EC Green Paper

Copyright in the Knowledge Economy

November 2008

Response from
The
Educational Recording Agency Limited

New Premier House
150 Southampton Row
London
WC1B 5AL
Summary

ERA welcomes recognition within the Green Paper of the importance of the Three Step Test for the application of copyright exceptions or limitations.

Exceptions and limitations should apply :-
in 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 Commission must therefore be able to distinguish the subsections of “the public” which might claim the benefits of copyright exceptions and limitations from “the public” who are potential “consumers” or licensed users of copyright works.

In the world of “education” it is important to distinguish:-
educational use for the purposes of educational establishments; and
use for the sole purpose of illustration for teaching; from
wider “educational use” – which could just as well be “use by a natural person for private use and for ends that are neither directly nor indirectly commercial”.

Flexible interpretation of the wording used in Article 5 of the Copyright Directive for potential copyright exceptions and limitations has supported:-
application to rapidly evolving technologies;
reconciliation with experience under different Member States’ national laws;
recognition of cultural differences and language differences of benefit to society; and
lower legislative costs in terms of legal review against the above issues;

whilst also providing flexibility for courts to develop case law taking into account the above issues.

ERA does not believe that greater legal certainty, or better protection for beneficiaries will be achieved by making and additional categories of exceptions defined under EU law, mandatory.

In addressing the question of “educational uses” it is important to link any exceptions to activities by, or under the auspices of “educational establishments” (and not to allow extension to wider “educational” concepts that would be impossible to define in the context of the “special cases” to which the three step test might apply).

The issue of what constitutes an “educational establishment” is an important issue for all rights owners.

Use of copyright works for the purposes of
(a) illustration for teaching
and
(b) scientific research
does not have the same implications for all types of work.

Education and awareness about the scope of available educational licences must continue to be promoted by rights owners as the debate over the scope of educational copyright exceptions and limitations continues.

The positive changes made by rights owners in licensing to accommodate increased on-line use and distance learning within education must be considered by the Commission. As an example, ERA and others have pushed for changes to the scope of section 35 CDPA relevant within the UK to match the ERA Plus Licence launched back in 2007.

Rights owners are not opposed to change. However change within the scope of the Three Step Test needs to be thought through. Potential markets need to be addressed separately when considering copyright exceptions and limitations.

Nowhere is this more important than within the field of education. It is a field within which the educational market place is the primary one from which rights owners might secure a return for the use of their work.

Priorities such as this must not be forgotten in the wider social debate to “promote free movement of knowledge and innovation as the “Fifth Freedom” in the single market”.

The Educational Recording Agency Limited

The Educational Recording Agency Limited (ERA) is a copyright collecting society. It was set up under the laws of England and Wales in 1989 with a view to operating a copyright licensing scheme for non-commercial educational use of copyright protected material.

Uniquely serving the UK education sector, ERA is one of a range of collecting societies which helps copyright owners and performers derive an income from the licensed use of their works.

However the range of the repertoire represented by ERA is uniquely broad when considered against the types of copyright work and performances involved in the production and broadcast of television and radio programmes1.

The ERA certified licensing scheme operates to enable educational establishments to record for (non-commercial) educational purposes any radio or television broadcast output of ERA members within the United Kingdom (apart from Open University programmes which are covered by a separate certified licensing scheme).

Only “educational establishments” as defined by the Secretary of State under the Copyright, Designs

11 At present ERA has 16 members each representing a very significant copyright repertoire. They are:

- Association De Gestion Internationale Collective Des Oeuvres Audiovisuelles
- Authors’ Licensing and Collecting Society Limited
- BBC Worldwide Limited
- BPI (British Recorded Music Industry) Limited
- Channel Four Television Corporation
- Channel 5 Broadcasting Limited
- Design and Artists Copyright Society Limited
- Directors UK Limited
- Equity
- The Incorporated Society of Musicians
- ITV Network Limited
- Mechanical Copyright Protection Society
- Musicians’ Union
- The Performing Right Society Limited
- Phonographic Performance Limited
- Sianel Pedwar Cymru (S4C).
and Patents Act 1988 (as amended) and ensuing Statutory Instruments, are able to take out an ERA licence.

In 2007 ERA launched a new stand alone licence scheme for the benefit of educational establishments. It is known as the ERA Plus Licence scheme. Details can be found on the ERA website at www.era.org.uk

Responses to questions raised in the Green Paper

1. Should there be encouragement or guidelines for contractual arrangements between rightsholders and users for the implementation of copyright exceptions?

Exceptions are not “rights” in themselves.

Contracts have always been able to override exceptions. It is the extent to which this happens that matters.

2. Should there be encouragement, guidelines or model licences for contractual arrangements between rightsholders and users on other aspects not covered by copyright exceptions?

Many such guidelines and models exist already.

Model licences need to reflect the marketplace for licensing different types of work.

Works are used in different primary and secondary markets. Model contracts often reflect this.

But a model contract for use of published extracts would not be the same as a model contract for licensing film or television rights.

Where formal guidelines are adopted, it is important that they do not override the contractual freedom and the flexibility that is usually linked to use and application of guidelines themselves.

3. Is an approach based on a list of non-mandatory exceptions adequate in the light of evolving Internet technologies and the prevalent economic and social expectations?

Yes. Flexible interpretation of exceptions benefits society.

Flexibility covers:-
- rapidly evolving technologies,
- experience of different Member States’ national laws
- cultural differences/language differences of benefit to society
- lower legislative costs in terms of legal review against the above issues
- flexibility for courts to develop case law taking into account the above issues.

4. Should certain categories of exceptions be made mandatory to ensure more legal certainty and better protection of beneficiaries of exceptions?

No. There is no real need to change beyond Article 5.1.

Clearer national definitions of what is meant by “educational purpose” and “research” may be helpful.

However in addressing the question of “educational uses” it is important to link any exceptions to activities by, or under the auspices of “educational establishments” (and not to allow extension to wider “educational” concepts that would be impossible to define in the context of the “special cases” to which the three step test might apply).
5. If so, which ones?
Not applicable.

Exceptions for libraries and archives

6. Should the exception for libraries and archives remain unchanged because publishers themselves will develop online access to their catalogues?

The Green Paper recognises two core issues
(a) the production of digital copies of materials held in the libraries' collections and
(b) the electronic delivery of these copies to users.

Article 5.2(c) Copyright Directive provides “Member States may provide for exceptions and limitations to the reproduction right ...in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums or by archives, which are not for direct or indirect economic or commercial advantage”.

The Green Paper suggests that this exception “stands out” as the only exception explicitly referring to the Three Step Test. However Article 5.5 makes is absolutely clear that any of the exceptions provided by the Directive “shall only be applied” in compliance with the 3 step test.

Therefore the right question is not whether the exception for libraries and archives should remain unchanged because publishers themselves will develop online access to their catalogues. (The reality is that many publishers and broadcasters are doing just that).

Instead, developing application of the exception in the way highlighted by the UK Intellectual Property Office consultation “Taking Forward The Gowers Review of Intellectual Property” is more appropriate. This consultation considered clarifying the law to allow for reproductions to be made by libraries with an interest in preserving content that is stored on unstable media such as film which deteriorates with age. Aiding the non-commercial process of preservation or replacement of items in permanent collections where it is not reasonably practicable to purchase a copy is therefore an issue which can be much more appropriately linked to the application of the Three Step Test.

However it may be possible to allow for such preservation as a “specific act of reproduction” which is acknowledged to fall within the existing provisions of Article 5.2 (c).

7. In order to increase access to works, should publicly accessible libraries, educational establishments, museums and archives enter into licensing schemes with the publishers?

Are there examples of successful licensing schemes for online access to library collections?

ERA submits that the licensing schemes offered to educational establishments through ERA within the United Kingdom are good examples of the way that copyright owners have been able to set up licence schemes which provide choice and opportunities for educational establishments to build libraries of recordings made off-air from broadcasts and to use these for educational purposes. Further details can be found on the ERA website at www-era.org.uk
8. Should the scope of the exception for publicly accessible libraries, educational establishments, museums and archives be clarified with respect to:

(a) Format shifting;
(b) The number of copies that can be made under the exception;
(c) The scanning of entire collections held by libraries.

The application of the Three Step Test to copyright exceptions must be applied distinctly and separately to the different types of establishment referred to in this question.

Uses of a non-commercial nature may be different in scope when considering use by students in an educational establishment on the one hand and adult researchers who may have links with the commercial world accessing libraries, on the other.

Turning to “educational uses”, it is important that any exceptions continue to be linked to activities by, or under the auspices of “educational establishments” (and not extended to wider “educational” concepts that would be impossible to distinguish from “private use” or in the context of “special cases” to which the Three Step Test might apply.

The UK has included in its copyright legislation (s 174 CDPA 1988) a helpful flexible definition of “educational establishment” covering schools and any other description of educational establishment specified by order of the Secretary of State. The definition is important to ensure that activities within “establishments” are distinguished from more general aspects of the lives of consumers or users of copyright.

9. Should the law be clarified with respect to whether the scanning of works held in libraries for the purpose of making their content searchable on the Internet goes beyond the scope of current exceptions to copyright?

No. The Commission itself confirms that current EU law under the Directive clearly requires rights holder consent for such activity.

10. Is a further Community Statutory Instrument required to deal with the problem of orphan works, which goes beyond the Commission Recommendation 2006/585/EC of August 2006?

No.

Reference is made to the High Level Experts Group reports of 4 June 2008.


The Sector Reports established specific guidelines linked to the issue of orphan works in various sectors.

The High Level Experts Group’s reports of 4 June 2008 recommend a self-regulatory system of sector-specific Codes (linked to the Memorandum of Understanding on Diligent Search Guidelines for Orphan Works signed by many representative bodies of rights owners.

It has already been proposed that the sector and national codes should be structured to recognise each other on a fully interoperable basis.

It remains to be seen whether some enabling legislation is required at national level. However this would need to do no more that enable or authorise the self-regulatory system of Codes already established by the High Level Experts Group reports of 4 June 2008.

ERA is a member of the British Copyright Council and would refer the Commission to the British Copyright Council’s submission to the UK Intellectual Property Office outlining detailed proposals
supporting licensing structures for use of orphan works. It is hoped that the proposal will enable the structures put in place to operate on an interoperable basis with licensing arrangements in place within other Member States.

11. If so, should this be done by amending the 2001 Directive on Copyright in the Information Society or through a stand-alone instrument?

Not applicable.

12. to 18. No comments.

Teaching and Research

19. Should the scientific and research community enter into licensing schemes with publishers in order to increase access to works for teaching or research purposes? Are there examples of successful licensing schemes enabling online use of works for teaching or research purposes?

