



Taking Forward the Gowers Review of Intellectual Property: Second Stage Consultation on Copyright Exceptions

CLA Response

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1. Introduction and Structure of this Response

CLA entered a submission to the first stage Consultation on taking forward the Gowers Review and this submission will not repeat remarks made in that submission. There is an Executive Summary followed by a few general comments regarding the approach that the IPO propose to adopt. The individual Gowers Recommendations being taken forward are then addressed and finally relevant Questions contained in Annex B to the Consultation document are answered.

CLA confirms that this submission may be publically disclosed.

2. Executive Summary

- Changes to copyright law affecting the rights and obligations of copyright owners and users ought not to be implemented by means of secondary legislation.
- The analysis of the Berne 3 Step Test in the consultation document is helpful, but many difficulties would be overcome if the test were to be formally incorporated into UK law as a qualifier to all copyright exceptions.
- Widening the “fair dealing” exception of s.29 to include sound recordings, films and broadcasts risks an unintended widening of the interpretation of the exception and a confusion with the education-specific exceptions where the matter would be better dealt with.
- The extension of educational exceptions to include sound recordings and films would sit better in s. 35 not s.36, subject to displacement by a certified licensing scheme.
- CLA agrees with the decision not to include ‘on-demand’ services within these educational exceptions.
- The decision to retain the regime whereby ss.35 and 36 only apply to the extent there is no licensing scheme is welcome.
- The retention of the 1% limit in the s. 36 exception for reprographic copying is correct; this should not be extended to include artistic works.
- We believe there is a risk to UK exports if the extension of s. 36 to include distance learners is not limited to those based in the UK.
- The libraries and archivists exceptions should not allow digital copies created by format shifting to be delivered overseas.
- CLA agrees that there is no need for an exception for parody, caricature and pastiche.

3. General Comments

3.1 Implementation by Secondary Legislation

The Government is proposing to rely on s. 2(2) of the European Communities Act on the basis that this gives the Government a wide power to implement European Directives by means of secondary legislation. It states (para. 50 on page 9 of the Consultation document) that it believes that confining the scope of copyright further than when the Copyright Directive was first implemented is within the scope of s. 2(2). But as previously stated, our belief is that s. 2(2) is limited to implementing those changes which are necessary to comply with EU Directives or, in the words of the Act, “for the purpose of implementing any Community obligation of the United Kingdom”. S. 2(2) does also allow provision to be made to enable any ‘rights’ to be enjoyed but this surely cannot be stretched to allow significant changes to legislation to widen UK law affecting the rights of copyright owners where this is not directly required by the Copyright Directive.

The Copyright Directive attempted to harmonise the copyright law across the EU by limiting the number of exceptions that were permitted. There is one mandatory exception and a menu of 20 permitted exceptions. We fail to see how changing UK law to widen exceptions, which may be allowed but are not required by the Copyright Directive, can be described as being necessary to comply with a Community obligation.

3.2 Berne 3 Step Test

CLA welcomes the analysis of this (at paras 46-49 on page 9) of the Consultation document and, in particular, the remarks on Step 2 of the Berne test that the ‘normal exploitation’ of a work includes the use of licensing schemes as a way of exploiting the work (also mentioned on page 16, para 102). The Consultation document comments that because the exception is displaced by a licensing scheme there is no infringement of the test; it must be equally true that any exception which prevents normal exploitation through licensing schemes must fail the test.

CLA however disagrees that Step 1 (application in certain special cases) means no more than that the exemption must apply only in “clearly defined circumstances”. The word ‘special’ must connote something narrower than that, something exceptional and out of the ordinary. “Circumstances” might well be “clearly defined” but so widely as to include entire sections of the population - which cannot be the rationale of this element of the test.

Although we welcome the general approach on the 3 step test, we feel an opportunity to clarify the law in this area is being missed. As previously stated, we feel that it would be appropriate for compliance with the 3 Step Test to be included in the primary legislation to make it clear that every

exception has to be measured against this requirement. CLA's experience is that these exceptions have been liberally interpreted by users in ways which must infringe the 3 step test giving copyright owners an uphill struggle to enforce their rights. Formalising the 3 step test into UK law would be a perfectly proper use of secondary legislation as it would be complying with a requirement of EU law; indeed it is arguable that UK is obliged to do this to achieve full implementation of the Copyright Directive.

