

# CLA Submission to IPO Consultation on Proposed Changes to Copyright Exceptions

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Also attached:

CLA Schools Scanning Licence  
CLA Further Education Licence  
CLA Higher Education Licence

## **1. Introduction**

- 1.1 The Copyright Licensing Agency Ltd (“CLA”) welcomes the IPO consultation on taking forward the Gowers Review on Intellectual Property, and acknowledges the thoughtful and detailed work that has gone into identifying the issues in the Consultation Document.
- 1.2 CLA is a member of the British Copyright Council (“BCC”) and of the Alliance Against IP Theft (“AAIP”) and has the benefit of having read and contributed to their submissions. This submission focuses on those matters that bear most directly upon CLA’s activities in providing collective licensing solutions in the world of hard copy and digital publishing of books, journals, magazines and other periodicals. Although we make some comments on the broader implications to copyright on some of the recommendations, these are dealt with more fully in the BCC and AAIP submissions with which CLA is happy to associate itself.
- 1.3 CLA was founded in 1983 by the Authors Licensing Collecting Society Limited and the Publishers Licensing Society Limited who themselves represent, directly or indirectly, authors and publishers of most of the books, journals, magazines and other periodicals published in the UK. Artistic works such as photographs, illustrations, etc. appearing within those works are covered by virtue of an agency agreement between CLA and the Design & Artists Copyright Society Ltd; a network of repertoire exchange agreements with similar organisations throughout the world means that CLA’s collective licences cover the overwhelming majority of UK publications as well as a huge number of titles from overseas. Further details of CLA’s collective licensing activities and the benefits it brings to users and to copyright owners and creators are contained in CLA’s original submission on Gowers at [http://www.cla.co.uk/assets/139/gowers\\_review2.pdf](http://www.cla.co.uk/assets/139/gowers_review2.pdf).
- 1.4 The cultural value of the copyright industries to the UK needs to be fully appreciated. The UK’s rich history of creating and producing literary and dramatic works is unparalleled anywhere else in the world, and of course the English language is the predominant international language for business, education and entertainment. The economic and financial importance of the copyright “industries” is also highly significant; this includes both the core copyright industries of publishing, involving the creation, distribution and sale of copyright products and services, and copyright-dependent industries whose existence depends upon the core copyright industries (for example manufacturers of hardware on which copyright content is made available, transmitted and consumed).

## **2. General**

### **2.1 Exceptions and the 3 Step Test**

The first point to make is that all copyright exceptions should be subject to, and comply with, the Berne 3 Step Test. The Government’s general view is that the way any exceptions are framed means that the conditions of the 3 Step Test are necessarily complied with and that therefore there is no need to state specifically that exceptions are subject to the Berne 3 Step Test. This can only be so if the exceptions are interpreted in practice, and in any judicial decision, so as to accord with the Berne 3 Step Test. This produces an unnecessary area of doubt allowing the possibility of dispute that would be removed were all exceptions to be stated categorically to be subject to this test. In the case of *Fraser Woodward Ltd vs BBC* [2005] EWHC 472(Ch) the judgement included compliance with the Berne 3 Step Test as being one of the factors relevant to the understanding of what constitutes “fair dealing”. CLA does not think that such an important matter should be left open as a matter of judicial interpretation to resolve a dispute between parties, but should be stated clearly in the legislation that gives rise to the exceptions in the first place.

- 2.2 The application of the 3 Step Test to the particular recommendations is covered below, but it is worth commenting in general terms on the description and analysis of the 3 Step Test

contained in page 14 in the section on the extension to Educational Exceptions (Recommendation 2) of the Consultation Document. Whilst this does seem to support rightsholders view that the test should be interpreted so as not to damage rightsholders economic as well as rightsholders other interests, CLA would note:-

- i) “certain special cases”: this seems to be equated with the exception only applying in “clearly defined cases” as opposed to the more normal understanding of the word special, i.e. “peculiar” or “restricted”. Whilst it is true by definition that an exception for education can only apply to a limited number of beneficiaries and activities (i.e. pupils or students in education), it is hard to see the many millions of students and pupils as constituting a “special” class as envisaged by the Berne Convention.
- ii) “no conflict with normal exploitation of the work” and “does not unreasonably prejudice the legitimate interest of the rightsholder”: CLA welcomes the Government’s view in recognising that collective licensing, and indeed other forms of secondary licensing, are part of the rightsholder’s normal exploitation of the work and one of the author’s legitimate rights that could be unreasonably prejudiced by an exception which obviated the need for a licence. However, it is important also to bear in mind the possible impact on primary sales of wider exceptions. It is almost impossible to prove a direct nexus between a lost sale of a book or a journal and the application of a liberal interpretation of a statutory exception, but it must be true at a general level that this can be the case. The committees in existence prior to the 1988 Act which led to the formation of CLA (e.g. De Freitas Committee, the Wolfenden Committee) all recognised the potential impact of photocopiers on sales of educational texts. The same is true, or possibly even more so, in the digital age.