The impact of exceptions and limitations linked to “research” must be distinguished from the possible impact of exceptions relating to use within educational establishments.

The introduction to the Green Paper states:-
“The Green Paper will focus on how research, science and educational materials are disseminated to the public and whether knowledge is freely circulating in the internal market”.

The Commission then goes on to state that “the public” addressed in this Green Paper comprises “scientists, researchers, students and also disabled people or the general public who want to advance their knowledge and educational levels by using the Internet”.

That is a pretty broad section of society.

The Commission must therefore be able to distinguish the subsections of “the public” which might claim the benefits of copyright exceptions and limitations from “the public” who are potential “consumers” or licensed users of copyright works.

In the world of “education” it is important to distinguish:-
(a) educational use for the purposes of educational establishments; and
(b) use for the sole purpose of illustration for teaching; from
(c) wider “educational use” – which could just as well be “use by a natural person for private use and for ends that are neither directly nor indirectly commercial”.

20. Should the teaching and research exception be clarified so as to accommodate modern forms of distance learning?

In addressing this question it is particularly important that the Commission is able to distinguish the subsections of “the public” which might claim the benefits of copyright exceptions and limitations involving “distance learning” from “the public” who are potential “consumers” or licensed users of copyright works.

The Green Paper picks up on the fact that, where the current exception for teaching and research is reflected in national law, the relevant provisions differ to a significant extent.

Within the UK the Gowers Review of Intellectual Property has led to this and similar questions being considered in some detail.

http://www.hm-treasury.gov.uk/gowers
ERA has provided detailed responses to both the initial Gowers Review and to the subsequent consultation by the UK Intellectual Property Office published in January 2008 entitled “Taking Forward the Gowers Review of Intellectual Property”. The Appendix attached to this response includes ERA’s response to the UK IPO Consultation in April 2008 (which in turn includes ERA’s response to the original Gowers Review as Annex 3 to that paper).

The existing scope of sections 35 and paragraph 6 of Schedule 2 Copyright, Designs and Patents Act 1988 is linked to Article 5.2 of the EC Copyright Directive. This recognises that “Member States may provide for exceptions and limitations to the reproduction right ...(c) in respect of specific acts of reproduction made by publicly accessible educational establishments .. which are not for direct or indirect economic or commercial advantage”.

Limiting any exception to use which is not for direct or indirect economic or commercial advantage is key, and must continue to be recognised for any changes envisaged to the scope of copyright exceptions linked to educational use.

ERA has previously submitted that interpretation of Article 5.2 (c) would be simpler if it was easy to identify when an educational establishment was acting in ways that did not involve direct or indirect economic or commercial advantage.

Commercial pressures on those responsible for running educational establishments make this increasingly complex.

One way to help identify this “non-commercial activity” is to distinguish the copyright exceptions that are linked to more core curricular educational activities when assessing how application of educational copyright exceptions, and licensing schemes linked to them, operate in practice. The certified licensing scheme operated by ERA under the existing provisions of section 35 and paragraph 6 of Schedule 2 CDPA is a good example.

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

Copyright works include:-

(a) works which have a commercial existence and use entirely independent of use by or within any form of educational establishment;

(b) works which are created for people working in, or connected to, education, where use within an educational establishment is likely to be the main area through which the creators of the work can charge for the use of their material, or exploit the material in any realistic commercial form;

(c) works which are created by people working in or connected to education; and

(d) works which have a commercial existence that is enhanced as a result of the educational nature of the work or the context within which the work is used.

---

4 CDPA – Copyright, Designs and Patents Act 1988 (as amended)
5 See UK SI 2007 No. 266 and UK SI 2008 No. 211.
The above distinctions are important when considering the impact of any educational exception against the Three Step Test.

That said, ERA has addressed ways in which licences issued by it authorise educational establishments to communicate educational recordings to students within an educational establishment might also cover licensed communication to “authorised users” when they are outside the educational establishment. To address this, ERA now offers educational establishments the opportunity to take out an ERA Plus Licence. Details of the ERA Plus Licence can be found on the ERA website at www.era.org.uk

For the ERA Plus Licence scheme to operate fairly it has been vital to link the licence scheme to communication overseen by an educational establishment, so that the communication remains for educational purposes and can be distinguished from the private study activities of individuals who are not linked to a “relevant network” operated by or on behalf of an educational establishment.

21. **Should there be a clarification that the teaching and research exception covers not only material used in classrooms or educational facilities, but also use of works at home for study?**

Please see response to question 20.

22. **Should there be mandatory minimum rules as to the length of the excerpts from works which can be reproduced or made available for teaching and research purposes?**

Minimum rules would be impractical to apply across the different types of copyright work (bearing in mind the results that application of the Three Step Test may have when applied to use of different types of work.

By way of example, the ERA licence (or s 35 and paragraph 6 Schedule 2 CDPA) allows schools to record entire television and radio programmes and thereafter to choose the duration of clips or excerpts that a teacher may wish to show to a class in order to demonstrate a particular point. The exception under s 35 CDPA (or licensing scheme if in place) does not specify any minimum rules concerning length of excerpt to be used because such minima would:

- (a) not really provide any additional protection for rights owners; and
- (b) potentially complicate licensing arrangements for teachers.

Contrast this to the “maximum” rule for copying permitted under s 36(2) CDPA (not more that one per cent of any work may be copied by or on behalf of an educational establishment in any quarter).

Here the maximum use covered by the exception has in practice led to helpful “top up” licences being made available through the Copyright Licensing Agency in the UK.

Without the CLA licence teachers and researchers would face difficulties if they were required to only use only the 1% of a work covered by the exception in the case of a scholarly journal or other learned text (but the correct thinking set out in the journal/text cannot possibly be correctly understood unless a greater part of the text is digested and considered). Minimum rules may therefore be misinterpreted as providing for levels of use for excerpts which are in practice unhelpful to both users and rights owners.

23. **Should there be a mandatory minimum requirement that the exception covers both teaching and research?**

No.
Use of copyright works for the purposes of
   (c) illustration for teaching
   and
   (d) scientific research
does not have the same implications for all types of work.

They should therefore be treated separately.

Defining “research” under UK law has triggered much debate. The meaning under UK law was
narrowed to exclude “commercial research” following implementation of the EC Copyright Directive in
2003. However the scope of the term is still potentially broad and must be considered reasonably
against the background of the Three Step Test.

User-created content

24. Should there be more precise rules regarding what acts end users can or cannot do?

No.

The framework recognised by the EC Copyright Directive already provides an important flexible
framework for rules to be developed to accommodate specific types of copyright work and differing
types and scale of use and distribution.

25. Should an exception for user-created content be introduced into the Directive?

The Green Paper picks up on a definition of “user created content” taken from the OECD Study6
quoted as “content made publicly available over the Internet, which reflects a certain amount of
creative effort, and which is created outside of professional routines and practices”.

The distinction that the definition appears to draw between “professional” and “amateur”, fails to
recognise the fundamental purpose of copyright. This is to provide recognition for intellectual property.

The interests of creativity and cultural diversity within the European Community do not seem likely to
be served by copyright law making arbitrary assumptions over the value of a new work before it has
been created?

All creators of copyright works should be entitled to protection. How creators choose to use or license
their own works should help to support innovation and diversity for the benefit of society.

The Educational Recording Agency Limited
New Premier House
150 Southampton Row
London
WC1B 5AL

6 Participative Web and user-Created Content OEC 2007 p9
Taking Forward the Gowers Review of Intellectual Property

Proposed Changes to Copyright Exceptions

April 2008

Response from The Educational Recording Agency Limited

New Premier House
150 Southampton Row
London
WC1B 5AL
Taking Forward the Gowers Review of Intellectual Property

Proposed changes to copyright exceptions

Response from The Educational Recording Agency Limited

Introduction

The Educational Recording Agency Limited (ERA) is a copyright collecting society. It was set up under the laws of England and Wales in 1989 with a view to operating a copyright licensing scheme for non-commercial educational use of copyright protected material.

Uniquely serving the UK education sector, ERA is one of a range of collecting societies which helps copyright owners and performers derive an income from the licensed use of their works.

However the range of the repertoire represented by ERA is uniquely broad when considered against the types of copyright work and performances involved in the production and broadcasts of television and radio programmes1.

The certified scheme operates to enable educational establishments to record for (non-commercial) educational purposes any radio or television broadcast output of ERA members within the United Kingdom (apart from Open University programmes which are covered by a separate certified licensing scheme).

Only "educational establishments" as defined by the Secretary of State under the Copyright, Designs and Patents Act 1988 (as amended) and ensuing Statutory Instruments, are able to take out an ERA licence.

Extension to educational exception 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?

1 1 At present ERA has 16 members each representing a very significant copyright repertoire. They are:

The type of copyright work, and the most likely audience for its appreciation, must be taken into account to assess the impact of any expansion of educational exceptions.

Costs and benefits must be considered on the basis that permitted educational exceptions apply only to non-commercial use.

Article 5.2 of the EC Copyright Directive\(^2\) recognises that “Member States may provide for exceptions and limitations to the reproduction right ...(c) in respect of specific acts of reproduction made by publicly accessible educational establishments .. which are not for direct or indirect economic or commercial advantage”.

Limiting any exception to use which is not for direct or indirect economic or commercial advantage is key, and must continue to be recognised under any changes to the laws applicable within the United Kingdom.

However, interpretation of this provision would be simpler if it was easy to identify when an educational establishment was acting in ways that did not involve direct or indirect economic or commercial advantage.

Commercial pressures on those responsible for running educational establishments make this increasingly complex.

One way to help identify this “non-commercial activity” is to distinguish the copyright exceptions that are linked to more core curricular educational activities when assessing how application of educational copyright exceptions, and licensing schemes linked to them, operate in practice. The certified licensing scheme operated by ERA under the existing provisions of section 35 and paragraph 6 of Schedule 2 CDPA\(^3\) is good example\(^4\).

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

Copyright works include:-

(a) works which have a commercial existence and use entirely independent of use by or within any form of educational establishment;

(b) works which are created for people working in, or connected to, education, where use within an educational establishment is likely to be the main area through which the creators of the work can charge for the use of their material, or exploit the material in any realistic commercial form;

(c) works which are created by people working in or connected to education; and


\(^3\) CDPA – Copyright, Designs and Patents Act 1988 (as amended)

(d) works which have a commercial existence that is enhanced as a result of the educational nature of the work or the context within which the work is used.

The above distinctions are important when considering the impact of any educational exception against the Three Step Test.

Changes to the scope of sections 35 and 36 will have differing impacts on the “normal exploitation” of the different types of work described above.