4. Gowers recommendations

4.1 Research and Private Study (Gowers Recommendation 9)

We believe the proposed extension to s. 29 as drafted is dangerous and risks introducing a 2 tier system of fair dealing exceptions whilst producing a confusing overlap with the educational exceptions. In our submission to the First Stage Consultation we had urged that exceptions be narrowly drafted to target clearly their intended beneficiaries to avoid an unintended wider application. CLA appreciates that an attempt has been made to limit the extension of the fair dealing exceptions (to cover sound recordings, films and broadcasts) to educational purposes. However, we also said that these exceptions all needed to be made specifically subject to the 3 step test and that there was a risk of blurring the distinction between the general fair dealing exceptions contained in s. 29 and s. 30 with the education-specific sections contained in s. 32 et seq. We repeat our view that if the main problem that the proposed exception is intended to address lies in the educational sphere, it would be better dealt with in the education specific exceptions.

The Consultation document notes (para 48, page 9) that the third step in the Berne Test involves a balancing exercise between the general interest of protecting rightsholders exclusive rights and the public interest. We do not believe that such a balance exists in the fair dealing exceptions as they are not expressed to be subject to the test, or subject to being displaced by a licensing scheme. They must therefore run the danger of damaging rightsholders interests, contrary to the test and the requirements of the Copyright Directive. The inclusion of the proposed exception in the fair dealing provisions targeted at an educational audience also risks the existing exceptions being re-interpreted more widely by suggesting that all copying by pupils and students in educational establishments is fair dealing.

4.2 Educational Exceptions (Gowers Recommendation 2)

4.2.1 Section 35

As stated above, we believe that s. 35 is the correct place to deal with education-specific exceptions for sound recordings, films and broadcasts. We think the proposed extension to the fair dealing

exception of s. 29 is fraught with difficulties and would be better addressed in this section which is designed to facilitate lawful access. Educational institutions would have an entitlement to some usage rights for educational purposes, either under the exception or under the application of a certified licensing scheme, thereby meeting the reasonable requirements of educational establishments whilst ensuring rightsholders are not unreasonably prejudiced contrary to the 3 step test. We also think the proposed extension of s. 36 (reprographic copying) to deal with sound recordings and films would be better addressed in this section.

CLA welcomes the decision not to include the recording of “on-demand” works in the amendments. We do not think there is a problem with access to on-demand services and the nature of the provision of the service carries with it a licensing framework for the scope of usage rights granted.

We have had the benefit of reading the submission from ERA and agree with their comments about the possible confusion arising from the different use of language in this section and in the proposed amendments to s. 29.

4.2.2 **Section 36**

Effect of licensing schemes

CLA welcomes the proposal that the extension of this educational exception to include distance learners should follow the Gowers recommendation that it should only apply if there is no licensing scheme in existence. CLA has now completed its development of its educational licences so that they all now include the right for learning materials (within licence limits) to be transmitted electronically to pupils at remote locations. We therefore do not think it would be necessary for CLA licences to be revised to reflect the proposed changes (see page 12, para 68).

Definition of ‘Educational Establishments’

CLA also welcomes the decision to retain the current definition of educational establishments and not to extend it to include museums, galleries, libraries or archives which would have introduced doubt over the extent of the application of the exception.

Adding films, sound recordings to s. 36

The extension to include sound recordings and films sits uneasily in s. 36 which is specifically aimed at the copying of published literary, dramatic or musical works. For instance the 1% limitation would appear more difficult to operate in a meaningful fashion for sound recordings or films. We think these provisions would be better dealt with under the s. 35 regime where copying of the whole of the sound

recording or film could be covered under appropriate conditions by the certified licensing scheme operated by ERA.

Artistic Works

We agree that it would be inappropriate to extend this exception to include artistic works. Copying of an entire artistic work would undoubtedly breach the requirements of the 3 step test (as is noted at para 98, page 15) and yet any limitation to copying some smaller part would appear impossible to craft in a meaningful way. Artistic works, where they appear within a published edition of a book or periodical, are a different matter. The CLA licence, by virtue of its agreement with DACS, includes all artistic works within the books, journals and magazines that CLA licences cover.