### 2.3 **Technological Protection Measures (“TPMs”)**

The Consultation Document asks some general questions as to whether the beneficiaries of exceptions should be able to make use of the remedy in the Copyright, Designs and Patent Act 1988 (“CDPA”) where TPMs prevent the exercise of permitted acts. There is an argument that section 296ZE of the CDPA, which was introduced by secondary legislation (the Copyright and Related Rights Regulations 2003) incorrectly effected a fundamental change in copyright law which went beyond the scope of implementing the Copyright Directive, by introducing new rights. The fair dealing and other exceptions had traditionally only provided a defence against an action for copyright infringement without necessarily confirming them as a right. The distinction between the two may not have mattered hugely in practice in the analogue era when the subject of a sale was a physical product such as a book which by definition could only be physically possessed at any one time by only one person. But when the subject matter of the sale is a digital product, such as a literary work sold on a CD-Rom or available online via subscription or a music CD, the possibilities for this to be shared unlawfully, e.g. by file sharing amongst peer groups, increase dramatically. Casting the exceptions as a “right” that then have to be allowed or enabled by the rightsholders causes significant problems in practice – with, it is suggested, little commensurate benefit to users.

- 2.4 It is only right and appropriate that TPMs should be allowed to enable rightsholders to protect their legitimate interests. The authors’ exclusive right of authorising reproduction of these works under Article 9 of Berne must be prejudiced if such TPMs have to be disabled to allow the exercise of a so-called right. Even if it is accepted that the exceptions to copyright do more than provide a defence against an action for infringement and should be regarded as a right, the lack of legal certainty as to the extent and practical application of these provisions make it hard to see how this could operate smoothly. How can a rightsholder provide for a limited disabling of TPMs to accommodate an exception of an unknown extent, whilst preventing unlawful use? The potential for vast abuse (whether through organised piracy or by a multitude of individual acts of file sharing) surely outweighs any perceived benefit to users whose legitimate interest in obtaining access to the information or work in question can, and indeed are, met either through the ability to purchase the product or service directly or through collective licensing schemes.

2.5 It follows that CLA believes that any expansion of copyright exceptions as proposed in the Consultation Document should not be accompanied by an extension of s. 296ZE CDPA which appears not to have worked or have been needed at a practical level, and serves only to introduce confusion.

## 2.6 **Performers Rights**

2.6.1 The Consultation Document asks whether – in terms of exceptions – the corresponding provisions of the CDPA relating to Performers Rights should be amended. This, of course, could only relate to some of the recommendations (e.g. it is hard to see how performers rights could be affected by an amendment to s. 36 which deals specifically with reprography) and this does not directly affect CLA. We think the key to this is in the correct framing of exceptions with, in the field of artistic and literary works, a clear application of the Berne 3 Step Test.

2.6.2 Article 15 of the Rome Convention dealing with Performers Rights allows Contracting States to provide for exceptions for private use, short excerpts in connection with the reporting of current events and used solely for the purpose of teaching or scientific research. It provides also that Contracting States may provide for the same kinds of limitations to the protection of performers, producers of phonograms and broadcasting organisations in domestic laws as it provides in connection with the protection of copyright in literary and artistic works. This would also therefore suggest the application of the principles of the Berne 3 Step Test to any such limitations. Any extension of the exceptions to Performers Rights, as with the proposed exceptions affecting literary and artistic works, must be confined so as not to endanger primary sales or prevent the collection of a reasonable remuneration via collective licensing for secondary uses.

## 3. **Recommendation 2 – Extension to Educational Exceptions to Include Distance Learning**

3.1 Clearly it is the proposed extension to s. 36 that is most relevant to CLA, although it is conceivable that any extension to s. 35 to include on-demand communications within its ambit might affect some activities of CLA's rightsholders. Conventional hard-copy publishing, involving the production and sale of a physical copy of a work, is now complemented to a great extent by electronic products available on CD, as is preferred by schools, or online either as an outright purchase on a subscription or pay per view basis.

### 3.2 **Extension of s. 35 to include on-demand services in broadcast exception**

3.2.1 It is our view that in general the broadcasting exceptions should not be amended so as to include on-demand services within it. The rationale for the current exception is not that it is thought important that educational establishments should be able to obtain access to broadcasts for free, but rather that they should be able to obtain access at all. The communication/making available of a broadcast cannot be grounded in a typical contract for the sale and purchase of a physical product, but must be dealt with by way of a licence. It would therefore be difficult or impossible for educational establishments to access broadcasts lawfully under, e.g. the standard TV licence unless a separate licensing scheme was established.

3.2.1 The legislature recognised that such access should not be free by allowing for the displacement of the exceptions by certified licensing schemes which can charge an appropriate fee. But the problem of access to on-demand services does not arise at all since they are, by definition, available "on demand". There would only be a case of statutory intervention if the market failed to provide licensing models that allowed multiple receipts/viewing of a single broadcast and there is no evidence that this is the case. Extending s. 35 could risk jeopardising the continuance of such services or the launch of new ones.

- 3.2.3 CLA disagrees, therefore, that s. 35 should not be defined “by media” but rather by intent, category of views and activity as specified in paragraph 46 of the Consultation Document. On the contrary CLA think s. 35 should continue to be defined by “media” and focus on “broadcasts” as it currently does, albeit possibly amended to incorporate broadcasts that may be accessed by a viewer at a time of their own choosing where this facility is made available. This is essentially similar to the “time-shifting” provisions in intent.
- 3.2.4 The other issues surrounding s. 35 mentioned in the Consultation Document are repeated in considering the proposed extension to s. 36 and are dealt with in our submission on that below.