It is therefore important that any extensions reflect the careful balance recognised within International Treaties between the rights of copyright owners and facilitating access to works for the purposes of education and teaching.

This balance reflects Article 10 of the WIPO Copyright Treaty 1996. It also recognises that similar provision is made within Article 16 of the WIPO Performances and Phonograms Treaty. These provisions were in turn reflected in the provisions relating to permitted copyright exceptions and limitations set out in Article 5 of EC Directive 2001/21 concerning harmonisation of certain aspects of copyright and related rights in the information society.

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

“The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 (of Article 5) shall only be applied in special cases which do not conflict with the normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder”.

It is helpful to note recognition in the consultation paper that, if the impact of any changes does not satisfy each of the three parts of the three step test, the changes should be rejected.

If changes can be shown to satisfy each of the three parts of the three step test, only then can the costs or benefits to rights holders and users of copyright be properly considered.

It is on this basis that ERA puts forward suggestions for changing the scope of section 35 CPDA in this response.

Costs or benefits to right holders if the changes satisfy the Three Step Test.

Extension of the exceptions under sections 35 and 36 CDPA may result in potential costs for rights owners, to the extent that they will be required to assert rights which currently fall within the scope of rights for which owners are entitled to grant or withhold licences to users.

---

5 WIPO Copyright Treaty 1996 – Article 10 (1)
Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights of authors of literary and artistic works under this treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author”.

6 WIPO Performances and Phonograms Treaty 1996 – Article 16(1)
Contracting Parties may, in their national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of performers and producers of phonograms as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works.

7 See Annex 2
However, in the case of ERA, application of narrow exceptions against the provisions of section 35 and paragraph 6 Schedule 2 CDPA has encouraged collecting societies and representatives of rights owners with considerable individual repertoires to co-operate and participate in ERA, on the understanding that licences granted by ERA work in a complimentary way to other licensing activities linked to the rights that they represent.

ERA members are therefore able to take account of their own existing infrastructure to assist in the receipt of distributions from ERA, whilst ensuring that the funds received from ERA are allocated and used in the interests of their own members/individual rights owners and performers.

**Licensing efficiencies**

Under its certified licence scheme, ERA provides for the licensing of around 36,500 educational establishments in England, Scotland, Wales and Northern Ireland, each year.

To reduce bureaucracy, ERA has developed a system of blanket licensing for groups of educational establishments whenever representative bodies are willing to take on the responsibility for collective licensing.

This has been particularly true for the 36,000 primary and secondary schools in England and Wales whose licensing requirements cover around 4.5 million primary school students\(^8\) and 3.4 million secondary school students\(^9\) each year.

To cover this wide range of licensing, ERA issued blanket licences to 170 of the 174 Local Education Authorities in England and Wales in 2007. These licences covered all the primary and secondary schools within a licensed LEA area. LEA’s were given a significant discount against full licence fee rates to recognise the bureaucratic savings made as a result of the blanket licence arrangements.

The remaining 4 LEA’s elected to require schools in their area to take our individual ERA Licences. As a result of this ERA issued 60 individual licences to state schools in Lambeth, 58 licences to individual state schools in Harringey, 158 licences to individual state schools in Liverpool and 32 licences to individual state schools in Reading. Schools licensed individually were required to pay licence fees calculated at the full tariff rate.

32 blanket licences were issued to COSLA covering all primary and secondary schools in Scotland.

One blanket licence was issued to the Association of Education and Library Boards covering all primary and secondary schools in Northern Ireland.

In addition, last year ERA issued:

- 166 licences to Universities/Colleges of Higher Education;
- 441 licences to colleges of Further Education;
- 1,322 licences to Independent Schools;
- 208 licences to language and nursing colleges; and
- 186 licences to cover other educational establishments, including independent universities, the Offenders Learning and Skills unit, the Fire Service and Police Training Colleges.

---

\(^8\) 4,480,220 primary students
\(^9\) 3,479,673 secondary students
The total number of licences (including blanket licences) operated by ERA last year was below 3,000, but these provided the benefits of copyright licenses for several million individuals across all aspects of education within the United Kingdom.

ERA’s work with Local Education Authorities has been important in:-
(a) keeping the bureaucracy for licensing all schools within an LEA to a minimum; whilst
(b) enabling LEA’s to secure a discount against the fees that would be payable if schools within their area were required to take out individual licences.

It is to be hoped that this cooperative work with LEA’s will be encouraged and permitted to continue under funding regulations for schools, should licensing opportunities against the background of section 35 and paragraph 6 of Schedule 2 be extended10.

Costs or benefits to users of copyright if the changes satisfy the Three Step Test.

Since responding to the initial consultation within the Gowers Review 11ERA has consulted with its licensees and launched an “add on” licence available for educational establishments who wish to allow licensed ERA Recordings to be made available to authorised students when they are not physically within an educational establishment. This licence is called the ERA Plus Licence. Details are set out in Annex 4.

If the rights licensed under the ERA Plus Licence were brought within the scope of section 35 CDPA (and paragraph 6 Schedule 2), the possibilities for merging the ERA and the ERA Plus licence would be increased. Bureaucratic savings would result for licensees who chose to take out both types of licence.

SECTION 35 (RECORDING BY EDUCATIONAL ESTABLISHMENTS OF BROADCASTS)

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

No.

In general, if services are available on-demand, then it should be possible for the material to be accessed and viewed or listened to in an educational establishment “on-demand”. As such, access may be available without the need for the establishment to make recordings and act as an intermediary between the service provider and the users (albeit in an educational context).

Some “on-demand services” are “made available” to the public (and to educational establishments) on terms and conditions that permit users both to access the material electronically transmitted by the service and record/reproduce the material for further use.

---

10 The School Finance (England) Regulations (SI 2006 No 468) (formerly permitted under SI 204 N0 3131 - The LEA Budget, Schools Budget and Individual Schools Budget (England) Regulations 2004) recognise under Schedule 2 clause 29 that one of the classes of expenditure that can be deducted from the Schools Budget of a Local Education Authority is “Expenditure on licence fees or subscriptions paid on behalf of schools”.

11 ERA response to Gowers Review of Intellectual Property is attached as Annex 3
In these cases, any exception under section 35 would be unnecessary, to the extent that the terms and conditions for accessing the on-demand service already license or permit the activities that might otherwise have been relevant to the exception.

However, when the licence terms do not permit recording or further use, the balance of interests for rights owners is very different.

It is a fundamental part of the value of the “making available right” for copyright owners that they are able to license the rights on terms and conditions which dictate the ways in which material accessed may be used. This right is absolutely central to the way in which choice and diversity are being provided through new online business models.

Because of this, if a rights owner chooses to apply terms and conditions that allow educational establishments to access material for viewing, but not recording, it is hard to see how making educational establishments the beneficiary of an exception that allows them to “override” the terms and conditions on which the on demand service is provided, will not “unreasonably prejudice the legitimate interests of the rights holder”.

The Gowers Review agreed with 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”. But it also recognised that any exceptions have to comply with the Three Step Test.

The provision of an “on-demand service” involves the “communication to the public” of copyright works. In particular, when individuals access material provided through an electronically transmitted service “on-demand” the “communication to the public right” involved will be “making available to the public” works by electronic transmission in such a way that members of the public may access them from a place and at a time individually chosen by them” (as recognised by section 20(2) (b) CDPA and Article 3 EC Copyright Directive).

This response has previously picked up on the importance of curricular educational use and the non-commercial nature of use being fundamental to the application of educational copyright exceptions involving the reproduction right. To that extent the “intent” and “activity” elements in the Open University statement seem uncontroversial.

But the Consultation Paper also recognised how any educational copyright exception must comply with the Three Step Test and apply only in special cases, which do not conflict with the normal exploitation of the work or subject matter and which do not unreasonably prejudice the legitimate interests of the rights holder.

It is hard to see how the owners of copyright works that are licensed to be “made available on-demand” within a specified service will not be prejudiced if, rather than being required to access material on demand in line with terms and conditions applied for access to the service, educational establishments can override these terms and reproduce and store the material for subsequent use.
Section 46 of the consultation paper recognises:—

“Section 35 is currently defined by media and is limited to traditional style “broadcasts. It does not apply to the newer and increasingly popular web-based communication technologies.”

It is important to note that, whilst section 35 applies to the recording broadcasts off-air, the subsequent use permitted under section 35 covers both reproduction and non-commercial communication to the public of the recordings within the premises of an educational establishment.

In other words, section 35 (and certified licence schemes operating as a result of it) do apply to the use of new technologies by educational establishments in so far recordings of broadcasts are “communicated to the public by a person situated within the premises of an educational establishment provided that the communication cannot be received outside the premises of the establishments”.

Section 46 of the Consultation Paper then goes on to state:—

“Indications are that traditional broadcasters and others are increasingly making their content available on the Internet as a major distribution platform.”

This is accepted, but it is submitted that such activities are in fact increasing the range of materials that are available for use in an educational context, whilst also allowing rights owners to develop new business models by shaping “on-demand” services to suit the needs of interested customers.

The ERA members have given particularly careful consideration to the way in which any ERA Licence might enable educational establishments who hold an ERA licence but who “miss” recording a broadcast off-air to have access to a recording for non-commercial educational purposes.

Some have suggested that, where programmes are made available on demand via “Free catch-up TV services” within a few days of the original broadcast (such as programmes made available through the BBC iPlayer or Channel 4’s free video on demand services) educational establishments should be permitted to circumvent the DRM terms that apply to access of these services for the purposes of retaining copies for educational use.

However, the commercial impact that such arrangements would have on the provision of services to users other than educational establishments, and the increased threats from illegal use mean that rights holders believe that such circumvention would “unreasonably prejudice the legitimate interests of rights holders” and therefore fail the Three Step Test.

Nevertheless ERA members have also worked to establish voluntary arrangements within the scope of the ERA Licence which it is believed enable educational establishments to access recordings of broadcasts in most cases where they “miss” making an off-air recording themselves.
The voluntary arrangements flow from the provisions of clause 9(c) of the Schedule to the ERA Licence\(^{12}\).

These enable off-air recordings of broadcasts to be made “on behalf of an educational establishment … (c) at the premises of a third party authorised by the Licensee to make recordings or copies on behalf of the Licensee under written contractual terms and conditions which prevent the retention or use of any recordings or copies by that third party or other third party unless ERA shall have expressly agreed that a specific third party may retain any recordings or copies for subsequent use only by authorised Licensees of ERA in accordance with the provisions of the Licensing Scheme”.

As a result of this, ERA has entered into agreements with a number of “authorised third parties” (including the British Universities Video Council) under which copies of off-air recordings may be supplied to ERA Licensees on a non-commercial basis.