Authorised Persons

We agree that the definition of teacher in s. 174(5) is wide enough to include support staff as well as teachers and pupils as being "Authorised Persons". CLA licences typically authorise pupils, teachers, staff and, as appropriate, parents and governors.

1% Limit

We agree that the 1% limit should remain unchanged. Any numerical limit is going to be somewhat arbitrary, but the current 1% limit is well understood and sends the message that only a very small part may be copied under the exception. As noted in para 102 (page 16) any extension towards the 5% limit in CLA licences would have the effect of diminishing the need for the licence thereby preventing the normal exploitation of the work contrary to the 3 step test.

Distance Learners

In our submission to the first stage consultation we urged that the exception should be limited to the UK. We do not see how an exception under UK law could actually provide a defence against a claim for copyright infringement in another country if the receipt by a distance learning student based overseas represented an infringing act (such as importation) in that country – and it would be dangerous to suggest to educational institutions and their students that this might be the case. In para 113 (page 17), the Consultation paper considers that the issue of distance pupils being located outside the UK is unlikely to rise in practice. In fact there is a significant market in the commercial delivery of distance learning materials by UK institutions to overseas markets such as the Far East and the Caribbean.

According to HESA figures in 2007/2008 there were over 100,000 under graduate and post graduate overseas distance or flexible learning students with over 7,000 students at overseas campuses of UK

universities. There were nearly 60,000 other arrangements including collaborative provision with overseas institutions and 29,000 overseas “partner” organisations. We do not have figures for the value of this market, but it is obviously significant – CLA was given an informal estimated figure of \$8.2 billion for the market in the EU in 2008. We think it is most important that this activity is not jeopardised through an unwanted interpretation of an exception to UK law and we ask the IPO to reconsider the introduction of a limitation to UK-based distance learners.

Distribution outside of controlled network

We agree that the exception should not authorise any onward distribution of material to those outside controlled networks (para 120, page 18) and this is in keeping with the proposed clarification to s. 29 (1) and in keeping with the limits in ss. 32, 35 and s.36 about subsequent dealing with copies made under exception.

Communication to the public

We are concerned about the use of the term “public” when the intention is to cover only pupils and students (whether distance learning or resident) at an educational institution. The Restricted Act in question (s. 18 of the Act) is ‘Communication to the Public’ which is presumably why the proposed SI is drafted in this way. But the term might be easily misunderstood as connoting members of the public outside of the intended beneficiaries of the exception.

Notwithstanding the fact that the Restricted Act in s. 18 is “Communication to the Public”, we would prefer that this exception always referred to an “Authorised Person” as defined in the proposed new s. 36 (1E). It should also include a reference to the communication being for “the purposes of instruction” to reflect the wording of s. 36 (1).

4.3 Preservation by Libraries, Archives (Gowers Recommendations 10A and 10B)

CLA welcomes the emphasis that copying by librarians and archivists under s. 42 is purely for preservation purposes and not in some way to enlarge the library of materials available for public access, which should not be the subject matter of a statutory exception. We are pleased that the exception will continue also to be subject to the requirement that it is not reasonably practicable to buy a replacement copy. As noted in our original submission, we see no particular reason why museums and galleries should not be included along with libraries in this provision and agree that the exception should extend to include other types of copyright work.

We agree that some ability to format shift is necessary for preservation purposes, but that as with the legal deposit regime mentioned in the Consultation document, any access should be subject to the permission of the copyright owner either given individually or, where appropriate, under a collective

licence scheme. There is of course no point in preserving the nation's cultural heritage if it cannot be accessed or made available in some way to the public; but the line between the statutory exception enabling preservation and the operation of a library in lending or making available copies to the public must not be blurred.

We repeat the concern that the conversion of paper editions of a literary work into a digital copy is potentially more dangerous in terms of the proliferation of unlicensed and unlawful copies. We believe therefore that the conditions to be prescribed in relation to the libraries, museums and galleries that are capable of benefiting from the exception should clarify that only UK institutions can receive a format-shifted copy. As with distance learning, UK law cannot provide a defence to a claim for copyright infringement for an overseas entity and the difficulty of policing and enforcing rights against overseas bodies with a risk of global dissemination of unlawful copies suggests that this exception should be narrowly drawn to apply only to the UK.

5. Annex B Questions

Annex B Questions on Section 29

Q1. Section 29(3) will apply equally to the additional works (sound recordings, film and broadcasts) as to the works originally covered by this exception.

a. Are there any consequences which make this impractical?

