions?</td>
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</tr>
<tr>
<td>Will the proposal have a significant impact on competition?</td>
<td>No</td>
</tr>
<tr>
<td>Annual cost (£-£) per organisation (excluding one-off)</td>
<td>Micro</td>
</tr>
<tr>
<td>Are any of these organisations exempt?</td>
<td>No</td>
</tr>
</tbody>
</table>

**Impact on Admin Burdens Baseline (2005 Prices)**

<table>
<thead>
<tr>
<th>Increase of</th>
<th>£</th>
<th>Decrease of</th>
<th>£</th>
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</thead>
<tbody>
<tr>
<td><strong>Net Impact</strong></td>
<td>£ N/A</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Key:** Annual costs and benefits: Constant Prices  (Net) Present Value
### Summary: Analysis & Evidence

#### Policy Option: 1
**Description:** No change to copyright law

| Description and scale of key monetised costs by 'main affected groups' | Not available |
|---|

#### ANNUAL COSTS

<table>
<thead>
<tr>
<th>One-off (Transition)</th>
<th>£</th>
</tr>
</thead>
<tbody>
<tr>
<td>Average Annual Cost (excluding one-off)</td>
<td>£</td>
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</table>

#### ANNUAL BENEFITS

<table>
<thead>
<tr>
<th>One-off</th>
<th>£</th>
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</thead>
<tbody>
<tr>
<td>Average Annual Benefit (excluding one-off)</td>
<td>£</td>
</tr>
</tbody>
</table>

#### Other key non-monetised costs by 'main affected groups'
Consumers will not legally be able to format shift works for consumption on more convenient devices, but are likely to do so anyway. Pursuing this option would send a mixed message - that format shifting is not a problem but is still illegal. This would do nothing to encourage respect for copyright law.

#### Other key non-monetised benefits by 'main affected groups'
No awareness raising on the changes to the law are required.

### Key Assumptions/Sensitivities/Risks
Consumers will not pay for material in more than one format and will continue to format shift. Failure to introduce an exception would make activity, considered reasonable by consumers and industry, illegal.

### Price Base Year
<table>
<thead>
<tr>
<th>Time Period Years</th>
<th>Net Benefit Range (NPV)</th>
<th>NET BENEFIT (NPV Best estimate)</th>
</tr>
</thead>
<tbody>
<tr>
<td>£</td>
<td>£</td>
<td></td>
</tr>
</tbody>
</table>

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

### Impact on Admin Burdens Baseline (2005 Prices)
**Increase of £**
**Decrease of £**
**Net Impact £**

<table>
<thead>
<tr>
<th>Key:</th>
<th>Annual costs and benefits: Constant Prices</th>
<th>(Net) Present Value</th>
</tr>
</thead>
</table>
Evidence Base (for summary sheets)

Introduction

1. The Gowers Review of Intellectual Property made a number of recommendations to reform copyright law to provide greater balance and flexibility in the intellectual property (“IP”) system by enabling consumers to use copyright material in ways that do not damage the interests of right holders. One recommendation was the introduction of a “format shifting” exception.

2. This partial impact assessment (“IA”) seeks evidence on the impact of introducing a format shifting exception for personal use, and puts forward three main options: (1) do nothing, (2) provide a format shifting exception for all works, or (3) allow format shifting of sound recordings and films only.

3. At this stage we do not have enough evidence to prepare an IA for the second option (format shifting for all works), so the preferred option is, by default, format shifting for sound recordings and films only. As part of the ongoing policy development process, the UK-IPO will consult stakeholders and seek evidence to build on the partial IA for option two and quantify the net benefits of this option, relative to the do nothing option. We will also gather evidence on the viability of option three.

4. The remainder of this document analyses the impact of a private format shifting exception for sound recordings and film on the groups of society that it would affect: sound recording and film businesses, artists and consumers.

The problem

5. Advances in digital technologies have given rise to new ways of consuming copyright protected material such as music and film. This has given rise to demand for content to be transferred into different formats (for example from CD to an MP3 file) to take advantage of new and more convenient playback devices. Currently the act of format shifting infringes the exclusive right of a copyright owner to copy their works, as changing the format results in a copy of the work being made.

6. The Gowers Review found that format shifting for personal use is commonly perceived to be legitimate use. According to evidence from the British Phonographic Industry (“BPI”) and the International Federation of the Phonographic Industry (“IFPI”) to the Gowers Review, the industry has never pursued anyone for copying within such boundaries and does not intend to do so. This suggests there is a discrepancy between copyright law and mutually accepted market practices.

The proposal

7. The consultation to which this impact assessment is attached suggests a limited format shifting exception that enables a person who owns a legitimate (not pirated) copy of work to copy that work into another format. Format shifting would only apply for personal or private use, so format shifted copies could not be made for third parties (including family and friends), and third parties could not make copies on behalf of consumers. The exception would not allow consumers to override technological protection measures or digital rights management information where these technologies had been applied by copyright owners to prevent format shifting.

The policy objective

8. The policy objective is to adjust existing copyright law to be fit for the digital information age and to address any excessive restrictions on consumer use that are unnecessary for the purpose of ensuring sufficient creative output in the future. The introduction of a format shifting exception would re-define the scope of copyright protection to take account of new technological opportunities, but only to the extent that this potentially increases consumer benefits without causing any significant income loss to producers.
Rationale for Government Intervention

9. As with other forms of IP protection, the economic rationale for copyright protection is the perceived market failure to generate a sufficient level of creative works. Copyright provides limited monopoly rights to incentivise the production of or investment in creative works that society wants and needs. Without copyright protection competitors would soon be able to offer the same good for a considerably lower cost as they would not have incurred the initial cost of creation. This would discourage investment in creative activity, and the total amount of creative output available would be less than what would be socially desirable.

10. However, copyright protection creates monopolies at a cost to consumers. This can include the social costs of restricting access, the costs of restricting follow-on creation or cumulative innovation, welfare loss due to inefficient resource allocation and transaction costs of maintaining the system (protection and enforcement). Copyright therefore has limits and exceptions; even though an appropriate level of protection is vital to ensure a socially desirable level of creative output, the copyright system needs to be designed in such a way that it does not impose undue costs to consumers. Laws that grant excessive rights beyond this purpose should be abandoned.

11. Applied to the issue of format shifting this means that if restrictions on format shifting for personal purposes are not essential for ensuring sufficient financial returns for creators and right holders they should be abandoned.

Options

12. The consultation considers a number of options for taking forward the format shifting proposal:

   Option one: no change to copyright law. There is no non-legislative route available to achieve the policy objective. Some industry sectors have in the past said they would consider a block licence approach allowing people to copy for private purposes but a workable model has never been developed. It is likely that consumers would be unwilling to pay for what they believe is a legitimate use of purchased music.

   Option two: allow a format shifting exception for all works. This would allow format shifting for personal use in relation to all classes of copyright works including literary, dramatic, musical and artistic works, sound recordings and films.

   Option three: allow format shifting of sound recordings and films only

13. In relation to options two and three there are three further options relating to when the exception would have effect:

   • Allow format shifting of works published after the date the exception is introduced;
   • Allow format shifting of works purchased after the date the exception is introduced; or
   • Allow format shifting for all existing and prospective works.

Impacts of the preferred option

14. We have identified three major groups that would be affected by this proposal: consumers, the music industry and the film industry. Artists and the producers of format shifting and play back devices are also affected but to a smaller degree.