ERA members are happy to keep these voluntary arrangements under review to encourage the effective use of licensed off-air recording rights linked to broadcasts.

Subject to this, unlike debate over the possible “format shift” exception, excluding “on demand” services from the scope of section 35 is particularly important for rights owners because of potential application of section 296ZE and Schedule 5A CDPA to services relevant to the exceptions.

Paragraph 79 of the Consultation Paper recognises :-

“If 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”.

This appears to provide for the possibility that new subscription on-line services targeted specifically at the educational community and provided “on-demand” to consumers, could be made economically unviable if brought within the scope of any extended section 35.

If brought within section 35, the following scenario could then apply :-

(a) A broadcaster or publisher invests £100,000 to launch new subscription service to support a specialist training course, intending to recoup investment from subscriptions.

(b) The new service is launched and made available on-demand to subscribers.

(c) Educational establishments want to make the course available to their students but claim the subscription DRM prevents them accessing the on demand service for recording and making available under a section 35 exception.

---

\(^{12}\) The Copyright (Certification of Licensing Scheme for Educational Recording of Broadcasts) (Educational Recording Agency Limited) Order 2007 – Schedule – clause 9 (c).
(d) Educational establishments make a complaint to the Secretary of State under section 296ZE, and argue that the exception should allow them to circumvent the subscription DRM.

Clearly such steps would prevent the service provider from effectively collecting legitimate subscriptions to their service. As such, the actions of any complainants under section 296ZE would both “conflict with the normal exploitation” of works included in the subscription on-demand service and “unreasonably prejudice the rights holders” as a result.

In summary, ERA believes that :-

(a) the rapid growth in the number of broadcast radio and television services available in the UK under licence from Ofcom provides a vast array of choice in the broadcast material that may already be recorded off-air from broadcasts. In May 2007 Ofcom reported\(^\text{13}\) that 891 television broadcast licences and 79 radio broadcasting licences were in existence.

(b) the voluntary arrangements that ERA has in place to allow licensees to access non-commercial “back up” off-air recordings of broadcasts should reduce any demand from licensees who wish to keep copies of material accessed through Free Catch up TV on-demand services over and above the extent permitted by the terms and conditions (DRM) applicable to that service.

(c) Permitting educational establishments to circumvent DRM applied to on-demand services would unreasonably prejudice the legitimate interests of rights holders, as they look to license the making available right in their works in ways that will provide choice and diversity of service in the world of electronic communications.

3. If so, should the recording of an on-demand service be permitted only where the work in question was subject to an original broadcast? Would this restriction be practical?

We have outlined in answer to question 2 why we believe it would not be right to extend the scope of section 35 to cover the recording of on-demand services.

We have also outlined how the ERA voluntary “third party” arrangements are intended to help ensure that ERA Licensees are able to access an off-air recording under their licence, in circumstances when they have overlooked recording the broadcast itself.

Over and above this, we do not believe that permitting recording of works included in an on-demand service only when the works have also been the subject of an original broadcast would be practical. Instead it is likely to be harmful to rights owners and confusing and bureaucratic for educational establishments.

The right to authorise the broadcast of a work is a separate right from the right to authorise making available on demand. The effect of secondary use of a broadcast (and therefore the way in which the Three Step Test can be applied for linking copyright exceptions to the act of broadcasting) is different to secondary use involving circumvention of the terms and conditions and DRM applied for access to on-demand services. When and how a work was broadcast before being made available through a subsequent transmission in an on-demand service “eligible” for recording with the scope of section 35, would be extremely difficult and cumbersome to police.

This is particularly true when the number of on-demand services that are made available in ways which permit recording or reproduction in secondary ways within the “licence” terms and conditions applicable to the service, are taken into account.

Further concerns arise because the range of services that might fall within the description of an “on-demand service” is extremely broad. The IPO suggests the following definition for “on-demand transmission” in Annex D of the Consultation Paper:

“A transmission which can be accessed as required and at a time determined by the consumer”.

However, this wording does not define the nature of “the transmission” for copyright purposes.

As section 35 stands, it is clear that a “transmission” has to be a “broadcast” to attract the benefit of the exception. This is turn means that the transmission has to be a “broadcast” as the expression is defined in section 6 Copyright, Designs and Patents Act 1988.

This has in turn linked the section 35 exception relating to the “reproduction right” to recording of “transmissions” that amounted to broadcasts only.

The exception in section 35 relating to works included in the “broadcast” could therefore all be related to this for the purposes of interpreting Article 2 and Article 5.2 of the Copyright Directive.

If “transmissions” which are not “broadcasts” for the purposes of section 6 CDPA are to be made relevant to section 35 (1) it is submitted that they will have to be clearly defined as another subset of “electronic transmissions” which amount to “communication to the public” for the purposes of section 20(2) CDPA.

---

14 S6 “broadcast” means an electronic transmission of visual images sounds or information which
   (a) is transmitted for simultaneous reception by members of the public and is capable of being lawfully received by them, or
   (b) is transmitted as a time determined solely by the person making the transmission for presentation to members of the public, and which is not excepted by section (1A); and references to broadcasting shall be construed accordingly.
   (1A) Excepted from the definition of “broadcast” is any internet transmission unless it is
   (a) a transmission taking place simultaneously on the internet and by other means;
   (b) a concurrent transmission of a live event, or
   (c) a transmission of recorded moving images or sounds forming part of a service offered by the person responsible for making the transmission, being a service in which programmes are transmitted at scheduled times determined by the broadcaster”.
Section 20(2) provides that “References .... to communication to the public are to communication to the public by electronic transmission, and in relation to a work include:

(a) the broadcasting of the work;
(b) the making available to the public of a work by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them.

For the reasons previously outlined, it is submitted that seeking to apply section 35(1) to all “communications to the public” which do not amount to “broadcasts” is far too broad a definition to be able to reconcile with application of the Three Step Test.

Likewise the suggestion that the recording of an on-demand transmission might only be permitted where the work in question was the subject of an original broadcast raises practical questions of defining when a relevant “broadcast” had taken place, which it is believed would be both impractical to police and impossible to reconcile with the scope of permitted exceptions and limitations within the provisions of Articles 5.2 and 5.3 Copyright Directive.

SECURE ENVIRONMENTS

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

Yes, access should be subject to security measures.

Security measures are needed to ensure that access is limited to users authorised by the educational establishments within the scope of licence terms (or in default of licences being unavailable within the scope of section 35).

Password requirements are an obvious precaution, already in place and used by many educational establishments.

Overburdening educational establishments with licence terms that require them to incur costs specifically linked to copyright licence compliance could act as a deterrent to licence take up.

However, it may be that simple password protection systems could be easily open to abuse. Instead, linking the security arrangements necessary to identify licensed copyright users with other security arrangements that an educational establishment has to put in place in any event, to protect personal data of students or other legal requirements (such as protection of minors or Criminal Records checks), will provide for the development of pragmatic but reasonable levels of security.

Linking secure authentication to activities undertaken “by or with the authority of” a licensed educational establishment, will be important.

In addition, requiring that the authentication system operates “in a manner consistent with current best practice” will help ensure that developments in security protocols and software (such as Shibboleth used for “trust management”) which are picked up by sectors within the educational world, will actually also help to improve the security arrangements in place to support observance of copyright licences (because establishments will tend to find it economic for security systems to apply across all their activities – rather than applying security developments on a piecemeal basis).
5. (a) Who should be able to view recordings made by an educational establishment in a VLE?

Subject to appropriate security and authentication systems, only individuals who are connected to an educational establishment and who wish to view licensed ERA Recordings for the non-commercial educational purposes of the establishment should be able to view licensed off-air recordings for educational purposes. However these individuals should be permitted to do this via electronic transmission whether they are on the site of the educational establishment or elsewhere in the United Kingdom.

The way that “Authorised Users” have been defined in existing ERA and CLA licences can provide guidance to help define the scope of this audience.

The definition currently used in the ERA Plus licence provides that “Authorised Users” covers individuals who are (during the term of the licence) either enrolled to study at a licensed educational establishment or who are members of the academic, research or teaching staff at a licensed educational establishment (whether on a permanent temporary or contract basis) and who are authorised by an officer of a licensed educational establishment to access a “relevant network” by means of “secure authentication”.

The definition was prepared with a view to defining a group within the general public whose interests could be clearly linked to the non-commercial educational purposes of an educational establishment.

It was also thought important to distinguish when Authorised Users are acting in a capacity which is linked to an educational establishment and when they are not. This distinction is also significant when the activities of individuals undertaking “private study” or “research” are considered. It is important for rights owners and members of the public to understand when educational use of material may have the benefit of a licence granted to an educational establishment with which they are connected, and when use falls outside this scope.

In its response to the initial consultation issued by the Gowers Review of Intellectual PropertyERA outlined how it was looking to launch a licence scheme outside the scope of section 35 (2) and paragraph 6(1B) for the first time. Since that time ERA has consulted with representatives of educational establishments and launched a new ERA Plus Licence in order to address the issue referred to as “The Problem” in the Evidence Base example set out on pages 44 and 45 of the latest consultation paper.

The ERA Plus Licence has been launched to enable educational establishments to permit “Authorised Users” to access licensed ERA Recordings whether they are on the premises of an educational establishment or at home or working elsewhere within the United Kingdom, to the full extent that ERA Recordings include works owned by or administered by ERA members.

This wider scope of the ERA Plus Licence supports educational establishments providing wider communication to the public of licensed ERA Recordings to Authorised Users reflecting increased use of online communication services by educational establishments.

However, as previously submitted by ERA, although an enormously broad range of rights are covered by the ERA Plus Licence, there is currently a risk that there may be some rights included in the broadcasts of programmes from which ERA off-air recordings are made, which have not been “cleared” for the uses envisaged under the ERA and the ERA Plus Licences.

---

15 See Annex 1
16 See Annex 4
Where section 35 (2) and paragraph 6 (1B) of Schedule 2 apply, ERA has been able to advise its licensees that they do not need to worry about any “missing” rights unless a separate certified scheme existed. In practice the only other section 35 certified scheme has been the scheme relevant to Open University programmes, which are easily identifiable.

ERA can give no such assurances as regards the “remote access” rights now being licensed in ERA members’ repertoire under the ERA Plus Licence. It remains true that, to the extent there are any “missing” rights relevant to the ERA Plus Licence, they are probably inextricably embedded in an unidentified number of the wide range of broadcast programmes potentially available for educational copying under the main ERA licences.

It is also likely that, if rights owners have chosen not to seek to assert their rights under a certified licence scheme linked to section 35 and paragraph 6 Schedule 2 CDPA for the purposes of the off-air recording activities of educational establishments and communication of the recordings within the establishments, they will be unlikely to seek to enforce their rights by picking up on the add-on communication now being facilitated through the ERA Plus Licence.