#### **4. Section 36 – Extension to include Virtual Learning Environments (“VLEs”) and Distance Learners**

- 4.1 CLA, in conjunction with representative bodies within the various educational sectors, has worked to develop licensing solutions allowing educational establishments to scan hard copy material and to disseminate the digital copy thus created to their students or pupils for educational purposes. It should be noted at the outset that this is slightly wider than the problem that Gowers focussed on in terms of distance learners and VLEs in that before these or other transmission methods can be employed, the original digital copy needs to be created in the first place. This, of course, requires the copyright owner’s permission since it involves copying and indeed transferring a hard copy into a digital product. This digital product has a greater value to the user, but equally presents a greater threat to rightsholders if not done with consent or properly licensed (our comments on the proposed format shifting section below at paragraph 5 are relevant here).
- 4.2 CLA launched a basic scanning licence to the Further Education sector in 2003 and a licence for Universities and other Higher Education Institutions (“HEIs”) was negotiated with UUK/GuildHE in 2006 to allow extracts to be scanned to produce digital copies to be used in courses of study. Finally, CLA has launched (with effect from 1st April 2008) a schools scanning licence which will also allow digital copies to be created by schools and transmitted electronically to their pupils. All of these licences address the issue of delivery to distance learners and are drafted so as to be “technology neutral” therefore allowing presentation through VLEs, PowerPoints, etc. A copy of each of these three core licences is attached. It might be thought therefore that expanding s. 36 is providing a solution to a problem that for the most part does not exist.
- 4.3 CLA is in the process of broadening its repertoire so it is likely that in the near future only those copyright owners (whether UK or overseas) who have specifically excluded their works would not be encompassed by a CLA licence covering scanning and electronic transmission.

#### **4.4 Consultation Document Questions**

##### **Q1: What impact would the expansion of the educational exceptions have? What cost or benefits would accrue to rightsholders and users of copyright works?**

**CLA answer:** The expansion would certainly clarify the rights of users as regards any repertoire not covered by CLA or other licensing schemes. This would clearly be a benefit to users, but it should be recognised that their legitimate needs are being met through voluntary licensing solutions. The additional cost to users of the scanning/digitisation rights is generally quite modest given the greater utility that is offered. The trial scanning licence for HEIs placed a figure of 50p on the scanning right, albeit this was negotiated in the absence of any hard data as to the use and value of scanning by HEIs and this rate is currently part of the renegotiation for the renewal of the licence which expires in August 2008. The increase proposed, for this year, for schools with the addition of scanning rights is 5% plus RPI. As was the case with the HE licence, this is being offered obviously in advance of any data as to

the volume or value of scanning to schools and the rate may have to be reviewed in the future.

For CLA's rightsholders, assuming of course that, as envisaged by the Consultation Document, any expansion of the exception would be subject to a licensing scheme, the benefit would depend upon the rate that can be charged for the additional use of copyright works, which is ultimately subject to the control of the Copyright Tribunal. Although not the subject of this Consultation, it should be noted that the recent reports on the Copyright Tribunal from the IPO and the DIUS Select Committee found that there is a need for reform to restore faith in it on the part of rightsholders. It must be remembered that any analysis of the risks and benefits to rightsholders of an extension to copyright exceptions is crucially dependent on the fairness and operation of the Copyright Tribunal to which collecting societies and their rightsholders are subject.

The risk to those copyright owners not represented by CLA or other licensing schemes is in the lack of remuneration for the use of their work under the exception and the risk to primary sales. A risk that applies to all rightsholders is abuse of the section in that whatever limits are imposed, it can be difficult to monitor or enforce in practice and can lead to instances of excess copying which may significantly increase the threat to primary sales.

**Q8: Should limits be placed on the form of communication used by educational establishments to communicate extracts to distance learners?**

**CLA Answer:** There should certainly be geographical limits to any proposed expansion of this exception. The exception should make it clear that it would only apply to communication to members of the educational establishment within the UK and that sharing between institutions is not permitted. It should be clear that distance learners based overseas should not be covered by this exception which should be aimed at ensuring that UK students and pupils are able to access learning materials provided by their educational institution. This may include genuine distance learning students (probably in the tertiary education sector, but might include those living in remote locations) or those with a learning disability. Overseas distance learning students are generally taking a commercially operated course – but whether or not the course is operated on a commercial basis, it should not benefit from a UK exception. It should also be the case that the exception, as now and in addition to being limited to applying to “educational establishments” for “the purposes of instruction” again should not apply to those operating on a commercial, for profit basis wherever they are based.

Generally technical limits on the communication would appear to be ineffective and probably unnecessary (see below).

**Q9 & 10. Should the expanded exception be limited to communication inside a VLE? Should communication by e-mail outside a VLE be permitted?**

**CLA Answer:** Any attempt to limit communication to a VLE may quickly become outdated as technology and the services and products available change. Indeed it would be hard to settle on a clear definition of a Virtual Learning Environment that met all current needs let alone unanticipated future needs. CLA believe that any such exception should be technology neutral as is the case with the current suite of CLA licences so that, for instance, communication by e-mail might be permitted. The key here is the security of the transmission, as to which see below.