15. Our overall preliminary assessment is that the introduction of a limited format shifting exception for music and film will increase total welfare and not impact negatively on copyright owners. In reaching this conclusion we have considered the economic rationale for copyright protection and a number of studies and surveys that have looked at the effects of the digitisation of music and film, the use of the internet, physical and online piracy and illegitimate file sharing. From this information we have derived a number of principles to assess the impact of the introduction of the exception (considered below).

16. We have not been able to estimate quantitatively the effects that format shifting may have had on the music or film industries. This is because there are no studies available that have focused on format shifting. While we might be able to do an ad-hoc calculation based on the studies noted above and market data, this would not generate an accurate assessment. We therefore seek quantitative evidence from respondents to the consultation on the potential impacts.
Analysis

17. Available survey data has been used to consider the following factors:
   - The demand for and existence of format shifting;
   - The drivers for demand and whether it is expected to grow;
   - The possible effects on the markets for recorded music and film (including impacts on recording companies, artists and consumers);
   - Consumer attitudes; and
   - The use of digital rights management and technological protection measures.

18. From this analysis a number of principles have been identified which can be used as a testing tool for a format shifting exception when exploring the impact of the exception on different groups of society, both in terms of scope and scale. If all questions but the last can be answered with “yes”, and the last question does not lead to the conclusion that format shifting has caused a downturn in sales, it would suggest that the introduction of a private format shifting exception for a specific market would be reasonable. Our preliminary assessment of these principles in relation to the recorded music and film industries is that the introduction of the exception would appear to be reasonable.

Principles

- Do consumers own legitimate copies (i.e. not pirated or copied or rented)?
- Is there a perceived need or demand for format shifting from such copies?
- Does format shifting only service private or personal purposes (not commercial or for friends and family)?
- If yes, is it realistic to assume that format shifting is already happening?
- Is the technology that is driving the demand expected to expand in the future?
- Is it realistic to assume that the majority of this demand for copies in different formats is “additional demand” to the previous market situation (i.e. a format shift does not substitute demand that existed before the introduction of the ability to format shift)?
- What has been the revenue development of the industry? Can it credibly be linked to the new technologies and increased format shifting?

The evidence base

19. This partial impact assessment is based on evidence presented to the Gowers Review and consumer surveys into the uses and preferences in relation to new technologies in the recorded music and film markets. These include:
   - The European Consumer Survey 2006 into Digital Music Usage and Digital Rights Management by Indicare, commissioned by the European Commission (“the Indicare Study”);
   - The Digital Music Survey conducted by Entertainment Media Research in three consecutive years (2005 to 2007), sponsored by the legal consultancy Olswang (“the Olswang Survey”);
   - The Music Consumer Survey 2005 conducted by Jupiter Research and commissioned by IFPI (“the Jupiter Survey”).
   - The European Consumer Survey into Digital Video Usage and Digital Rights Management in 2006, commissioned by the European Commission (“the Indicare Film Survey”);
   - The OECD report on digital film and video 2007; and

Recorded music

The demand for and existence of format shifting

20. Evidence to the Gowers Review, including from IFPI and BPI, acknowledges that format shifting is happening. The Indicare, Olswang and Jupiter studies confirm this.

21. The Indicare study found that 64 per cent of internet users in the UK have used a computer to listen to music or to copy CDs. It also found that format shifting from the personal CD collection was the
most important source of digital music (82 per cent had transferred their own CDs into digital files at some point within the past six months) and 75 per cent of UK digital music users make their own CD mixes. Commercial services such as online music stores, subscription services or mobile music services ranked the lowest sources of digital music. The Indicare Study also identified a high demand for transferring music between devices, with about 86 per cent of digital music users stating that this is important to them.

22. The Olswang Survey found that 83 per cent of consumers had copied at least one privately owned CD and that 38 per cent had format shifted their entire collection. Transferring music between devices was also a strong theme in this study, and in the Jupiter Survey where IFPI concluded that there is a strong demand for transferring music between different listening devices which is expected to grow further in the future (see IFPI Digital Music Report 2006).

23. The fact that all three surveys were limited to internet users somewhat qualifies the results, however, it can still be concluded that at least some forms of format shifting such as copying from CD into digital files is already taking place, and among more ICT savvy users to a large degree.

The drivers for demand and whether it is expected to grow

24. The Indicare, Olswang and Jupiter surveys found that transferability between different devices and the rise of portable digital music players are key factors in meeting future consumer demand. This supports the assumption that a demand for private format shifting is driven by a new set of technological opportunities, in particular MP3 players and music enabled mobile phones.

25. The 2007 Ofcom Communications Report shows growth in ICT, including a dramatic increase in ownership of MP3 players in the UK from two per cent in 2000 to 40 per cent in the first quarter of 2007. The market for portable music players (such as iPod) is expected to rise for a short while further, and there is even more scope for uptake with 3G enabled mobile phones and personal digital video recorders. Another indicator that these technologies will continue to rise is the strong uptake among teenagers.

26. This survey information leads to the conclusion that if there is a connection between consumer demand for format shifting and the spread of new technical devices, then demand for format shifting is likely to rise further in the future.

The possible effects on the market

27. The impact of format shifting exception has been considered in relation to its effect on recording companies, artists and consumers.

Recording companies

28. As noted above, estimating quantitatively any effects that format shifting may have had on the music recording market or the wider music industry is not possible within the scope of this partial impact assessment. This is because there are no studies available that focus on format shifting. Most studies have looked at the effects of digitisation on music or the use of the internet and broadband in general and the effects of physical and online piracy and illegitimate file sharing. It is difficult to attribute market movements to format shifting in isolation as a number of market developments have impacted simultaneously on the market for recorded music. Apart from the above mentioned advent of digitisation and broadband, internet technologies (that have arguably also given rise to increased online file-sharing and other piracy) and physical piracy have also negatively affected the returns of the recorded music industry. Other factors with a significant impact include the recent entry of large non-specialised retailers into the music retail market, and shifts in consumers’ leisure expenditure between different forms of entertainment. For example, spending may have shifted between recorded music and other forms of music consumption such as live music concerts and merchandising (The Economist reported in July 2007 that artists’ income streams over the last seven years have shifted away from recorded music sales as their main income source towards concert tours, merchandising and endorsements).

29. Annual sales figures for the recorded music industry, published by IFPI, show that retail music sales have been falling since 2004. This is generally interpreted as an effect of the explosive growth of the online music market, where declining sales of physical music recordings have not yet been fully compensated by revenues from online music sales. Online music downloads are usually considerably cheaper (due to lower production and distribution costs) than physical copies such as CDs. While illegitimate music downloading and file sharing have also been blamed for the decline in sales (IFPI Digital Music Reports), format shifting has not been mentioned in this context. This
supports the suggestion made above that it is not possible to attribute movements in recorded music returns to format shifting in isolation.

30. The Olswang Survey asked consumers about their future expected spending on music (including CDs and legal downloads). It found that 64 percent would continue to buy CDs at the same rate as previously, 44 per cent said downloading had decreased the amount of CD’s they purchased, and 54 per cent thought downloading had no effect on their total spending on music (24 per cent thought it decreased it and 22 per cent said it increased it). These findings show that the sale of CDs has been affected by online music products, and that some of the spending has been redirected to the online products. The differences in the shares of individuals spending more or less money as a result of downloading are too small to conclude that consumers do spend less on music than previously. If on the whole individuals do not spend less money on music than previously, it would be legitimate to assume that format shifting is additional demand. In other words that music that is format shifted between a PC and a digital music player does not substitute existing demand for music but represents additional demand that didn’t exist previously.