On the other hand, whilst the risks to licensees over the “missing rights” clearances are likely to be low, because of the broad spectrum of ERA representation, the risk is there.

The ERA Plus terms therefore currently have to place this risk with licensees. Risk such as this exists in virtually all areas where blanket licences from collecting societies are relied upon.

In the wider copyright licensing context the ERA Plus Licence has a significant value to licensees. ERA’s consultation with current licensees addressed this value in the light of broadband roll-out and increased use of on line and wireless technology in the education sector. As a result of this, the licence fees for the ERA Plus Licence set out in Annex 4 were announced. Since launch a considerable number of HE and FE educational establishments have taken out an ERA Plus Licence.

In addition, over 20 LEA’s in England and Wales have extended their blanket ERA licence arrangements to cover either all schools (both primary and secondary) in their area, or all secondary schools in their area.

The main reason for establishments not taking up an ERA Plus Licence immediately appears to be the lack of bandwidth availability for schools to stream very significant amounts of data to Authorised Users when off the site or campus of the school or HE or FE establishment.

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

Such authorised users should be distinguished from the general public by ensuring that they are entitled to access the licensed off-air recordings available within a VLE through secure authentication.

Secure authentication should only be permitted for those who are:-
(a) enrolled to study at the educational establishment; or
(b) members of the academic, research or teaching staff of the educational establishment (whether on a permanent, temporary or contract basis; and who are (in either case) authorised by an officer of the educational establishment to have access to the VLE by means of appropriate password and other appropriate secure authentication in a manner consistent with best practice for educational establishments.

Such best practice will include precautions to protect children and young persons from
inappropriate content or offensive material.

5.(b) Is the reference to “teachers and pupils at an educational establishment and other persons directly connected with the activities of the establishment” in section 34 sufficient or too widely cast?

Yes. Difficulties arise from use of the words “persons directly connected to the activities of the establishment”.

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

It is important that licences linked to any licence scheme(s) operating under sections 35 and 36 can be related to the educational purposes of an educational establishment.

Reference to persons “directly connected with an educational establishment” may not recognise this important link with “educational purposes”. For example, it might be argued that parents or guardians of a pupil are “directly connected to an establishment”. However, to bring such persons within the scope of copyright exceptions covering the use of copyright material for educational purposes could hardly be called a “special case” for the purposes of the first of the tests under the Three Step Test.

It is therefore suggested that reference to “individuals who are either enrolled to study at an educational establishment (as defined) or who are members of the academic, research or teaching staff of the educational establishment and who are authorised by the educational establishment to have access to the benefit of the licence” would be a better definition providing for the relevant “educational” nexus.

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

As copyright licensees, educational establishments must take on responsibility for compliance with the licence terms.

That said, if the system acknowledged as applicable for “Secure Authentication” under copyright licences is also the system used to preserve personal data etc, it is submitted that the burden of ensuring compliance then falls against wider business and educational interests of an educational establishment. The burden of compliance is not then just “a copyright licence” issue.

These wider business interests will include precautions to ensure that children and young persons are protected against access to viewing inappropriate or offensive material.

The possible harm to children and young people if schools fail to put in place secure authentication systems against viewing inappropriate or offensive material within a school VLE will be an increasingly important business issue for schools.

The protection of personal data about pupils, students and staff within FE and HE establishments held within VLE’s under the control of the establishment will become increasingly important, reflecting increased use of distance learning and delivery of documents and course work online linked to assessments and examinations.

All these issues suggest that “Secure Authentication” systems will be a much larger issue for educational establishments than the extent to which they need to be applied for copyright licence compliance.
They do need to be applied for copyright licence compliance. However, in view of the wider issues involved, linking the copyright licence requirements to applying secure authentication “in a manner consistent with best practice” will hopefully mean that copyright licence compliance can be served without additional security costs being imposed on educational establishments.

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

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

This should be supported by appropriate application of section 35(3) and paragraph 6(2) Schedule 2 CDPA (as amended) and by the use by educational establishments of geo id software when permitting authorised users to access VLE’s.

(a) Section 35(3) and Paragraph 6(2) Schedule 2 CDPA

Section 35 (3) (and the corresponding provision in paragraph 6(2) Schedule 2) helpfully provide: "Where a copy which would otherwise be an infringing copy is made in accordance with this section but is subsequently dealt with, it shall be treated as an infringing copy for the purposes of that dealing, and if that dealing infringes copyright for all subsequent purposes”.

It is important that these provisions continue to underpin both the scope of certified licence schemes and any direct application of section 35 and paragraph 6 Schedule 2 to use not covered by a licence scheme.

However, if the scope of the section is broadened to facilitate the wider communication to the public envisaged by the ERA Plus Licence, the final paragraph both section 35 (3) and paragraph 6 (2) Schedule 2 will need amending to recognise that “dealt with” prohibited by the sections covers any communication to the public from within the premises of an educational establishment other than to “connected persons” (rather than to any person outside the premises of the establishment).

The definition of “connected persons” might then reflect that suggested for “authorised users” in answer to question 5 (a) above.

(b) ERA Licence terms

Licensees/ educational establishments will be expected to apply terms and conditions set out in ERA Licences to any authorised user accessing material. Clause 3 of the ERA Plus Licence (see Annex 4) expressly states that the Licence does not authorise any “Dealing” with licensed off-air recordings over and above rights granted by the Licence. In addition discussions with users led to the development of a list of agreed descriptions of what “Dealing” means in this context. These provisions are set out in paragraph 3.2 of the Schedule to the ERA Plus Licence.

It is hoped that terms and conditions reflecting the limits on the scope of the ERA and ERA Plus Licences will be clearly acknowledged and accepted by users as part of any access/authentication process.

(c) Application of geo id software

Geo id software is available to ensure that only individuals seeking online access from domain addresses registered within the UK can comprise “Authorised Users” for the purposes of ERA licences.
In its consultations with users, a number of universities have sought to argue that ERA licences should extend to cover access by students based outside the UK, but registered to undertake distance learning courses with the university.

ERA has not been able to agree to such access for a number of reasons. These include:-

(a) ERA’s mandates from its members have been linked to the territory to which section 35 and paragraph 6 Schedule 2 CDPA have had direct application.
(b) The business and/or commercial nature of the way that universities market courses for overseas students who do not come to the UK for the courses on offer.
(c) The local copyright jurisdictions which apply to students based in countries such as China and India where students may wish to access copyright information linked to educational courses.
(d) The different ways in which copyright exceptions applicable to educational use and individuals using copyright works for the purposes of private study apply (or have been applied) in different territories of the world.

Additional Questions

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

Having consulted with its members, all the current members of ERA would support any appropriate changes that are agreed to section 35 being matched with corresponding changes to paragraphs 6 (1) and 6(1A) Schedule 2 CDPA.

However, this anticipates that section 35 is only extended to cover the communication to the public of licensed ERA Recordings to the extent already envisaged under the ERA Plus Licence. This would enable licensed ERA Recordings to be communicated to students and teachers online within secure networks whether they were on the premises of their educational establishment, or at home or elsewhere in the United Kingdom.

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

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

(a) to the reproduction right in the cases described in Article 5 (2) of the Copyright Directive; and

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

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

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

In addition Article 5 (2) (e) permits copyright exceptions or limitations
“in respect of reproductions of broadcasts made by social institutions pursuing non-commercial purposes…..on the condition that rights holders receive fair compensation”.

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

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

It is submitted that this last provision highlights the importance of any exception under section 35 and paragraph 6 Schedule 2 relating only to off-air recordings of broadcasts being communicated to authorised users as illustrative materials within “educational purposes” and not as the base for new (potentially commercial) course materials compiled, developed and promoted by educational establishments as a means of helping to attract students to undertake courses with a particular educational establishment.

SECTION 36 (REPROGRAPHIC COPYING BY EDUCATIONAL ESTABLISHMENTS OF PASSAGES FROM PUBLISHED WORKS)

8. Should limits be placed on the form of communication used by educational establishments to communicate extracts to distance learners?

Section 36 does not currently extend beyond applying exceptions to the “reproduction right” in published literary, dramatic or musical works.

When section 35 CDPA was amended by the Copyright and Related Rights Regulations 2003 to insert for the first time provisions to recognise works being “communicated to the public by a person situated within the premises of an educational establishment provided that the communication cannot be received by any person situated outside the premises of that establishment” – rights owners involved in licensing rights against the provisions of section 35 had to assess the way in which fair compensation was to be secured for licensing both “reproduction” rights and “communication to the public” rights.

The value of any communication to the public rights does need to be assessed separately from the value of the reproduction right for the purposes of applying the Three Step Test to any copyright exception involving the communication to the public right.

The experience gained in defining and limiting “communication to the public” so that communications cannot be received by persons situated outside the premises of an educational establishment linked to the provisions of section 35 and paragraph 6 Schedule 2 is important when considering how any similar provisions might operate for reprographic copies made within the provisions of section 36 CDPA.

We have already commented on the important restrictions that need to be in place to help with this when responding to question 4-7 above.
9. Should the expanded exception be limited to communication inside a VLE?

ERA believes that enshrining a definition of “VLE” or “Virtual Learning Environment” within the CPDA may be counterproductive. Any wording used may also become outdated due to future advances in digital file sharing technologies.

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

Licences already offered by the CLA to educational establishments help to define “authorised users” in a way that supports use by or on behalf of an educational establishment for the purposes of instruction (both for use that would fall within the scope of the exception permitted by section 36 and the additional use covered by the terms of the CLA licence).

Such authorised users should be distinguished from the general public by ensuring that they are entitled to access any source of communication authorised by an educational establishment through secure authentication. The way that the CLA has developed a definition of “Secure Network” in its educational licences, provides helpful guidance.

The key elements of the definition are:-

(a) there is a network, which may be a standalone network or a virtual network (within the Internet). Generally e-mail traffic on e.g. personal e-mail accounts is not permitted;

(b) the network is only accessible to individuals who are approved by the licensee for access;

(c) such individuals must authenticate their identity at the time of log on and periodically thereafter by the use of passwords;

(d) such logon and authentication must be in accordance with best practice \(^{17}\); and

(e) whose conduct is subject to regulation by the educational establishment.

As with section 35, it is suggested that secure authentication should only be permitted for those who are:-

(a) enrolled to study at the educational establishment; or

(b) members of the academic, research or teaching staff of the educational establishment (whether on a permanent, temporary or contract basis;

\(^{17}\) Requiring that the authentication system operates “in a manner consistent with current best practice” will help ensure that developments in security protocols and software such as Shibboleth used for “trust management” picked up by sectors within the educational world, will actually also help to improve the security arrangements in place to support observance of copyright licences (because establishments will tend to find it economic for security systems to apply across all their activities – rather then applying security developments on a piecemeal basis).
and who are (in either case) authorised by an officer of the educational establishment to have
access to the material to be communicated by means of appropriate password and other
appropriate secure authentication in a manner consistent with best practice for educational
establishments.