**Q11. 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 measure might be appropriate?**

**CLA Answer:** Yes; we would refer to the definition of “Secure Network” in CLA licences which has been built upon similar definitions agreed in standard licences in both the educational and corporate sectors. The key elements of this are that:-

- i) there is a network, which may be a standalone network or a virtual network within the Internet. Generally e-mail traffic on, e.g. personal e-mail accounts, should not be permitted;
- ii) the network is only accessible to individuals who are approved by the licensee for access;
- iii) such individuals must authenticate their identity at the time of log-in and periodically thereafter generally by the use of passwords;
- iv) such log-in and authentication to be in accordance with current best practice (thereby 'future-proofing' to some extent);
- v) and whose conduct is subject to regulation by the educational institution.

The latter point is particularly important. It is vital that the educational institutions seeking to benefit from an exception should accept the responsibility of alerting their students to the existence of copyright. They must endeavour to control conduct so that it complies with the limits of any statutory exception just as under any licence they are required to endeavour to ensure compliance with licensing terms. This could include the use of appropriate student disciplinary measures for breach of those conditions; for instance password sharing or "trafficking" can easily break security and lead to widespread infringement. CLA would expect institutions benefiting from such an exception to withdraw access immediately and consider other disciplinary measures available to them.

**Q12 & 13. 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?**

**CLA Answer:** CLA believe that the exception should be limited to staff, students and pupils. The phrase "other persons directly connected with the activities of the establishment" in s. 34 is there for a different purpose and would lead to uncertainty as to who was covered and for what purpose. You will note that CLA licences may extend the category of persons to whom copies can be made, and currently there is a wider category of persons for paper copies than for digital copies, again depending on access to a "Secure Network". But an extension of the exception beyond those directly involved in the giving and receiving of instruction would be unwarranted and should be left as a matter for licensing as appropriate and by agreement between the rightsholders and their agents, the collecting societies, and the various user groups.

**Q14. How should onward communication beyond a secure environment be prevented?**

**CLA Answer:** It is very difficult to see how such communication can actually be prevented – as opposed to being prohibited. Inevitably there will be those who seek to abuse exceptions and/or licensed permissions, but any attempt at a technical solution, e.g. by trying to limit it by something called a VLE, is likely to fail while possibly causing greater disruption to the law abiding majority. CLA think the best approach is to ensure that educational establishments accept the burden of raising copyright awareness amongst their staff and students and to be vigorous in monitoring usage of the learning materials and applying, where appropriate, disciplinary measures. Another part of the answer to this, again not the subject of this Consultation, is to ensure the correct legislative regime for enforcement of copyright by providing effective, dissuasive and proportionate remedies as envisaged by the Copyright and Enforcement Directives, including a right for collecting societies and other intellectual property right management bodies to have a right of action (a Representative Action) in accordance with the Enforcement Directive.

**Q15. Should Section 36 be expanded to included classes of work other than short extracts from published literary, dramatic and musical works? If so, what classes of work should be included?**

**CLA Answer:** CLA think the answer to this lies again in understanding the need to ensure that educational institutions can have access to learning materials rather than they should have access at no cost. The current s. 36 exception for reprographic copies limited to 1% of a work per quarter should be seen less as a “right” for schools, colleges and universities, but more as a statutory safety net to ensure some access is possible should rightsholders not deliver licensing solutions. CLA are not convinced that there is any particular need for the exception to be extended in the way described because of a lack of potential access. CLA would point out that CLA licences do include artistic works so far as they occur within a book, journal, magazine or other periodical. CLA would be willing to work with other collecting societies towards delivering a solution to any genuine requirement for licensing of multimedia works.

**Q16. What consequences would such an amendment have on rightsholders?**

**CLA Answer:** As stated above, CLA are not convinced of the need for this expansion and would be concerned that it could have adverse effects on the development and launch of products designed to meet any such need as arises. Any limits that could be set (see below) would necessarily be open to abuse, thus exacerbating the problem. It must be remembered that it is in the interest of authors, visual creators and publishers to produce works relevant to the needs and demands of schools, colleges and universities at a fair price. Generally once the demand is established, the market will ensure there is a supply to match it.

**Q18. 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?**

**CLA Answer:** Numerical limits in the current s. 36 applying to reprographic works are generally well understood and capable of some form of measurements, although even this can be problematic. It is hard to see how such numerical limits could be imposed on other classes of work (how do you measure 1% of a painting?) which might suggest a solution of a generalised description such as “small portion” or “insubstantial”. But apart from the uncertainty that this would undoubtedly generate, it would increase the possibilities of abuse. At best, teachers and others trying to comply with the law would struggle to understand what it meant and when they were operating within appropriate limits, and at worst it could allow the use/abuse of extracts of such a size as to damage primary sales.