Artists

31. It is also important to consider the impacts on artists, as the purpose of copyright is to ensure a sufficient supply of creative activity. Traditional business models and relationships between artists and recording companies are changing as a result of digital technologies. The value added by recording companies can now, to some degree, be replaced by direct contact with consumers via the internet. Some artists and independent labels consider recorded music a form or marketing rather than an important revenue stream (e.g. Prince’s Planet Earth CD given away in a newspaper and to concert goers). In this context, format shifting does not seem to interfere with the ability of artists to recoup their investments to a sufficient level. It is, however, important to recall the finding from the OECD’s digital music report, that most artists are still supported by recording companies.

32. The above analysis does not identify any reason to believe that recording companies or artists would be negatively affected by the introduction of the proposed format shifting exception. As format shifting makes music available on different playback devices that have relatively recently become available, it is mainly a response to additional demand that did not exist previously. This additional demand has been created as direct result of the introduction of the new playback devices. This demand is arguably on top of the existing demand for music to be played on a single device.

33. The move from LPs to CDs shows that there are conceivably cases in which consumers would indeed be willing to pay a second time for music they already own in a particular format. When CDs were launched as a new format, sales figures indicated that consumers did buy CDs that they already owned on LP or cassette. But in that case there was no alternative – affordable and easy to use technology was not available to enable consumers to format shift themselves. Music recording companies were therefore able to appropriate the value of the additional demand for the new format. In the present case of digital music files, recording companies are in competition with technology that enables consumers to format shift themselves. Some of the value of the additional demand is arguably captured by providers of the necessary technology for private format shifting (e.g. software, computer hardware and portable devices). As long as this does not impede the creators’ ability to receive sufficient compensation for their initial investment which would stifle the supply of new music in the future - and so far there is no evidence to suggest that there is a reduced supply of new music as a result of financial damages due to format shifting - there is no economic reason to intervene in these market allocation processes.

Consumers

34. The Indicare and Olswang Surveys considered the impact of format shifting on the willingness of consumers to pay for different music products, although “willingness to pay” results are not always reliable. The Indicare Study indicated that consumers would pay more for music products that provide more flexibility in terms of copying, sharing and format shifting. This suggests that format shifting is of additional value for consumers.

35. It is not possible, however, to determine the concrete magnitude of the additional consumer benefit from the data available. The value could be approximated by rough indicators such as the value of the technical equipment used to format shift (e.g. software and CD burners), but this would not be reliable as these devices also serve other purposes and assumptions would have to be made about the value share that could be attributed to format shifted music.
Film

The demand for and existence of format shifting

36. The Indicare Film Survey found a growing demand for format shifting and transferability of audiovisual content between different devices, albeit on a lower level than for digital music. Twenty per cent of UK internet users stated they had consumed digital video content through a portable player, and a further 24 per cent indicated their intention to do so in the future. The survey also found that personal DVD collections are an important source for digital video content, showing the existence of format shifting.

The drivers of demand and whether it is expected to grow

37. Demand is likely to increase with advances in consumer electronics as consumers gain more experience with digital content. An OECD report on digital film and video reaches similar conclusions and predicts that the emergence of new devices capable of replaying audiovisual content may also contribute to a growing demand for format shifting that may eventually catch up with recorded music (for example, the iPod now incorporates audiovisual replay). That said, there are arguments that the film and video industry may not follow the same path as the music industry. A much larger part of film and video content is distributed by broadcasting (TV, cinema, online streaming, video on demand) or rentals, where consumers do not technically own a “copy” of the content. As a result the demand to format shift copies of film and video content (legitimately acquired etc) is likely to remain lower than for the music market.

The possible effects on the market

38. Unlike the music industry where there is clear evidence that format shifting is happening, it is difficult to observe effects on the film industry. This may be because DRM is more commonly used for DVDs than for music CDs. As a result a format shifting exception would not apply to a large share of the film and video market. The Indicare Film Survey suggests that portability is not yet a major factor for video consumers, meaning that the added consumer benefit is likely to be much smaller than for music.

39. Despite the lack of concrete figures, a tentative conclusion is that a format shifting exception is unlikely to cause any damage to content suppliers. At least at the moment, the film and video industry is likely to be much less affected by a format shifting exception due to the lack of technological opportunities for consumers, the focus of existing business models on broadcasting and renting services and the nature of the product itself. In order to derive a firmer conclusion about the future, further evidence on consumer expectations and future developments in consumer electronics would be beneficial.

Consumer attitudes

40. It is a basic assumption of human behaviour that individuals will break the law if the expected benefit is higher than the risk of detection and the scale of the potential punishment (Beckers model of crime, 1968). Enforcing copyright has already become difficult in the digital age. The technical possibilities for copying exist and are easily accessible, and the perceived risk of detection for small-scale copying for private purposes is negligible. Under such conditions, most rational utility-maximising consumers would be expected to copy beyond the bounds of the proposed format shifting exception (for example, to make copies for family and friends).

41. The above analysis suggests that careful communication of the format shifting exception is key, and it is proposed that a format shifting exception would be accompanied by a joint government and industry copyright awareness campaign. This would address the issue that while they do not mind limited format shifting, the industry is concerned that legalising format shifting would create a false expectation that more than format shifting was permitted. The cost for accompanying publicity campaigns would constitute a one off cost of introducing a format shifting exception. It is also considered that this publicity campaign, which would also include the other proposed changes to copyright law (proposed in the attached consultation document), would address any additional administrative burdens to business of understanding the law changes. The campaign would, therefore, off-set any administrative burdens.

Digital Rights Management

42. The consultation document proposes that digital rights management (“DRM”) or technological protection measures applied to works, which prevent copying and format shifting, cannot be circumvented to take advantage of the format shifting exception. This will allow copyright owners to
differentiate their products (and prices) in terms of format shifting opportunities. For example, heavy music consumers may be willing to pay more for music or film with more flexible user permissions, while occasional consumers may be content with paying less for a song that they can only listen to through one single device. Without the use of DRM, the music industry may only be able to offer unrestricted content for a higher price at which a number of occasional consumers may not choose to buy, thus lowering the total amount of music consumed and the total consumer welfare.

43. According to the latest annual digital music report by IFPI (2007), the “vast majority of consumers acquiring music via digital delivery are doing so via channels that use DRM [including iPod and mobile handsets] … “. It is likely that consumers may feel less compelled to try and override DRM for the purposes of format shifting as it poses an extra hurdle, and awareness of wrongdoing may be larger when consciously trying to break a technological barrier. It is also the case that many consumers will not have the technical means or knowledge needed to break DRM protection.

Specific impact tests

44. The proposed format shifting exception will not have any significant impacts on competition, as the exception will not limit the number or range of suppliers, or the ability of suppliers to compete. Rather, the impact is on the ability of all suppliers to exploit a potential new revenue stream for format shifting of their works. The fact that users of copyright works will not be able to format shift where DRM or technological protection measures have been applied could raise minor and indirect competition concerns where certain suppliers may control access to DRM technologies or where DRM causes interoperability issues between different digital formats and devices.

45. The evidence available does not suggest this is a major concern, and there does not seem to be a direct relationship between the introduction of a format shifting exception and competition barriers resulting from restrictive DRM. We welcome further evidence on this point from consultees.