Should communication by email outside a VLE be permitted?

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

Communication should only be permitted when made by or on behalf of an educational
establishment to “authorised users” who request that the material is made available to them on
demand within the geographic limits relevant to application of section 36.

SECURE ENVIRONMENTS

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

Yes. Access should be subject to security measures. Please see comments in answer to question
4 above.

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

Only authorised users connected to an educational establishment who are authorised by the
establishment to access extracts for the purposes of instruction and through use of a Secure
Network along the lines previously outlined, should be permitted access.

12(b). Is the reference to “teachers and pupils at an educational establishment and other
persons directly connected with the activities of the establishment” in section 34
sufficient or too widely cast?

Yes. Difficulties arise from use of the words “persons directly connected to the activities of the
establishment”.

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

It is important that licences linked to any licence scheme(s) operating under sections 35 and 36
can be related to the educational purposes of an educational establishment.

Reference to persons “directly connected with an educational establishment” may not recognise
this important link with “educational purposes”. For example, it might be argued that parents or
guardians of a pupil are “directly connected to an establishment”. However, to bring such persons
within the scope of copyright exceptions covering the use of copyright material for educational
purposes could hardly be called a “special case” for the purposes of the first of the tests under the
Three Step Test.
13. **What level of responsibility should an educational establishment have for maintaining the security of a password protected VLE?**

As copyright licensees, educational establishments must take on responsibility for compliance with the licence terms.

That said, if the system acknowledged as applicable for “Secure Authentication” under copyright licences is also the system used to preserve personal data etc, it is submitted that the burden of ensuring compliance then falls against the wider business and educational interests of an educational establishment. The burden of compliance is not then just “a copyright licence” issue.

These wider business interests will include precautions to ensure that children and young persons are protected against access to inappropriate or offensive material.

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

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

This should be supported:

   (a) by appropriate application of section 36(5) CDPA\(^\text{18}\) and
   (b) by the use by educational establishments of geo id software when permitting authorised users to access “Secure Networks”.

As with possible changes to the scope of educational communication relevant to section 35, the final paragraph of section 36(5) will need amending to ensure that any communication to the public other than expressly permitted “educational communication” will still be treated as “dealing” and therefore outside the scope of section 36.

**CLASSES OF WORK**

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

No. The suggestion that the introduction of interactive whiteboards in the classroom somehow makes the limits of section 36 no longer relevant, is a red herring. Section 35 already lays the ground for the use of off-air recordings of broadcasts of sound recordings and films to be communicated to students through the use of interactive whiteboards.

Many educational materials are now licensed with this express use in mind.

\(^{18}\) S 36 (5) currently provides “Were a copy which would otherwise be an infringing copy is made in accordance with this section but is subsequently dealt with, it shall be treated as an infringing copy for the purposes of that dealing, and if that dealing infringes copyright for all subsequent purposes. For this purpose “dealt with” means sold or let for hire, offered or exposed for sale or hire or communicated to the public”. 
Many more materials are now being made available in on-demand services which can also be received and viewed in the classroom directly.

Against this background, section 36 applies an exception to reprographic rights involving no more than one per cent of the relevant copyright works.

To try and apply such a percentage to artistic works would be impractical.

Section 35 already covers the off-air recording of broadcasts and all types of work included in the broadcast. As such, section 35 services educational establishments recording and using a library of recordings in the form of sound recordings and films for non-commercial educational purposes. The one per cent limit does not apply to use of off-air recordings of broadcasts.

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

The different genres of works previously referred to in this submission (some more targeted at educational markets than others) must be considered when addressing the consequences of applying section 36 to any additional types of copyright work.

The one percent limit in section 36(2) is important to reflect the way that reprographic copying by educational establishments above this level would fail to comply with the Three Step Test (in that it would conflict with the normal exploitation of the work and unreasonably prejudice the legitimate interests of the rights owner through the loss of opportunity to sell or otherwise provide access to works for educational purposes).

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

An amendment to extend section 36 to sound recordings and films and broadcasts is rendered unnecessary when the provision of sections 34 (2), 32 (2) and section 35 are taken into account.

Section 35 has previously been commented on.

Section 34 (2) already provides: -

"The playing or showing of a sound recording, film or broadcast before (an audience consisting of teachers and pupils) at an educational establishment for the purposes of instruction is not a playing or showing of a work in public for the purposes of infringement of copyright.

Further section 32 (2) already provides that: -

"Copyright in a sound recording, film or broadcast is not infringed by its being copied by making a film or film sound track in the course of instruction, or of the preparation for instruction, in the making of films or film sound tracks, provided that copying

(a) is done by a person giving or receiving instruction; and

(b) is accompanied by sufficient acknowledgement".
It is important to bear in mind the many legitimate sources of films and sound recordings when considering the wish of educational establishments to reproduce clips of films or sound recordings reprographically in course packs.

When this is done, it is hard to see how an additional copyright exception to cover reproduction in course packs will not contravene the “non-commercial purpose” requirements of section 36.

An alternative would be for course packs to refer to the clips from sound recordings and films legitimately available for viewing under an ERA licence (with the educational establishment being responsible for communicating the chosen clips to authorised students on demand within the scope of the ERA licence).

17. What benefits would there be for educators?

If the issues raised in response to question 16 are taken into account, relevant benefits to educators would ensue, without detriment to rights owners.

18. If the exception is expanded to other works, what limits should be placed on the size of extracts? Would the application of existing limits to other works be desirable or practical?

For the reasons previously described it is not thought appropriate for section 36 to be expanded to cover additional works.

The application of the existing limits to artistic works would be impractical.

Expansion of section 36 to cover other works would create confusion and reduce transparency in the application of the other educational copyright exceptions that already apply to the use of films, sound recordings and broadcasts.

FORMAT SHIFTING EXCEPTION
RECOMMENDATION 8

19. What impact would the introduction of a format shifting exception have? What costs or benefits would accrue to right holders and users of copyright?

The Gowers Review appears to have accepted the widespread belief amongst consumers that private copying of works between devices that they own is permissible, of itself justifies the introduction of a new exception to copyright to make the law match the perception.

“We do not believe that the present statutory exemptions from infringement of copyright are providing clarity or confidence for users or for the creative industries, particularly in relation to home copying”.

However the suggested remedy runs in danger of making what is legitimately a complex issue even less satisfactory for both rights owners and consumers.
From the rights owners’ perspective, any format shift exception must take into account the effect of both:-

(a) the provisions of the Three Step Test; and

(b) Article 5(2) (b) of the EC Copyright Directive which provides that any “private copying” exceptions may apply ONLY

“in respect of reproductions on any medium made by a natural person

(i) for private use; and

(ii) for ends that are neither directly nor indirectly commercial

on the condition that the rightsholders receive fair compensation which takes into account the application or non-application of technological measures … to the work or subject matter concerned.

In trying to accommodate these conditions, the Consultation Paper suggests that, by relying on (debatable) interpretation of recitals in the EC Copyright Directive, a “narrow” exception might mean that prejudice to rights owners is minimal, and therefore no obligation for payment (comprising fair compensation) may arise.

The conditions referred to in the Consultation apply to :-

(a) format shifting for copies that people have legitimately purchased

(b) when they keep the original; and

(c) when they only use the copies for their own private use.

Crucially the Consultation Paper also recognises that any exception would not permit any “private copy” to be given away or shared more widely (for example in a file sharing system or on the internet).

But coupling this with a further condition that private copies could not be retained if an individual was no longer in possession of original, is hardly conducive to encouraging legal transparency or an improved ability for rights owners to police use of their work.

The first impact for both rights owners and consumers is that, despite good intentions, any change is likely to make the legal situation more, rather than less, complex.

The second impact is that the exception mooted will be likely to provide perceived cover for illegal activity. For example, recent IPSOS data has shown that one of the main reasons for which people justify buying counterfeit DVDs or using home copied DVDs is that it is much cheaper that buying legitimate copies, alongside reasons indicating an lack of willingness to pay for content (particularly if other easy alternatives are available). This does not suggest that a format shift exception along the lines proposed would lead to increased respect for the law. Indeed, the
additional conditions necessary for any exception is to be introduced are likely to reduce, rather than increase, respect for the law.

A third impact is dependent upon the extent to which the UK government can rely upon its interpretation of a “narrow exception” for format shifting meaning that relevant “fair compensation” for rights owners is nil.

This raises a number of concerns about the level of economic evidence gathered by the Gowers Review as the likely effect of any new format shift exception, before making its recommendation for “clarification” of the law.

There is a real concern that a “gut feeling” about wanting to allow individuals to copy CDs onto their own MP3 Players without infringing copyright has been used to open up debate on copyright licensing structures that are in reality working well or evolving well for other parts of the creative industries.

This is particularly true for the film and online services which are increasingly using controlled access to works in an on line/streaming/download environment to support vital new business models.

**SCOPE OF THE EXCEPTION**

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

If an exception is to be introduced, the conditions outlined in the Consultation Paper are important to move towards reconciling any exception with the Three Step Test. But, as previously mentioned, the more widely any exception is made, the more the “no compensation necessary” approach of Gowers becomes unsustainable.

Even the conditions outlined do not in reality go far enough if licensing options to support any exception for any works are not more fully explored and tested.

21. **Would a requirement to keep an original copy, or dispose of a format shifted copy if the original was given away or sold or otherwise disposed of, be practical or enforceable? What alternatives can you suggest to address the problem of original copies going back into circulation after copies have been made?**

No. It is submitted that such a proposal would be very difficult to police or enforce in practice.

In addition, one of the main problems that led to the format shift proposal from Gowers would fail to be addressed. This concerns the (misplaced) view that when consumers “buy” a CD, they also “buy” all the material included on it.

If they feel that they “own” a CD and so they can “do what they like with it” under the current law – how are new rules that say, in return for a right to format shift, you are not now allowed to sell on your old CDs at a car boot sale, or return your watched DVD to Blockbuster in return for money off new purchases, actually going to change current perception?
The fact that CD buyers felt that they had been somehow deprived when they discovered that technical protection measures prevented them from making copies of the CD was (and remains) a real problem for the industry.

However, the value of transparent terms and conditions stating what a customer can and cannot do in terms of private copying is likely to build more long term trust and economic stability for the creative industries than an inevitably complex effort to introduce a private format shift exception into UK copyright law.