**4.5 Other Issues**

**4.5.1 “Dealt with”:**

this definition is less problematic for s. 36 than for s.35 which currently specifically prohibits communication from within the premises of educational establishment to any person situated outside those premises. For s. 35 any inclusion of distance learners within the exception necessarily requires that to be revised. The current definition in s. 36 however contains no such restriction and is, for most purposes, serviceable in that it prohibits any sale or letting for hire. The final limb of the definition in s. 36 (Communication to the public) does require some revision, but this could be addressed by a cross reference to those who are able to access extracts (teachers, students and pupils as above) and confirmation that communication to them by the educational institution for educational purposes and as part of their educational studies does not equal “communication to the public”. If the mechanism of a “Secure Network” is used as described above, then some of the problems envisaged in paragraph 72 (page 13) of the Consultation Document would simply not arise. The simple answer to the question of whether transmission to an incorrect e-mail address would produce an infringing copy is that technically it would. It is of course entirely

unlikely that a single instance of transmission to an incorrect e-mail address would be likely to result in any action or liability.

#### 4.5.2 European Law and 3 Step Test:

this is covered in the introduction to this submission.

#### 4.5.3 Digital Rights Management (“DRM”):

s. 296ZE would, without more, apply by default to any extension to copyright exceptions, including the education specific exceptions of s. 35 and s. 36. Our views on the legal basis and practical effect of this section were covered in the Introduction. In addition, s. 296ZE is dealing with the application of effective technological measures to a copyright work and is therefore necessarily dealing only with electronic products, whereas the problem identified by the Gowers Review relates primarily to hard copy works that could be photocopied and distributed by hand to a class – see for instance paragraph 5 (page 2) of the Consultation Document referring to the purpose of s. 36 to allow “educational establishments to copy (usually by photocopier)” and also to paragraph 60 (page 12) of the Consultation Document stating the current exception is “aimed at permitting teachers to prepare ad hoc hard copy “handouts” for their pupils”.

It is true that the definition “reprographic process” in s. 178 of the CDPA includes reference to works “held in electronic form” and therefore “any copying by electronic means”. But this again touches on the fundamental difference between a sale of a physical hard copy product (which does not require a separate licence to be granted to allow use of the original acquired) and the sale of an electronic product which can only be handled by means of a licence. Electronic products, whether sold online or offline, will come with licence terms specifying, amongst other things, the classes of person who may access the product and where different pricing models will depend on the size and width of that class. Should any educational establishment wish to acquire a licence permitting use of interactive whiteboards to enhance the classroom learning experience or to allow extracts to be sent to distance learning students by electronic means, they can achieve this through a licence from the supplier of electronic product (and which, in accordance with s. 36 (3) would displace the statutory exception).

CLA would suggest that it would needlessly complicate a relatively straightforward expansion of the exception to include consideration of the possible application of TPMs preventing the exercise of “permitted acts” (with an underlying and contested notion that they are “rights”) and which can only apply to products sold originally in electronic form which do not present the problem which Gowers is seeking to address. It follows, therefore, that CLA believes that s. 296ZE would have to be amended to as not to apply to these exceptions.

## 5. Format Shifting

- 5.1 It is worth making a point of principle that we have made previously in our communications with the IPO to do with an issue of terminology. The proposed new exception relates to “format shifting” and we are most anxious to distinguish this from what we would term as “media shifting” (converting a paper copy to a digital one) and which we do not think should be the subject of an exception at all.

To quote from our letter of 28th February 2007:-

“**Format shifting**, we think, should mean shifting the same content – and in the same media – from one digital carrier to another. Digitisation however involves upgrading from paper to digital – a different medium with vastly greater utility and potential for copies to proliferate

without any recompense for rightsholders. It isn't just a copy; it is a different product. We would regard this as **media shifting**.

Documents which have been "media shifted" using such ubiquitous technology as digital cameras and scanners can even now be converted using run-of-the-mill OCR software into digital files which can be manipulated, stored as part of a database, and searched using keywords. The process is already relatively quick using readily available consumer products, the technical efficiency and speed of which can only increase. The utility of the end product is of a different order entirely from that offered by the paper version. Whilst media shifting might be permitted as an exception only for archival purposes in accordance with the Gowers recommendations, media shifting for other uses should only be permissible under licence. It should not form part of a statutory exception."

- 5.2 The Consultation Document is clear that in this phase of implementation of the Gowers Review this exception is being discussed specifically to deal with the perceived problems with recorded music, and possibly also of films. But in both the main commentary and in the Impact Analysis for the format shifting recommendation, it is seeking evidence on a possible extension of this proposed exception to cover all classes of work ("option 2"). We are concerned at the examples given on page 17 envisaging the possible scanning of artistic works and literary works which we think are unnecessary and highly dangerous. In short, CLA would ask that any proposed format shifting exception (if required at all) should be strictly limited to music and possibly films where the problem first arose, and that this should not provide an opportunity for some lateral thinking as to which other areas such an exception might conceivably apply.

None of this should be taken as meaning that CLA agrees that a format shifting exception is necessary at all – CLA is happy to associate itself with the submission of AAIP – but simply that there is definitely no case for it to apply at some point to hard copy printed publications of literary works, including artistic works. We therefore address Questions 19 – 29 on the basis that it were being proposed that a format shifting exception should apply to all classes of work.