46. In relation to race, disability and gender quality and human rights, this proposal has no impact.
Specific Impact Tests: Checklist

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

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

<table>
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<td>No</td>
</tr>
<tr>
<td>Small Firms Impact Test</td>
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<td>Legal Aid</td>
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<td>Sustainable Development</td>
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<td>Carbon Assessment</td>
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<tr>
<td>Health Impact Assessment</td>
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<td>Race Equality</td>
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<tr>
<td>Rural Proofing</td>
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</tbody>
</table>
What is the problem under consideration? Why is government intervention necessary?

Copyright law currently provides that a person can copy certain types of copyright works for the purposes of non-commercial research or private study (if such copying amounts to fair dealing). The exception only applies to certain types of works and does not cover sound recordings, films and broadcasts.

The Gowers Review of Intellectual Property proposed that the exception be widened to cover all types of work - as the current law was inconsistent and was causing problems for researchers and students.

What are the policy objectives and the intended effects?

The objective is to prevent situations where a researcher or student needs to make a copy of a sound recording, film or broadcast for non-commercial research or study purposes but is prevented from doing so because of the need to seek the permission of the rights holder.

The intended effects are wider access to required materials for those engaged in scholarly activities leading to improved educational outputs and skills for individuals and society overall. Minimise impact on rights holders by addressing scope for misuse including copying for entertainment purposes not study purposes.

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

At this stage there are three broad policy options under consideration:

Option 1: extend the exception on copying for research and private study to cover copying of sound recordings, films and broadcasts for non-commercial research and private study.

Option 2: no changes to current exception.

Option 3: extend to cover these new types of works but limit eligibility - to prevent misuse or abuse.

A number of broad policy questions are being asked during this initial consultation to help develop detailed options for the next round of consultation.

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

As policy development is at an early stage, no date for review has been set.
### Summary: Analysis & Evidence

<table>
<thead>
<tr>
<th>Policy Option:</th>
<th>Description:</th>
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</table>

#### ANNUAL COSTS

- **One-off (Transition)**: £
- **Yrs**:  
- **Average Annual Cost (excluding one-off)**: £

**Total Cost (PV)**: £

Other **key non-monetised costs** by ‘main affected groups’

#### ANNUAL BENEFITS

- **One-off**: £
- **Yrs**:  
- **Average Annual Benefit (excluding one-off)**: £

**Total Benefit (PV)**: £

Other **key non-monetised benefits** by ‘main affected groups’

#### Key Assumptions/Sensitivities/Risks

#### Price Base Year

<table>
<thead>
<tr>
<th>Year</th>
<th>Time Period</th>
<th>Net Benefit Range (NPV) £</th>
<th>NET BENEFIT (NPV Best estimate) £</th>
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</table>

#### What is the geographic coverage of the policy/option?
- United Kingdom

#### On what date will the policy be implemented?
- 2009

#### Which organisation(s) will enforce the policy?
- Right holder, libraries

#### What is the total annual cost of enforcement for these organisations?
- £

#### Does enforcement comply with Hampton principles?
- Yes/No

#### Will implementation go beyond minimum EU requirements?
- Yes/No

#### What is the value of the proposed offsetting measure per year?
- £

#### What is the value of changes in greenhouse gas emissions?
- £

#### Will the proposal have a significant impact on competition?
- Yes/No

#### Annual cost (£-£) per organisation (excluding one-off)

<table>
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<tr>
<th>Micro</th>
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<th>Medium</th>
<th>Large</th>
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</tbody>
</table>

#### Are any of these organisations exempt?
- No No N/A N/A

#### Impact on Admin Burdens Baseline (2005 Prices)

<table>
<thead>
<tr>
<th>Increase of £</th>
<th>Decrease of £</th>
<th>Net Impact £</th>
</tr>
</thead>
</table>

**Key:**
- Annual costs and benefits: Constant Prices
- (Net) Present Value
Evidence Base (for summary sheets)

[Use this space (with a recommended maximum of 30 pages) to set out the evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Ensure that the information is organised in such a way as to explain clearly the summary information on the preceding pages of this form.]

Introduction

A number of respondents to the calls for evidence under the Gowers Review of Intellectual Property raised specific issues about the scope of the current exception on research and private study (section 40 of the Copyright, Designs and Patents Act 1988 ("CDPA")). The Review found that the current arrangements (which do not cover sound recordings and film) were inconsistent and could be causing problems in using materials for genuine academic purposes. Concern was also voiced about the impact on the cost of negotiating rights for sound recordings and film. To address these issues the Gowers Review recommended extending the current exception for research to cover all forms of content.

The high level recommendation made by the Gowers Review in this area raises numerous issues about the correct scope and form of an expanded exception for research and private study, making it difficult to develop detailed policy proposals on how the recommendation might be taken forward. As such, we have set out a number of broad policy proposals on which we are seeking views.

- What benefits can the new exception be expected to deliver?
- Should the new exception cover both research and private study?
- Should all forms of content be covered?
- Should the exception cover all fields of study or just specific areas?
- What might be the impact of the new exception on rights holders and other affected parties?
- What action, if any, should be taken to address possible concerns about misuse of the new exception?

In answering these questions and developing our policy proposals we need to understand the expected impact of such changes on rights holders, on researchers and students and on other affected parties such as librarians.

Further analysis and quantification of possible impacts will be required as policy proposals emerge. However at this stage it is helpful to identify the key parties that are likely to be affected by proposals in this area and some of the possible costs and benefits that might result.

Impacts

The groups mentioned below are likely to be affected by the introduction of an expanded exception in this area, although the impact is expected to vary depending on the detailed nature of the proposal. For example the impact on libraries in terms of potential liabilities, staffing and resources, of a lengthy validation and verification process before copying a work for a student is likely to be different to those arising from the current arrangements under section 40 of the CDPA or from new rules which simply require the researcher or student to provide proof of registration for study with an educational establishment.

It is worth noting at this early stage that it may be extremely difficult to monetise some of the possible costs or benefits of extending this exception.

Researchers and students

- Researchers and students will benefit from:
  - Being able to access and use works that they cannot currently use – building knowledge/expertise and skills for use in the marketplace; and
  - Reduced transaction costs in accessing and using works where permission is obtained today.
Some students will benefit more than others from such an exception – for example in areas where current rules represent real barriers to development of new restoration techniques for archive film.

The approach adopted in relation to the issue of digital rights management (“DRM”) may have a negative impact on researchers and students if a DRM workaround solution in not applied – as they will be unable to make copies.

If a DRM workaround solution is provided then researchers and students may be required to make detailed applications to rightsholders when they request unprotected copies of an extract, in order to allow the rightsholders to be satisfied that the copy is indeed needed. Such arrangements will have transaction costs.

A broader category of researchers and students may be further impacted if changes are also made to DRM workaround arrangements for literary and other works (which are covered by the exception today) in order to ensure consistency of approach.

**Society overall**

- Society overall will benefit from increased education and skills derived from use of these works for scholarly purposes.

**Rights holders for sound recordings, films and broadcasts**

- Right holders may lose future revenue:
  - where a person would previously have paid a licence fee to allow them to use the work (this is likely to be relatively small);
  - where persons use the exception to copy for entertainment purposes rather than research or study; and
  - where copies taken for research or private study are disseminated more widely.