In terms of alternatives, licensing solutions should be able to operate against increased consumer awareness of the terms and conditions applied to the purchase of physical formats incorporating copyright works.

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

The main additional condition is recognition of the option for rights owners (should they wish to do so) to secure fair compensation for the use of their work.

At the very least all the conditions applied to territories in which a private copying exception is recognised (whether or not supported by a system of blank tape levies) should be imposed.

These are

- Initial copy legitimately acquired
- Copying must be by a natural person
- For private/domestic purposes only
- For the purposes of format shifting between devices owned by the individual
- When the copying is not for direct or indirect commercial purpose
- All subsequent dealing is prohibited.

In addition it is important that the initial copy must be acquired in a physical format and not through electronic delivery or transmission of any kind.

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

Yes.

If the government continues to seek introduction of any format shift exception, the provisions should be limited and apply only to commercially released sound recordings when sold in recognised physical formats. (e.g. CD).

In such limited circumstances there are arguments that rights owners have agreed that they do not wish to apply Technical Protection Measures to the specified formats because they are willing to accept consumers undertaking a recognised degree of private copying (possibly subject to
recouping "fair compensation for such private copying through a use it or lose it licensing regime involving third parties who, in the absence of a licence, would be liable for secondary copyright infringement when private copying takes place).  

CLASSES OF WORK

24. Should the proposed format shifting exception be limited to recorded music and film or should it also apply to other works? If so, which ones?

Whilst attempting to address "the CD issue" it appears that Gowers has equated the markets for the sale and distribution of print materials and films with those for the sale of commercial music sound recordings.

The way in which people watch films or read or refer to magazines and periodical publications is not the same as the way they wish to listen to music on a repeated basis (making use of different hardware to listen to their music in different places).

The Gowers Review appears to have produced no economic evidence to set out the extent to which illegal format shifting of films and other audiovisual material is taking place, or the level of activity which would be legalised by the introduction of a format shift exception for films or any other copyright works (over and above commercial music CDs).

The Option 1 question appears to have been unfairly drawn to assume that if a format shift exception were introduced for recorded music, the exception should also apply to film. This is not accepted.

This lack of economic assessment or evidence for the effect on films is particularly damaging in view of the assumption that somehow the exception proposed is so narrow that no obligation for payment to rights holders is relevant.

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

We refer to our response to question 24 and the lack of evidence collected on the likely economic impact. It is not accepted that changing consumer patterns and use reflecting the availability of increasing numbers of DRM controlled online services in the audio, audiovisual and online publishing industries, have properly been taken into account for the purposes of applying the Three Step Test to any UK format shift exception beyond the CD to MP3 scenario.

One reason why government has consistently opposed the introduction of private copying levies under UK law has been the suggestion that rights owners would be unable to organise themselves to collect revenues in any sort of economically efficient way. ERA would submit that its breadth of membership shows how, in clearly defined circumstances, rights owners of all kinds can work together within straightforward licence arrangements. The ERA structure allows individual ERA members who are collecting societies or broadcasters dealing with wider rights for their own members to ensure that appropriate distributions are made or provided for the benefit of individual authors, producers and performers.
26. How many format shifts should be allowed?

The number of permitted private format shifts must remain a matter for rights owners to specify in licence terms and conditions.

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

Trying to provide solutions to cover possible changes in technology in the future by permitting repeated format shifting is likely to be particularly counterproductive as rights owners and consumers start to look at the ways in which the relative value of the “reproduction right” and the “communication to the public” right in copyright material shifts as the restricted act through exercise of which major economic returns are made for rights owners.

The more “shifts” permitted within any exception, the more likelihood that the exceptions will fail to comply with the Three Step Test and the more significant the “fair compensation” will need to be to recompense rights owners for the damage that permitted copying causes to the legitimate interests of rights owners.

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

It is submitted that section 28A CDPA (covering the making of temporary copies) should be applied for the purposes of addressing the technological process of transferring content within the scope of any permitted format shift exception.

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

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?

---

19 S28A CDPA – Copyright in a literary work. Other than a computer program or a database, or in a dramatic, musical or artistic work, the typographical arrangement of a published edition, a sound recording or a film, is not infringed by the making of a temporary copy which is transient or incidental, which is an essential part of a technological process and the sole purpose of which is to enable …. (b) a lawful use of the work; and which has no independent economic significance.
These questions and the difficulties acknowledged in the Consultation Paper do seem to suggest a “lose -v- lose” option for rights owners.

On the one hand it is argued that a new exception would be so “de minimis” that it would not affect the economic interests of rights owners and so no form of compensation should be forthcoming.

Alternatively it is suggested:-

(a) that private copying may have an economic effect, but that it must be down to rights owners to anticipate the economic effect of the exception when setting original prices for the sale of materials; but

(b) the changes to the law are about improving transparency and consumer understanding of what they can and cannot do in terms of private format shift copying.

Taking point (a), rights owners have to consider the point from which materials will include the relevant “compensatory charge”. In reality this is almost impossible because there is no way for rights owners to know in advance how much private format shift copying of a work will take place in the future.

Taking point (b), the Consultation Paper recognises that consumers will not remember when they purchased works that they wish to format shift and so allowing format shifting of works purchased after the format shift exception takes effect .. would cause confusion and would be impossible for right holders to enforce and so is likely to be viewed by consumers as nonsensical’.

ERA agrees with this last view, and therefore submits adoption of an option whereby any format shift exception applying to all works copied after the exception takes affect, leaves open the question of how rights owners are, in practice, to secure “fair compensation” for format shift copying that takes place.

**EXTENDING THE EXCEPTION FOR COPYING FOR RESEARCH AND PRIVATE STUDY RECOMMENDATION 9**

**GENERAL QUESTIONS:**

30. **What impact would the expansion of the exception for research and private study have?**

The suggested expansion of the fair dealing exceptions for research and private study, currently set out in section 29 CDPA, is primarily linked to films, sound recordings and broadcasts.

The Gowers Review backs its call for the expansion with a total of 4 lines of text :-

“Many users in the Call for Evidence outlined problems in using material for genuine academic purposes. Fair dealing for the purposes of non-commercial research and private study, permitted by section 29 of the CDPA excludes copying of sound recordings
or film, which is inconsistent and adds to the cost of negotiating rights for sound recordings or films”.

However, it is questionable whether the “problems” referred to are actually related to the use of sound recordings, films or broadcasts in all but very specialised circumstances.

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

It is important to remember that creating an exception does not of itself give access to material that might be copied under a “fair dealing exception”. Paragraph 134 of the Consultation Paper therefore erroneously refers to benefits allowing “researchers and students to access and make use of material”. Whether or not a person has access to material or not will depend upon availability through libraries, purchasing copies or other means.

In reality many people like to study sound recordings and films. However, with the existence of the time shift exception linked to broadcasts, and the falling prices of CDs and DVDs it is hard to see how a researcher or individual engaged in private study will not be able to access the relevant materials for repeated listening or viewing without infringing copyright. In addition ERA licences facilitate off-air recordings of radio and television broadcasts being made available to students for the purposes of private study.

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

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

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

We refer to our comments about possible changes to the scope of section 35.

If an individual is connected to an educational establishment that holds an ERA (and where appropriate an Open University) Licence linked to section 35 and paragraph 6 Schedule 2 CDPA, the library of off-air recordings of broadcasts (whether sound recordings from radio broadcasts or films from television broadcasts) will be available to the individual for the purposes of private study.

Consequently it may be appropriate to link more formally the use of sound recordings, films and broadcasts for fair dealing in the context of private study with the scope of section 35 (and possibly section 36). If “authorised users” can gain access to the materials through licences issued by ERA it may be possible for the certified licence arrangements to be more specific about the “fair dealing” with sound recordings and films made off-air from broadcasts which is permitted for the purposes of individual private study.
33. Should the expanded exception cover both research and private study?

It is not thought that there is a need for expansion of the exceptions within section 29 to refer to sound recordings, films or broadcasts. However, it would be helpful to make the non-commercial conditions linked to each of “research” and “private study” more consistent.

At present section 29.1 provides that relevant research must be “research for a non-commercial purpose”.

Section 29.1(C) states that “fair dealing with a literary, dramatic, musical or artistic work for the purposes of private study does not infringe any copyright in the work”. It is then necessary to refer to section 178 CDPA for “private study” to be defined by the provision “private study does not include any study which is directly or indirectly for a commercial purpose”.

34. Should all types of work be covered?

No.

Bearing in mind the way that recordings of broadcasts and sound recordings and films can be accessed by use of the section 70 time shift exception, purchase of physical copies, viewing or listening through an increasing array of on demand services, and used through such access and the availability of library services and licenses issues to educational establishments linked to section 35 CDPA, it is not thought helpful or necessary to extend the provisions of section 29 to apply to sound recordings, films or broadcasts.

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

For compliance with the Three Step Test and Article 5 Copyright Directive, fields of study linked to any section 29 exceptions must only involve study that is neither directly nor indirectly commercial.

36. What action, if any, should be taken to address possible concerns about misuse of the expanded exception?

THE BENEFITS OF AN EXPANDED EXCEPTION

For response to questions 37-45 – please see 46 below.

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?

It is not thought necessary for an expanded exception to be introduced. However the general work to help promote a better understanding and appreciation of the value of copyright should address the role of fair dealing in order that students and researchers understand the scope of what is likely to fall within fair dealing provisions.

DIGITAL RIGHTS MANAGEMENT

47. Should a DRM workaround be provided for all copying under the expanded exception or should the workaround just be limited to scientific research in line with EU law requirements?

To date ERA is not aware of any “notice of complaint” having been served on the Secretary of State under section 296ZE CDPA.

This suggests that industry has been working well with user groups to ensure that voluntary measures are put in place to allow for recognised “permitted acts”.

32
ERA has set out why it does not believe that an expanded exception under section 29 CDPA is necessary. Instead building on suggested links between the private study exception and licensing of educational establishments may provide for voluntary arrangements which remove the need for further legislative action.

In particular, by channelling the use of films and sound recordings through the authorisation and secure authentication systems in place for the copyright licences held by educational establishments, any DRM restrictions that might otherwise have triggered a “notice of complaint” under section 296ZE are likely to be avoided.

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

Workaround should be avoided. It would undermine new business models and open up greater opportunities for unauthorised use. Voluntary measures within prescribed terms must be the preferred course.

49. If a narrower approach is adopted, is it necessary to adjust the current arrangements for literary and other works to ensure consistency in this area?

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

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

Any changes should recognise the role of libraries and archives in preserving the material that they legitimately acquire through other sources.

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?