**Q19. What impact would the introduction of a format shifting exception have? What costs or benefits would accrue to rightsholders and users of copyright?**

**CLA Answer:** Were a format shifting exception to be so drafted as to be capable of applying to printed literary works, CLA thinks that the impact is likely to be adverse and potentially highly significant, with little legitimate benefit to users of copyright. The example given at page 17 of the Consultation Document suggests it may be desirable to allow users to scan a literary work into a portable electronic reading device to read while travelling. We disagree. It would be highly undesirable to allow such activity which, contrary to the last sentence, we do not consider would be legitimate and might impinge on the potential for, or viability of, the publication and sale of an electronic product in the first place. It is hard to believe that legitimate users would actually find the process of scanning a book of hundreds, perhaps thousands, of pages on to a portable electronic reading device to be a worthwhile, cost effective or useful activity and that little extra is gained in the way of convenience in terms of carrying a portable electronic reading device (such as a laptop) instead of a relatively small and lightweight book or journal. Clearly this should be left to the market to provide devices to allow reading with a market in the sale of literary content rather than it becoming a subject of statutory exception which could render stillborn the infant e-book/reader market.

**Q20. Do you agree with the conditions proposed above?**

**CLA Answer:** In any format shifting exception, CLA would certainly agree with the conditions proposed, but would want it to be clear that it did not apply in the first place to printed literary works and that, whatever the category of work in question, it should never apply to a copy generated from the use of an exception (e.g. fair dealing) as opposed to a paid-for acquisition.

**Q21-23:** Are covered by what is said above.

**Q24. 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?**

**CLA Answer:** CLA believes that any format shifting exceptions, as stated above, should definitely not apply to any categories of work (other than recorded music and film if indeed even this is necessary or appropriate).

**Q25. What impact would the introduction of a format shifting exception have on particular sectors of the creative industries?**

**CLA Answer:** The impact could be potentially damaging to the existing hard copy world of publishing in that it could potentially lead to a peer file-sharing culture that could devastate original sales of literary work similar to the music industry and could prevent the launch at all of successful e-book reader products.

**Q26-28. How many format shifts would 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?**

**CLA Answer:** The key to all these is in correctly defining what is a format shift as opposed to media shift, in other words allowing, for private use only, an individual to play or display on any number of digital media or carriers they own, content they have themselves purchased – and for private use only. Technology may develop different digital carriers, but the fundamental difference between an analogue (hard copy) product and digital product must be recognised by any exception.

**Q29. Should the exception apply to what works and from what date should the exception apply?**

**CLA Answer:** The difficulty of answering this question sensibly demonstrates the problem with the proposal that there should be an exception at all. If copyright law is not to be changed retrospectively, an exception could only apply to new works published after the date of any implementation of a new exception. This would necessarily imply that the work has also to be purchased after the date of the law changes, but since the change has been proposed in response to a current problem reflecting current and historic consumer behaviour, it is unlikely that consumers and users pay any attention to such distinctions. This rather suggests that the better solution would be a voluntary licensing one rather than a statutory exception. Alternatively, any format shifting exception (narrow and concise in its application as described above) could only apply to the extent that there was no licensing scheme available. In this case, it might be appropriate for the exception to apply to copies made after the date the law changes.

**6. Recommendation 9 extending the exception for copying for research and private study**

- 6.1 The proposed extension of this exception does not affect CLA's core activities and so we do not address specifically questions 30 to 49 of the Consultation Document. CLA would only note that any proposed expansion of copyright exceptions always needs to be measured carefully against the scale of the genuine need versus the possible risk to rightsholders. Exceptions need to be narrowly drafted clearly targeting their intended beneficiaries, as all too often they are capable of having a wider and unintended application. As noted in the introduction, all copyright exceptions should be made specifically subject to the Berne 3 Step Test and to the various requirements in the Copyright Directive for fair compensation.
- 6.2 The Consultation Document rightly notes the risk of blurring the distinction between the general "fair dealing" exceptions contained in s. 29 and s. 30 with the education-specific exceptions contained in s. 32, et seq. Since the main problem that this proposed exception is intended to address lies in the educational sphere, it might be appropriate to consider an

approach similar to s. 35 and s. 36 in that the needs of educational institutions could be met by a statutory safety net which applied in the absence of any voluntary licensing scheme. In this way the key purpose of access, as opposed to free access, would be met.

- 6.3 The Consultation Document also notes (paragraph 164, page 26) that the issue of DRM is a significant one for rightsholders in this area, and notes in paragraph 165 that the UK is obliged by EC law “to provide a DRM work around arrangement for copies required for the purposes of scientific research”. But this is only required where the member state has chosen to allow such an exception in the first place and where, in accordance with the Copyright Directive, that exception complies with the Berne 3 Step Test and provides fair compensation. Again a licensing solution that allows rightsholders to be compensated meets the requirements of the 3 Step Test enshrined in the Copyright Directive whilst the licence itself allows access, obviating the need for any statutory exception and the disapplication of DRM to allow that exception to be utilised.

## **7. Recommendations 10a and 10b – Amendment of Library Privilege Exceptions to Extend Permitted Acts for the Purposes of Preservation**

- 7.1 Many of the issues raised here (3 Step Test, DRM and disapplication of TPMs) are covered elsewhere in this submission. Recommendation 10a, extending the scope of the current library privilege exceptions to include all classes of copyright work, does not affect CLA beyond the general principles relating to exceptions already discussed.

### **7.2 Recommendation 10b**

“Prescribed libraries to be able to format shift works held on unstable media to preserve permanent collections in an accessible format and that museums and galleries should be added to the prescribed libraries exception”.