- There may be an impact on rights holders if there is confusion over the scope of the exception and students and researchers are copying more of a work than they need or are copying for presentation purposes. This may lead to:
  - Lack of awareness that weakens the overall strength of IP system – which may impact on future abuse and revenues; and
  - Lost revenue – should pay to use extracts solely required for presentation.

- DRM solutions may have a considerable impact on rights holders in several ways – in particular if the volume of requests made for DRM workaround is expected to be high. For example:
  - Resources required to analyse and sort requests for DRM workaround and to deliver a DRM free extract of a work where eligible (staff, equipment, technology); and
  - Potential financial impact of wider copying if such safeguards and measures are not applied.

**Libraries**

- Libraries may require additional staff to respond to increased requests for copying an expanded set of works. There will also be new and ongoing administration costs associated with processing requests.

- New equipment may also be required to allow them to copy films, broadcasts and sound recordings. Libraries are not however compelled to offer these services if they do not wish to do so.

- Steps taken to address possible concerns about misuse may increase the complexity of the process for libraries and librarians and add further to staffing costs and training etc. The likely impact will vary depending on nature of steps being taken.

**Educational establishments**

- Many universities and colleges currently provide guidance to students on how they can use the current exception to make copies of literary and other works. They may need to update this guidance (administrative costs and possible costs relating to advice on new law etc).

- School, college and university libraries will face the same issues as those outlined above in relation to general libraries.
Other effects

There may also be generic effects on the groups above. They may be affected by short-to-medium term costs associated with new uncertainties which may arise in the interpretation of any new law. Such uncertainties are unlikely to be resolved until rulings in court cases are delivered.

Specific Impact Tests

It seems unlikely that proposals to introduce an exception for research and private study to cover sound recordings, films and broadcasts (in addition to the works currently covered by the exception) will have any significant implications for competition – although options which might limit eligibility to certain educational establishments will need to be considered carefully.

In relation to race, disability and gender equality we do not consider this proposal will have an impact – there is no intention of applying the proposal to different groups in different ways. It will apply equally to all.
Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

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

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</table>
What is the problem under consideration? Why is government intervention necessary?
Some copyright protected works cannot be preserved by librarians and archivists because the current exception for preservation purposes does not extend to sound recordings, film and broadcasts, and does not enable format shifting into more stable mediums because of the current limit that only allows the making of a single copy. This limits the ability of libraries and archives to use new technologies for preservation work.

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

What policy options have been considered? Please justify any preferred option.
1. No change to copyright law.
2. Amend Section 42 of the Copyright, Designs and Patents Act 1988 to enable libraries to make multiple copies and format shift all classes of works for the purposes of preservation.
3. As 2 above but also extended to allow museums and galleries to benefit from the exception.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects? As policy development is at an early stage, no date for review has been set.

Ministerial Sign-off For consultation stage Impact Assessments:
I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister:

.................................................................Date:
### Summary: Analysis & Evidence

**Policy Option:** 2  
**Description:** Extend Copyright Exceptions Relating to Permitted Acts for the Purposes of Preservation by Prescribed Libraries

#### ANNUAL COSTS

<table>
<thead>
<tr>
<th>Description and scale of key monetised costs by 'main affected groups'</th>
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<tr>
<td>One-off (Transition)</td>
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<td><strong>Total Cost (PV)</strong></td>
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</table>

### Key Assumptions/Sensitivities/Risks

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

| What is the geographic coverage of the policy/option? | United Kingdom |
| On what date will the policy be implemented? | 2009 |
| Which organisation(s) will enforce the policy? | Rights holders |
| What is the total annual cost of enforcement for these organisations? | £ |
| Does enforcement comply with Hampton principles? | Yes/No |
| Will implementation go beyond minimum EU requirements? | Yes/No |
| What is the value of the proposed offsetting measure per year? | £ |
| What is the value of changes in greenhouse gas emissions? | £ |
| Will the proposal have a significant impact on competition? | Yes/No |
| Annual cost (£-£) per organisation (excluding one-off) | Micro | Small | Medium | Large |
| Are any of these organisations exempt? | No | No | N/A | N/A |

### Impact on Admin Burdens Baseline (2005 Prices)

<table>
<thead>
<tr>
<th>Increase of</th>
<th>£</th>
<th>Decrease of</th>
<th>£</th>
<th><strong>Net Impact</strong></th>
<th>£</th>
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</thead>
</table>

**Key:**  
- **Annual costs and benefits:** Constant Prices  
- **(Net) Present Value**
### Summary: Analysis & Evidence

#### Policy Option: 3

**Description:** Extend Copyright Exceptions Relating to Permitted Acts for Preservation Purposes by Prescribed Libraries, Museums and Galleries

### ANNUAL COSTS

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<tr>
<td>Other key non-monetised benefits by ‘main affected groups’</td>
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</tbody>
</table>

### Key Assumptions/Sensitivities/Risks

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

| What is the geographic coverage of the policy/option? | United Kingdom |
| On what date will the policy be implemented? | 2009 |
| Which organisation(s) will enforce the policy? | Rights holders |
| What is the total annual cost of enforcement for these organisations? | £ |
| Does enforcement comply with Hampton principles? | Yes/No |
| Will implementation go beyond minimum EU requirements? | Yes/No |
| What is the value of the proposed offsetting measure per year? | £ |
| What is the value of changes in greenhouse gas emissions? | £ |
| Will the proposal have a significant impact on competition? | Yes/No |

<table>
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<tr>
<th>Annual cost (£-£) per organisation (excluding one-off) Micro</th>
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<tbody>
<tr>
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### Impact on Admin Burdens Baseline (2005 Prices)

<table>
<thead>
<tr>
<th>Increase of £</th>
<th>Decrease of £</th>
<th>Net Impact £</th>
</tr>
</thead>
</table>

**Key:** Annual costs and benefits: Constant Prices *(Net) Present Value*
### Summary: Analysis & Evidence

**Policy Option:** 1  
**Description:** No Change to Copyright Law

#### ANNUAL COSTS

<table>
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Other key non-monetised costs by 'main affected groups'

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Other key non-monetised benefits by 'main affected groups'

#### Key Assumptions/Sensitivities/Risks

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

- **What is the geographic coverage of the policy/option?** United Kingdom
- **On what date will the policy be implemented?** 2009
- **Which organisation(s) will enforce the policy?** Rights holders
- **What is the total annual cost of enforcement for these organisations?** £
- **Does enforcement comply with Hampton principles?** Yes/No
- **Will implementation go beyond minimum EU requirements?** Yes/No
- **What is the value of the proposed offsetting measure per year?** £
- **What is the value of changes in greenhouse gas emissions?** £
- **Will the proposal have a significant impact on competition?** Yes/No
- **Annual cost (£-£) per organisation (excluding one-off)**
  - Micro
  - Small
  - Medium
  - Large
- **Are any of these organisations exempt?** No No N/A N/A

#### Impact on Admin Burdens Baseline (2005 Prices)

<table>
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**Key:** Annual costs and benefits: Constant Prices (Net) Present Value
Evidence Base (for summary sheets)

[Use this space (with a recommended maximum of 30 pages) to set out the evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Ensure that the information is organised in such a way as to explain clearly the summary information on the preceding pages of this form.]

Background

Section 42 of the Copyright, Designs and Patents Act 1988 (CDPA) provides an exception for librarians and archivists of prescribed libraries to make a (single) copy from any item in the permanent collection of the library in order to preserve or replace a lost, stolen or damaged item, subject to certain prescribed conditions, without infringing copyright.