CLA Response: The Libraries and Archivists Regulations issued pursuant to s. 40 would have to be amended to provide an equivalent to the restriction on multiple copies and copying of a certain amount of a work. We don't think these concepts sit at all well with sound recordings and films which cannot be easily divided in the same way as printed publications and where a prohibition on multiple access seems problematic when dealing with films, broadcasting, sounds recordings. These problems could be dealt with more easily if the matter were dealt with in the education-specific exceptions.

2. We propose that the law clarifies that legitimately copied extracts of sound recordings, film or broadcasts, if subsequently dealt with, would be infringing copies. We believe that the same should also be made explicit with regard to extracts already covered by section 29.

a. Are there any practical consequences of this that make this change unduly restrictive? If so, please state what they are.

CLA Response: We believe the proposed clarification (which mirrors the provisions in s. 35 and s. 36) would be helpful.

- b. Would this interfere with the normal things done by academics with their research and by students in the course of their studies? If so, please outline.**

CLA Response: Copies made under “fair dealing” exceptions obviously should not be on-sold, hired out or communicated to the public without any permission from the copyright owner and so should not interfere with what should be the normal activities of academics and students.

3. Section 29(1) specifically includes members of educational establishments who may not necessarily be on the teaching staff, but who are nevertheless carrying out research authorised by that establishment.

- a. Are there any practical consequences of this that make this an unreasonable approach? If so, please state what they are.**

CLA Response: As CLA believes this issue should be dealt with in s. 35 and s. 36 rather than in s. 29 and so does not have any comments on the drafting proposed for s. 29(1)b.

Annex B Questions on Section 36

9. We have taken the view that the term “reprographic copy” (as defined in Section 178 CDPA) seems to be too narrow to accommodate the types of digital technology employed by educational establishments, which may include remote and on-site access via computers, and the use of whiteboards. We therefore propose to remove the reference to “reprographic” in section 36 which will therefore permit any type of copying of passages extracts of the named works. We are however aware that there are various references to “reprographic” copies throughout the CDPA which may need to be examined depending on the context in which the expression is used. We have not, therefore included in the attached draft SI any consequential provisions which may result from this amendment pending the outcome of this consultation.

- a. What are the implications of replacing the specific term “reprographic copy” with “copy”?**

CLA Response: We understand the desire to update the language used in this section given that “reprography” is a little understood term now associated with older photocopying technologies such as xerography and other duplicating mechanisms. But a simple reference to “copies” of passages of published text may have an unintended consequence of widening the application of this exception.

The current definition (s. 178) states that a “reprographic process” means a process either for making facsimile copies or which involves the use of an appliance for making multiple copies (and where “facsimile copies” itself is defined to include a copy which is reduced or enlarged in scale).

The definition therefore contains a restriction that the exception in s. 36 only covers identical copies (albeit whether larger or smaller) and something valuable might therefore be lost if this definition does not apply to the copies which may be made under the revised s. 36. All rightsholders have a legitimate concern about manipulation of their work and the right to prevent an authorised reproduction that is not an authentic copy is an aspect of moral rights.

As the question notes, the term “reprographic process” is used elsewhere in the Act (particularly the s. 32 exception: things done for the purposes of instruction and examination) and s. 130 (licences for reprographic copying, factors to be taken into account in certain Copyright Tribunal cases). Since the definition already refers to appliances for making multiple copies (which will cover photocopiers, scanners and computers) and already contains wording dealing with works already held in electronic form, it might be thought that the definition already covers electronic copies.

Any clarification on this might better be dealt with in the definition in s. 178 leaving the term “Reprographic Copies” in s. 36 in keeping with the rest of the Act. If sound recordings and films were to be dealt with in s. 35 as we advocate then there will be no particular need to change the reference to Reprographic Copy in s. 36.

b. How do we ensure that this section of the act is sufficient to permit reasonable acts of copying extracts which reflect available technologies whilst preventing inappropriate copying?

CLA Response: As suggested above, it may be better to enlarge the definition of “Reprographic Copying” and “Reprographic Processing” in s. 178 by adding a third limb to refer to a ‘computer or other machine or electronic process’ for making copies (where “electronic” is as already defined in s. 178).