As recognised by the Consultation Document, it is important that this exception is limited to archiving and does not permit any subsequent dealing or exploitation. It must certainly not allow remote access, and even on-site access to archived copies must be subject to a condition that it does not substitute for primary sales. After all, archiving a paper copy in an electronic form then allows multiple simultaneous viewing that could otherwise only have been achieved through the multiple purchase of the work. Also, archive copies must be taken from legitimately purchased copies and not from legal deposit copies.

### **Q50. What impact would the expansion of the exception for libraries and archives have? What costs or benefits would accrue to rightsholders and users of copyright?**

**CLA Answer:** The Consultation Document notes in paragraph 173 (page 28) that the current exception provides for prescribed conditions with which a prescribed library or archivist has to comply in order to use the exception. S. 42 (2) CDPA specifies that those conditions should include “provision for restricting the making of copies to cases where it is not reasonably practicable to purchase a copy of the item in question to fulfil that purpose”. CLA agrees that any expanded exception must also be subject to this condition. The prescribed conditions are set out in the Copyright (Librarians and Archivists) (Copying of Copyright Material) Regulations 1989 SI No. 1212 (the “Regulations”). However, no library outside the UK should be a library prescribed for the purposes of receiving a format shifted (i.e. an electronic) copy pursuant to the provisions of the Regulations and to this extent Part B of Schedule 1 of the Regulations would need to be amended or disapplied. The “prescribed conditions” should include a requirement for the library to keep records of the occasions on which it uses the benefit of this exception with an indication of the steps taken to identify whether it was reasonably practicable or not to purchase another copy of the item in question.

Further, as noted above, the ability to reproduce a paper copy of a literary work into a digital copy to which there can be multiple and simultaneous access could substitute for the purchase by a library of more than one copy and so the prescribed conditions ought not to be

limited just to “reasonably practicable” efforts to acquire another copy, but to acquire as many copies as might be required for the likely demand for access to the work in a permanent collection.

**Q51. What are the consequences, for rightsholders and beneficiaries, of extending section 42 to cover all classes of works?**

**CLA Answer:** The current exception is limited to “literary, dramatic or musical” works and the Consultation Document proposes to extend it to all classes of work “including sound recordings, films or broadcast”. It does not specify “artistic” works, which are therefore proposed to be included almost by default. This falls outside of CLA’s remit (except to the extent that the artistic work may occur within the pages of a book, magazine or journal), but we note that format shifting original paintings, photographs and illustrations raises certain practical difficulties and issues of principle that require consideration.

**Q52 & Q53. Is it necessary to restrict the number of copies made for preservation purposes? If so, why, and how many copies should be permitted?**

**CLA Answer:** It would be difficult to agree on a numerical limit, so the restriction should be, as noted in the Consultation Document, to as many copies as are required for the purposes of preservation.

**Q54 & Q55. What would be the impact on rightsholders 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?**

**CLA Answer:** In terms of literary works, there seems no obvious reason why museums and galleries should not be added to the class of institutions capable of benefiting from this exception provided they are subject to similar or analogous conditions as are laid down for prescribed libraries.

## **8. Recommendation 12 – Caricature, Parody or Pastiche Exception**

- 8.1 In common with many other commentators, it appears to us that there is no proven need for an exception, the extent and application of which would be clouded in uncertainty and would probably cause more problems than it could hope to solve. There seems no real evidence that the current regime acts as a disincentive to the creation of new works that might supposedly be encouraged by the introduction of such an exemption which CLA firmly opposes. Accordingly we do not answer specifically questions 56 to 60.

## Appendix 1 – Impact Analysis and Call for Evidence (Recommendation 2)

Most of the points and issues covered in the partial impact assessment have been commented on in the main submission.

### 1. **Rightsowners represented by CLA**

We have commented above on the relatively modest fee increases charged or proposed to be charged by CLA to extend its licences to cover the scanning and making of digital copies and then their use in the provision of education. It is worth noting that these licences are in a trial phase and that the fees and the grant of rights may need to be revised in the light of further experience as to this use and value to the user and to the potential impact on these primary sales. It is a core value of CLA licences that they must not substitute for the original purchase of the product and that CLA licences must complement, and not compete with, the primary sales activities of their rightsholders.

It is also worth noting that the partial impact assessment is wrong in stating that rightsholders would be benefit from increased revenues as a result of any expansion of the statutory exception afforded by s. 36. S. 36 itself will not provide any revenue for rightsholders; that will come only from the issue of a licence scheme on behalf of rightsholders which, as current CLA licences show, do not depend on there being a pre-existing exception curtailed only to the extent that a licensing scheme exists. Rather one starts at the opposite end of the spectrum in that the exclusive rights of reproduction and communication afforded to the copyright owner require a user to obtain the copyright holder's licence to undertake these acts in the first place.

### 2. **Rightsholders not represented by CLA**

It follows that such rightsholders will be prejudiced by any proposed exception as their rights will be constrained by the exception and they will not automatically receive any compensation or remuneration for this use. If they wish to receive remuneration, they will be forced to contemplate joining a collective licensing scheme such as that operated by CLA or launching their own.

### 3. **Educational establishments/education authorities**

For students and teachers, the benefits listed here will, of course, only apply to those works where the rightsholders are not currently represented by CLA as the CLA licence already grants these rights for the vast number of rightsholders that it represents.