The Problem

Currently, the exception is limited insofar that it allows the making of only a single copy and only of items that are a literary, dramatic or musical works or an illustration accompanying such a work. Such a narrowly defined exception is out of step with other countries in terms of the number of copies allowed, the types of work that may be copied and in that format shifting is not permitted. The independent Gowers Review of Intellectual Property received a number of responses to its call for evidence that raised this issue and called for the Government to modernise the Copyright, Designs and Patents Act, 1988 (CDPA). Based on these submissions, the Gowers Review team made the recommendation that Section 42, CDPA should be amended and this has been accepted by the Government.

The Policy Objective

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

In addition, it is intended that the exception will be extended to cover all classes of works including sound recordings, films or broadcasts.

The Government is also considering extending the scope of organisations that the exception applies to so that it would also cover museums and galleries. This would permit such organisations to benefit from these provisions in the same way as prescribed libraries.

Impacts

The following groups would be affected by such changes:

1. Prescribed libraries

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

- copying, for example, from an unstable and deteriorating format to a more stable format;
- copying works that previously could not be copied without the rights holders’ permission; and
- making as many copies as is required for the purposes of preservation.

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

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

There is a concern amongst some rights holders that increased ease of access will result in works being copied and disseminated without the permission of the rights holder. This risk is connected to the available technology rather than acts of preservation.

3. Museums and galleries

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

4. Users of libraries, museums and galleries

Users of libraries will, in some limited circumstances defined in the CDPA 1988, be able to view works previously not accessible because they were too fragile or vulnerable to be displayed.

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

Users of museums and galleries will benefit from the more efficient preservation of the cultural heritage where collections are preserved rather than being lost through degradation (?) of the media upon which the work is stored. Such users will also benefit from the museums’ (often licensable) opportunities to make such works available to its users that will be made available through being able to format shift works for the purposes of preservation.

Specific Impact Tests

It is too early in the policy process to assess the specific impact tests. However, we expect that this proposal will have insignificant implications for competition because the number and range of rights holders involved will remain unaffected as will the relative attractiveness of libraries to users. A possible broadening of the exception may bring museums and galleries into the exception, but this is unlikely to impact on competition in the affected sectors. The potential for rights holders to obtain increased downstream revenues will be the same for all rights holders involved.

We also expect that the proposal will have no impact on race and gender equality, and note that it could have a positive impact on equality with benefits for disabled persons that could potentially result if off-site access is provided.

Request for evidence

As policy development is at a preliminary stage it is not been possible to prepare a comprehensive impact assessment or to estimate quantitatively the costs and benefits of the proposals. We seek evidence on matters such as:

- How many works are affected (i.e. where copyright has not already expired)?
- What social value can be attached to these works? Is the value the same for all works?
- If the law was not changed, how many works could not be preserved because libraries or archives could not afford to pay for a licence for this activity?
- To what extent have right holders been able to demand licence fees for preservation purposes (that goes beyond the scope of the current exception)? How much income would right holders stand to lose?
Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

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

<table>
<thead>
<tr>
<th>Type of testing undertaken</th>
<th>Results in Evidence Base?</th>
<th>Results annexed?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Competition Assessment</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Small Firms Impact Test</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
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<td>Carbon Assessment</td>
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<td>Other Environment</td>
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<td>No</td>
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<tr>
<td>Health Impact Assessment</td>
<td>No</td>
<td>No</td>
</tr>
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<td>No</td>
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<td>Gender Equality</td>
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<td>Human Rights</td>
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<td>No</td>
</tr>
<tr>
<td>Rural Proofing</td>
<td>No</td>
<td>No</td>
</tr>
</tbody>
</table>
**Summary: Intervention & Options**

<table>
<thead>
<tr>
<th>Department /Agency:</th>
<th>Title:</th>
</tr>
</thead>
<tbody>
<tr>
<td>UK Intellectual Property Office</td>
<td>Impact Assessment of a proposal to introduce a copyright exception for parody, caricature and pastiche</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Stage:</th>
<th>Version:</th>
<th>Date:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Consultation</td>
<td>1</td>
<td>31 October 2007</td>
</tr>
</tbody>
</table>


Available to view or download at:
http://www.hm-treasury.gov.uk/independent_reviews/gowers_review_intellectual_property

Contact for enquiries: Joanne Holley  
Telephone: 01633 814912

---

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

There is no exception from infringement in copyright law for the purposes of caricature, parody and pastiche (referred to below as 'parody'). The lack of an exception may be having an adverse effect on the ability of authors to create new parodies, etc which are based on others' works, and hence have a limiting effect on UK creative culture. This lack may also be hindering sponsorship for and promotion of the creative arts as institutions become averse to the risk of purchasing and exploiting new works. If these works are parodies, the institutions may find themselves liable for infringement.

---

**What are the policy objectives and the intended effects?**

To encourage creativity and create value in new works, by enabling the creation of parody-style works without fear of infringement of copyright in the underlying work. Such an exception would reduce transaction costs for those who wish to use copyright works in this way. It may also reduce the risks of infringement for institutions which purchase, and otherwise exploit new works of art which may incorporate parodies within them.

---

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

1. Introduce an exception for parody, caricature and pastiche
2. No change to copyright law

The recommendations of the Gowers Review of intellectual property, which the Government has stated its intention to take forward, included amending copyright law to incorporate within it a parody exception, with the aim of encouraging creativity and the value of the creative sector to the UK economy. The evidence in support of this is rather limited, but it will be compared with the 'do nothing' alternative.

---

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

As policy development is at an early stage, no date for review has been set.

---

**Ministerial Sign-off**

For consultation stage Impact Assessments:

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

Signed by the responsible Minister:

.............................................................................................................Date:
## Summary: Analysis & Evidence

### Policy Option: 1

**Description:**
1. Introduce an exception for parody, caricature and pastiche

### ANNUAL COSTS

<table>
<thead>
<tr>
<th>Description and scale of key monetised costs by ‘main affected groups’</th>
</tr>
</thead>
<tbody>
<tr>
<td>One-off (Transition) Yrs</td>
</tr>
<tr>
<td>£</td>
</tr>
<tr>
<td>Average Annual Cost (excluding one-off)</td>
</tr>
<tr>
<td>£</td>
</tr>
</tbody>
</table>

**Total Cost (PV): £**

**Other key non-monetised costs by ‘main affected groups’**

### ANNUAL BENEFITS

<table>
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<tr>
<th>Description and scale of key monetised benefits by ‘main affected groups’</th>
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</tr>
<tr>
<td>£</td>
</tr>
</tbody>
</table>

**Total Benefit (PV): £**

**Other key non-monetised benefits by ‘main affected groups’**

### Key Assumptions/Sensitivities/Risks

### Price Base Year

<table>
<thead>
<tr>
<th>Time Period Years</th>
<th>Net Benefit Range (NPV)</th>
<th>NET BENEFIT (NPV Best estimate)</th>
</tr>
</thead>
<tbody>
<tr>
<td>£</td>
<td>£</td>
<td></td>
</tr>
</tbody>
</table>

### What is the geographic coverage of the policy/option? United Kingdom

### On what date will the policy be implemented? 2009

### Which organisation(s) will enforce the policy? Right holders

### What is the total annual cost of enforcement for these organisations? £

### Does enforcement comply with Hampton principles? Yes/No

### Will implementation go beyond minimum EU requirements? Yes/No

### What is the value of the proposed offsetting measure per year? £

### What is the value of changes in greenhouse gas emissions? £

### Will the proposal have a significant impact on competition? No

### Annual cost (£-£) per organisation (excluding one-off)

<table>
<thead>
<tr>
<th>Micro</th>
<th>Small</th>
<th>Medium</th>
<th>Large</th>
</tr>
</thead>
<tbody>
<tr>
<td>No</td>
<td>No</td>
<td>N/A</td>
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</table>

### Impact on Admin Burdens Baseline (2005 Prices) (Increase - Decrease)

<table>
<thead>
<tr>
<th>Increase of £</th>
<th>Decrease of £</th>
<th>Net Impact £</th>
</tr>
</thead>
<tbody>
<tr>
<td>Key: <strong>Annual costs and benefits: Constant Prices</strong></td>
<td><strong>(Net) Present Value</strong></td>
<td></td>
</tr>
</tbody>
</table>
**Summary: Analysis & Evidence**

**Policy Option:** 2  
**Description:** No change to copyright law

### ANNUAL COSTS

<table>
<thead>
<tr>
<th>Description and scale of key monetised costs by 'main affected groups'</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>One-off (Transition)</strong> Yrs</td>
</tr>
<tr>
<td><strong>Average Annual Cost (excluding one-off)</strong></td>
</tr>
<tr>
<td><strong>Total Cost (PV)</strong></td>
</tr>
</tbody>
</table>

Other key non-monetised costs by 'main affected groups'

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</tr>
<tr>
<td><strong>Total Benefit (PV)</strong></td>
</tr>
</tbody>
</table>

Other key non-monetised benefits by 'main affected groups'

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**Key Assumptions/Sensitivities/Risks**

---

<table>
<thead>
<tr>
<th>Price Base Year</th>
<th>Time Period Years</th>
<th>Net Benefit Range (NPV) £</th>
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<td></td>
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<td>Which organisation(s) will enforce the policy?</td>
<td>Creators/right holders</td>
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<td></td>
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<td>Annual cost (£-£) per organisation (excluding one-off)</td>
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<td>Small</td>
<td>Medium</td>
</tr>
<tr>
<td>Are any of these organisations exempt?</td>
<td>No</td>
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**Impact on Admin Burdens Baseline (2005 Prices)**

<table>
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</tbody>
</table>
Evidence Base (for summary sheets)

Introduction

1. The Gowers Review of Intellectual Property came to the conclusion that copyright law should be amended to provide a new exception from infringement for parodies, caricatures and pastiches which are based on other copyright protected work. The Review suggests that this would encourage creativity and increase value in the creative economy by reducing the burdens on parodists who wish to create such works. They would no longer be required to seek permission from the owners of copyright in the underlying work. Such permission may not be given – in which case the intended work may not be created or will put the creator at risk of copyright infringement - or may only be given after negotiation and (usually) on payment of an agreed licence fee. The exception should therefore reduce transaction costs to those creating new parodies.

2. It should also reduce the risk of infringement for those institutions investing in new works. At the moment, they cannot be sure that when they seek to reproduce their acquisitions as e.g. postcards, calendars, etc, they are not infringing copyright in an underlying work. There may therefore be an impact on the creative output of the UK if institutions (and other purchasers) feel inhibited from buying new works and therefore from supporting creativity.

3. Whilst such difficulties arise, there seems to be little evidence at present about the scale of them, or to support the connections made between the hoped-for economic and creative gains and the introduction of such an exception. It is not clear how large the parody ‘market’ is, or how much individuals stand to lose or gain from changes. Many parodies are based only loosely on a copyright protected work, merely borrowing ‘ideas’ rather than using substantial parts of a work. In such cases, copyright is unlikely to be infringed. In the case of caricatures and pastiches, a ‘style’ may be copied or imitated, but not usually a specific work. Again, in such cases copyright is unlikely to be infringed.

4. If an exception is introduced, it will prevent rights holders from being able to retain control over the subsequent use of their works for such purposes, and will prevent them from being able to earn revenue from such uses.

5. Whilst there are likely to be positive impacts for the creators of parody-style works and those who purchase or subsequently use them, there are likely to be negative impacts on those who have created the underlying work on which the parodies are based. At this stage, it is difficult to quantify the size of those impacts.

Impacts

6. The groups following groups are likely to be affected by the introduction of an exception: creators of new parody-style works, creators of works which are the subject of a parody, purchasers of new works, owners of the underlying works upon which the parodies are based and society at large.

Creators of new parody-style works

7. Such creators may benefit from:
   • reduced transaction costs: they will not have to identify, seek permission from, or pay royalties to, copyright owners whose works from the basis of the new parodies;
   • greater support from those cultural institutions which currently feel constrained in purchasing new works by the possibility that they may turn out to be parodies which infringe others works; and
   • greater creative freedom as they will not be prevented from creating a parody by the owner or creator of the underlying work.

8. Negative effects on such creators may be similar to those listed under 2 below, if their own works are also suitable subjects for parody.

Creators of works which are the subject of a parody

9. Such creators may benefit from:
• greater exposure to the public, if a parody creates interest in the underlying work.

10. Negative affects on such creators may include:
• losing financial remuneration for the use of their work, as such use will no longer be licensable;
• losing any artistic or other input into the creation of any new work which parodies theirs;
• potential competition from a parody, detracting from the public’s interest in their own work;
• loss of reputation in the face of a parody;
• having to rely on non-copyright legislation, such as defamation or passing off, to protect their interests, and the costs associated with potential increasing numbers of actions under these branches of the law.

**Purchasers of new works**

11. Purchasers of new works, such as museums or galleries, should benefit from a greater certainty that they are unlikely to be infringing copyright, should an acquisition turn out to be a parody of another work, if e.g. they make copies of the new work for sale as postcards, within books, etc. Anecdotal evidence shows that the possibility that new works may include parodies of other works is deterring some museums or galleries from acquiring new works because they fear the legal (and financial) consequences of inadvertently infringing the copyright in any underlying work.

12. An exception should therefore free up some museums and galleries to return to making decisions about their collections based on primarily cultural and artistic reasons, rather than on a fear of infringement. It should also prevent other museums and galleries from introducing similar infringement-based selection criteria to their own acquisition policies.

**Owners of the underlying works upon which the parodies are based**

13. In many cases the copyright in a work will be owned by the commercial interest which is helping the creator of that work to exploit it. The costs and benefits to such owners are therefore likely to be broadly similar to those listed under 2 above.

**Society at large**

14. As ‘consumers’ of creativity, society at large may benefit from:
• the availability of a greater range of new creative works, if the exception encourages more creators to work in the field of parody, caricature or pastiche;
• greater public access to new works, if museums and galleries change their acquisition policies to make them less restrictive; and
• the creation of greater value in the economy as a whole if more works are created and subsequently exploited.

15. It is not clear at present that any of these benefits will actually arise in practice. There is also a theoretical possibility that a parody exception may discourage the creators of original works from publishing their material for fear of parody and resulting misuse and loss of reputation. This may be a negative effect for society at large.

**Other effects**

16. There may also be generic effects on the groups numbered 1-4 above. They may be affected by short-to-medium term costs associated with new uncertainties which may arise in the interpretation of any new law. Although the law will change the relative certainty of having to seek permission to a new one of not having to seek permission, it is likely to raise new issues about the extent to which a new work can be classed as falling within the new exception. Such uncertainties are unlikely to be resolved until rulings in court cases are delivered.