### 4. **Call for evidence**

**“The percentage of extracts of published works currently used by educational establishments that are covered by licensing schemes”.**

It is hard to put a percentage on this; the vast majority of the UK repertoire is covered by the CLA scheme, but there is less extensive coverage of overseas works.

**“The demand for communicating extracts of published works digitally to distance learners, and for displaying such extracts on interactive whiteboards”.**

According to CLA's most recent state schools sector research (QI Statistics “Schools Scanning Research Spring 2008”), the following was reported:

- 84.2% of primary schools and 75% of secondary schools replied that they used digitised copies with digital whiteboard/presentation software;
- 30.8% of primary schools and 45% of secondary schools replied that they used digitised copies with a VLE;

- 10% of primary schools and 50% of secondary schools replied that they e-mailed digitised copies to pupils.

CLA found similar findings from its November 2006 “Digital use of published material” survey of Scottish Schools (run in partnership with Learning and Teaching Scotland via the LTS website).

According to CLA’s most recent FE sector research (QI Statistics “FE Scanning Questionnaire Autumn 2007”):

- 40% of respondents reported they e-mailed copies to students, and;
- 60% of respondents reported they used digitized copies within a VLE/Intranet.

For Higher Education, the predominant trend is generally towards more E Learning rather than Distance Learning per se, i.e. regardless of whether a student is studying by means of regular classroom based tuition or studying at a Distance. There is a growing demand for teaching/learning resources (whether scanned from printed books, journals and magazines or derived from e books or e journals) to be available electronically.

While there is heavy use of Virtual Learning Environments and projected display of PowerPoint presentations on screen, CLA is unaware of demand for interactive whiteboard technology in HEIs.

**“The demand for distance learning generally and whether it is growing”.**

All the indications are that this is growing most rapidly in the FE sector, with HE and schools following on thereafter. This is due, no doubt, in large part to the long-standing role of FE colleges in distance learning provision based originally upon the principle of community outreach, which over time, has extended more significantly to overseas-based learners. The majority of distance learning in the UK post-compulsory education sectors is delivered through the FE sector.

The expanding work of the regional National Education Network members (including the LTS Glow platform, the various Regional Broadband Consortia and C2KNI) indicates demand is increasing.

According to a recent OECD/PISA report:

- UK schools have the most computers per pupil in the world (based upon a study of 57 countries);
- more than £3 billion has been spent on computer equipment in UK state schools in the past 8 years.

As noted above, HEIs seem to attach greater strategic importance to the expansion of ‘E Learning’ and ‘Blended Learning’ than to Distance Learning. Some Learning Technologists assert that “all HE students are now, to a greater or lesser extent, Distance Learners”; reflecting this point, there is no longer a consensus within the Higher Education community about how to define “Distance Learning” as a mode of study. This makes it problematical to point to definitive trends – though it is probably accurate to say that there is an upward trend in: (a) the number of students based overseas enrolled on courses/programmes at UK HEIs; (b) the number of students studying on a part time basis.

**“Which social groups make the most use of distance learning? Are certain vulnerable groups disproportionately represented?”**

There is little information on this, but it is not always vulnerable groups who benefit from distance learning. For example, the DLC pilot licence in Yorkshire was developed specifically to enable delivery of distance learning to gifted learning pupils - rather than the opposite. The CLA/LTS “Digital use of published material” survey of Scottish Schools examined the pedagogical importance and benefits of the new learning technologies in some detail. It identified that the use of ICT enables “equal access for print-disabled pupils: those who cannot see the text (visually impaired), who cannot read the text (dyslexic), who cannot handle the books (physically impaired), who cannot understand the text (learning impaired).”

**“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?”**

CLA has already launched its scanning licence for schools.

**“The impact on education outcomes”.**

The government drive for personalised learning is making teachers tailor learning resources to individual pupils more than before. Schools need licences that enable them to do this using techniques such as digital ‘cut and paste’ and to make full use of the features of new technologies like digital whiteboards. CLA’s enhanced licences enable teachers to do the everyday things they need to do in order to provide the best learning experience for individual pupils, but doing so within a blanket licence framework.

The CLA/LTS survey findings included:

- Individualised programmes of study were possible, giving rapid feedback to learners;
- Interactive learning, e.g. using whiteboards, involves children fully in the teaching/learning process;
- Opportunity for very young children to access resources in a safe environment.

**“The price sensitivity of smaller educational establishments to prices of licence schemes”.**

All of CLA’s education licences are based upon the size of the student/pupil population of the licensee. In this respect, all such licences issued by CLA are proportional to the size (and therefore the price sensitivity) of the licensee.

In the HE and FE sectors CLA negotiates licence fees with representative bodies of the sectors (e.g. UUK and AoC). These negotiations are on the understanding that almost by definition, blanket licensing schemes are aimed at providing a simple, cost-effective solution to rights clearance for licensees and can only be offered on a cost-effective basis by CLA when there is no tailoring of the licence terms to individual needs. There is less variation in size of institution in HE than there is in FE (partly because the FE sector is approx 2.5 times the size of the HE sector in institution number terms).

There is more significant variation in size of institution within the state schools sector, but again, all Local Authority maintained schools continue to be licensed with CLA.