**Enforcement and Monitoring**

17. As copyright is essentially a private right, right holders currently have to police any subsequent use of their works and gauge whether such use is an infringement or falls within the current exceptions to copyright. With a new exception for parody, they will additionally have to satisfy themselves that a work claimed to be a parody falls within the exception.

**Key assumptions/sensitivities/risks**
18. The key assumption is that the introduction of a parody exception will encourage greater creativity and add value to the UK’s cultural and economic wellbeing. There is at present little evidence to suggest that more parodies will be created than at present: the UK already has a history of creativity, and continues to be creative, in this area.

19. The risks faced by the introduction of an exception for parody concern the detrimental impact on the financial, creative and commercial interests of the right holders and original creators of works which become the subject of a parody. At this stage it is hard to evaluate the impact of these risks and how they can be mitigated.

Specific Impact Tests

20. It seems unlikely that proposals to introduce an exception for parody will have any significant implications for competition because it applies equally to all members of any one part of the supply chain. The exception is intended to encourage the creation of new works of parody. Its impact on the creation of other types of works is likely to be minimal: it is unlikely that decisions to create, or support the creation of, non-parody works are dependent on the likelihood of such a work later becoming the subject of a parody.

21. In relation to race, disability and gender equality we do not envisage that this proposal would have an impact – there is no intention of applying the proposal to different groups in different ways. It would apply equally to all.
Specific Impact Tests: Checklist

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

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

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<td>No</td>
</tr>
<tr>
<td>Term</td>
<td>Definition/literal</td>
<td></td>
</tr>
<tr>
<td>-----------------------------</td>
<td>------------------------------------------------------------------------------------</td>
<td></td>
</tr>
<tr>
<td>Caricature</td>
<td>Commonly: a grotesque usually comically exaggerated representation especially of a person; or a ridiculously poor imitation or version</td>
<td></td>
</tr>
<tr>
<td>CD</td>
<td>Compact Disc</td>
<td></td>
</tr>
<tr>
<td>CDPA</td>
<td>Copyright Designs and Patents Act 1988</td>
<td></td>
</tr>
<tr>
<td>CLA</td>
<td>Copyright Licensing Agency</td>
<td></td>
</tr>
<tr>
<td>Distance learning</td>
<td>A method of learning which involves learners accessing learning materials away from the classroom at a place and time of their own choosing</td>
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<tr>
<td>DRM</td>
<td>Digital Rights Management</td>
<td></td>
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<tr>
<td>DVD</td>
<td>Digital Versatile Disc</td>
<td></td>
</tr>
<tr>
<td>EC</td>
<td>European Community</td>
<td></td>
</tr>
<tr>
<td>Educational establishment</td>
<td>Broadly, any school or other description of educational establishment specified by order of the Secretary of State</td>
<td></td>
</tr>
<tr>
<td>ERA</td>
<td>Educational Recording Agency</td>
<td></td>
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<tr>
<td>EU</td>
<td>European Union</td>
<td></td>
</tr>
<tr>
<td>Format-shifting</td>
<td>The copying of legitimately owned works in a different format for use on different devices</td>
<td></td>
</tr>
<tr>
<td>Interactive whiteboard</td>
<td>A screen used with a computer and projector to create a touch sensitive screen display including, for example, text and images</td>
<td></td>
</tr>
<tr>
<td>IP</td>
<td>Intellectual Property</td>
<td></td>
</tr>
<tr>
<td>Moral rights</td>
<td>Rights conferred by Chapter IV of the Copyright Designs and Patents Act 1988 including the right to be identified as the author of a work, the right to object to derogatory treatment of a work and the right not to have a work falsely attributed</td>
<td></td>
</tr>
<tr>
<td>MP3</td>
<td>MPEG-1 Audio Layer 3 – a digital compression format</td>
<td></td>
</tr>
<tr>
<td>NLA</td>
<td>Newspaper Licensing Agency</td>
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</tr>
<tr>
<td>On-demand transmission</td>
<td>A transmission which can be accessed as required and at a time determined by the consumer</td>
<td></td>
</tr>
<tr>
<td>Parody</td>
<td>Commonly: a humorous exaggerated imitation of an author, literary work or style etc; or a feeble imitation, travesty</td>
<td></td>
</tr>
<tr>
<td>Pastiche</td>
<td>Commonly: a picture or musical composition from or imitating various sources; or a literary or other work composed in the style of a well known author, etc</td>
<td></td>
</tr>
<tr>
<td>PC</td>
<td>Personal Computer</td>
<td></td>
</tr>
<tr>
<td>Permanent collection</td>
<td>A collection of works permanently housed in a library, gallery or museum etc</td>
<td></td>
</tr>
<tr>
<td>Prescribed library</td>
<td>All libraries within the UK</td>
<td></td>
</tr>
<tr>
<td>Rental and Lending Directive</td>
<td>Council Directive (92/100/EEC) on rental right and lending right and on certain rights related to copyright in the field of intellectual property as consolidated into 2006/116/EC</td>
<td></td>
</tr>
<tr>
<td>TPMs</td>
<td>Technological Prevention Measures</td>
<td></td>
</tr>
<tr>
<td>Three-step test</td>
<td>Test that imposes constraints on exceptions to exclusive rights under national copyright laws</td>
<td></td>
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<tr>
<td>TRIPs</td>
<td>World Trade Organisation Agreement on Trade Related Aspects of Intellectual Property Rights</td>
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<tr>
<td>VLEs</td>
<td>Virtual Learning Environments</td>
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</tr>
<tr>
<td>WTO</td>
<td>World Trade Organisation</td>
<td></td>
</tr>
</tbody>
</table>
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?

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?

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?

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?

5. Who should be able to view recordings made by an educational establishment in a VLE? Is the reference to “teacher 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?

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

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

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?

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

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

SECURE ENVIRONMENTS

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

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

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

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

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

17. What benefits would there be for educators?

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?

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?

SCOPE OF THE EXCEPTION

20. Do you agree with the conditions proposed above?

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?

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

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

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?

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

FORMAT

26. How many format shifts should be allowed?

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

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

29. Should the exception apply to works:
   
a. published after the date the law changes;
   
b. purchased after the date the law changes; or
   
c. copied after the date the law changes?
   
d. What would be the practical implications of the above options?
   
e. Can you think of any alternatives?

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?

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

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

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

34. Should all types of work be covered?

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

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?

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

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

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?

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?

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?

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

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?

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?

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?

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

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?
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?

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?

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?

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?

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?

58. If so, would framing the exception as a ‘fair dealing’ exception address the problem adequately?

ACKNOWLEDGEMENT

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

DEFINITIONS

60. Is the ordinary meaning of the terms caricature, parody and pastiche sufficient?
CLASSES OF WORK

61. Is there any reason for excluding particular classes of work from the exception?

THE RIGHTS AFFECTED

62. Should the exception only apply to certain exclusive rights of a copyright owner or to all such rights? If the exemption is to be limited, how should it be limited and why?

WORK PUBLICLY AVAILABLE?

63. Should the exception explicitly state that it only applies where the underlying work has been made available to the public?

PARODY ONLY OF THE UNDERLYING WORK?

64. Should the exception only apply where the parody relates specifically to the underlying work?

MORAL RIGHTS

65. Is there any reason why section 79(4) should not be extended to exempt parodies from the right of attribution?

66. Is there any reason why section 84 should be amended to exempt parodies from the right of false attribution?