There does not appear to be any shortage of caricature, parody or pastiche within the UK creative industries. It therefore seems that there is little economic evidence of need for the UK to take advantage of the option open to it under Article 5(3) (k) EC Copyright Directive.

However, ERA acknowledges that its members have individual views on this issue and will be commenting in detail on questions 56 to 66 within individual submissions.

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?

See 56 above.

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

See 56 above.

ACKNOWLEDGEMENT

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

See 56 above.

DEFINITIONS

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

See 56 above.

CLASSES OF WORK

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

See 56 above.

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?

See 56 above.

WORK PUBLICLY AVAILABLE?

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

See 56 above.

PARODY ONLY OF THE UNDERLYING WORK?

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

See 56 above.

MORAL RIGHTS

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

See 56 above.

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

See 56 above.

Andrew Yeates
General Counsel
Educational Recording Agency
New Premier House
150 Southampton Row
London WC1B 5AL

Telephone 020 7837 3222
Taking Forward the Gowers Review of Intellectual Property

Proposed Changes to Copyright Exceptions

Annex 1 to response from Educational Recording Agency Limited
The Copyright (Certification of Licensing Scheme for Educational Recording of Broadcasts) (Educational Recording Agency Limited) (Revocation and Amendment) Order 2008

Made - - - 31st January 2008
Coming into force - - 1st April 2008

The Secretary of State certified, for the purposes of section 35 of, and paragraph 6 of Schedule 2 to, the Copyright, Designs and Patents Act 1988 (“the Act”) (a), a licensing scheme to be operated by The Educational Recording Agency Limited (company number 2423219) (“the ERA”) set out in the Copyright (Certification of Licensing Scheme for Educational Recording of Broadcasts) (Educational Recording Agency Limited) Order 2005 (b) (“the 2005 Order”) and a licensing scheme to be operated by the ERA set out in the Copyright (Certification of Licensing Scheme for Educational Recording of Broadcasts) (Educational Recording Agency Limited) Order 2007 (c) (“the 2007 Order”).

The ERA has informed the Secretary of State that the scheme certified in the 2005 Order will cease to be operated on 1st April 2008 and has applied to the Secretary of State for the 2007 Order to be amended in accordance with Article 3 of this Order.

Accordingly, the Secretary of State, in exercise of the powers conferred upon him by section 143 (d) of, and paragraph 16 of Schedule 2A (e) to, the Act, makes the following Order:

1. This Order may be cited as the Copyright (Certification of Licensing Scheme for Educational Recording of Broadcasts) (Educational Recording Agency Limited) (Revocation and Amendment) Order 2008 and shall come into force on 1st April 2008.

2. The 2005 Order is revoked.

3. For paragraph 8 of the licensing scheme set out in the Schedule to the 2007 Order substitute the paragraph set out in the Schedule to this Order.

Baroness Morgan
Parliamentary Under Secretary of State for Intellectual Property and Quality
31st January 2008

Department for Innovation, Universities and Skills

(a) 1988 c.48.
(b) S.I. 2005/222.
(c) S.I. 2007/266.
(d) Section 143 was amended by regulations 4 and 11 of the Copyright and Related Rights Regulations 1996 (S.I. 1996/2967) and by regulation 2 and Schedule 2 to the Copyright and Related Rights Regulations 2003 (S.I. 2003/2498).
(e) Schedule 2A was inserted by regulations 4 and 22 of the Copyright and Related Rights Regulations 1996 and paragraph 16 of Schedule 2A was amended by regulation 2 and Schedule 1 of the Copyright and Related Rights Regulations 2003.
SCHEDULE 1
Article 3

8. The Licensor Members of ERA and the works and performances forming part of ERA Repertoire in respect of which the Relevant Rights are owned or controlled by such Licensors will for the purposes of Licences issued under the Licensing Scheme comprise:

AUTHORS’ LICENSING AND COLLECTING SOCIETY LIMITED (“ALCS”)
Those literary and dramatic works which are owned by or controlled by persons represented by ALCS and which are included in any broadcast.

ASSOCIATION DE GESTION INTERNATIONALE COLLECTIVE DES OEUVRES AUDIOVISUELLES (“AGICOA”)
The films which are owned or controlled by persons represented by AGICOA and which are included in any broadcast from which an ERA Recording is made.

BBC WORLDWIDE LIMITED
The broadcasts of the British Broadcasting Corporation and all those copyright works owned or controlled by the British Broadcasting Corporation which are included in any broadcast.

BPI (BRITISH RECORDED MUSIC INDUSTRY) LIMITED (“BPI”)
Those sound recordings which are owned or controlled by persons represented by BPI and which are included in any broadcast from which an ERA Recording is made.

CHANNEL FOUR TELEVISION CORPORATION (“Channel 4”)
The broadcasts made on Channel 4, E4 and/or Film Four and/or any other broadcast service operated by Channel 4 or any of its subsidiary companies and all those copyright works owned or controlled by Channel 4 or any of its subsidiary companies included in any broadcast.

CHANNEL 5 BROADCASTING LIMITED (“Channel 5”)
The broadcasts made on Five and/or any other broadcast service operated by Channel 5 or any of its subsidiary companies and all those copyright works owned or controlled by Channel 5 or any of its subsidiary companies included in any broadcast.

DESIGN AND ARTISTS COPYRIGHT SOCIETY (“DACS”)
Those artistic works (as defined in the Act) in which the copyright is owned or controlled by the members of DACS or the members of copyright societies represented by DACS and which are included in any broadcast.

DIRECTORS UK LIMITED (“Directors UK”)
The copyright works which are owned or controlled by, or in which authorship is owned or controlled by, persons represented by Directors UK and which are included in any broadcast from which an ERA Recording is made.

EQUITY
The performances by persons represented by Equity which are included in any broadcast.
THE INCORPORATED SOCIETY OF MUSICIANS ("ISM")

The literary and musical works which are owned by or controlled by persons represented by ISM and the performances by persons who are represented by ISM which are included in any broadcast.

ITV NETWORK LIMITED ("ITV Network")

The broadcasts made on the channel branded as ITV1 in England and Wales, as the STV regions (formerly known as Grampian TV and Scottish TV) in Scotland, as Ulster in Northern Ireland, and as Channel TV in the Channel Islands, on ITV 2, on ITV 3, on the ITV News Channel and/or any other broadcast service operated by ITV Network Limited or any of its associated or subsidiary companies and all those copyright works owned or controlled by ITV Network Limited or any of its subsidiary or associated companies included in any broadcast.

MECHANICAL COPYRIGHT PROTECTION SOCIETY LIMITED ("MCPS")

Those musical works and sound recordings which are owned or controlled by members of MCPS and entrusted by its members to MCPS and which are included in any broadcast from which an ERA Recording is made.

MUSICIANS' UNION ("the MU")

The performances by persons represented by the MU which are included in any broadcast.

THE PERFORMING RIGHT SOCIETY LIMITED ("PRS")

The musical works which are owned or controlled by the PRS or by persons represented by the PRS and which are included in any broadcast from which an ERA Recording has been made.

PHONOGRAPHIC PERFORMANCE LIMITED ("PPL")

Those sound recordings which are owned or represented by PPL and which are included in any broadcast from which an ERA Recording is made.

SIANEL PEDWAR CYMRU ("S4C")

The broadcasts made on S4C, S4C Digital and/or S4C2 and/or any other broadcast service operated by S4C or any of its subsidiary companies and all those copyright works owned or controlled by S4C or any of its subsidiary companies included in any broadcast.

For the above purposes “broadcast” shall have the meaning provided by section 6 of the Act.

However, Licences under the Licensing Scheme shall not authorise the recording of Open University programmes. If the Licensee is in any doubt as to whether a Licence covers a particular right or a particular copyright work the Licensee shall be entitled to contact ERA who shall be obliged within a reasonable time (by one of the Licensors) to confirm whether or not a particular right is owned or controlled by one of the Licensors.”
EXPLANATORY NOTE
(This note is not part of the Order)


A licensing scheme operated by the ERA was also certified for the purposes of section 35 of, and paragraph 6 of Schedule 2 to, the Act by the Copyright (Certification of Licensing Scheme for Educational Recording of Broadcasts) (Educational Recording Agency Limited) Order 2007 (S.I. 2007/266) (the 2007 Order).

The licensing scheme certified in the 2005 Order will cease to be operated on 1st April 2008.

The ERA wishes to vary paragraph 8 of the licensing scheme certified in the 2007 Order to include new Licensor Members and to reflect recent changes of name by existing Licensor Members.

Section 143 of, and paragraph 16 of Schedule 2A to, the Act provides that an order shall be revoked if the scheme ceases to be operated and also provides that a variation of a licensing scheme is not effective unless a corresponding amendment of the order certifying the scheme is made.

This Order is made under Section 143 of, and paragraph 16 of Schedule 2A to, the Act and revokes the 2005 Order and amends paragraph 8 of the licensing scheme set out in the Schedule to the 2007 Order to correspond with the variation to the scheme which the ERA wishes to make (effective from 1st April 2008).

£3.00

© Crown copyright 2008

Printed and published in the UK by The Stationery Office Limited
under the authority and superintendence of Carol Tullo, Controller of Her Majesty’s

E1901 2/2008 181901T 19585
The Copyright (Certification of Licensing Scheme for Educational Recording of Broadcasts) (Educational Recording Agency Limited) Order 2007

Made - - - - 1st February 2007

The Educational Recording Agency Limited (company number 2423219), whose registered office is at New Premier House, 150 Southampton Row, London WC1B 5AL has applied to the Secretary of State to certify, for the purposes of section 35 of, and paragraph 6 of Schedule 2 to, the Copyright, Designs and Patents Act 1988 (“the Act”)(a), a licensing scheme to be operated by it:

The Secretary of State is satisfied that the scheme enables the works to which it relates to be identified with sufficient certainty by persons likely to require licences and that it sets out clearly the charges (if any) payable and the other terms on which licences will be granted:

Accordingly, the Secretary of State, in exercise of the powers conferred upon him by section 143 of, and paragraph 16 of Schedule 2A to, the Act, hereby makes the following Order:

1. This Order may be cited as the Copyright (Certification of Licensing Scheme for Educational Recording of Broadcasts) (Educational Recording Agency Limited) Order 2007.

2. The licensing scheme set out in the Schedule to this Order is certified for the purposes of section 35(b) of, and paragraph 6 of Schedule 2(c) to, the Copyright, Designs and Patents Act 1988.

3. The certification under article 2 shall come into operation on 1st April 2007.

Malcolm Wicks
Minister of State for Science and Innovation
Department of Trade and Industry
1st February 2007

(a) 1988 c.48.
(b) Section 35 was amended by regulations 2, 3 and 12 and Schedule 2 to the Copyright and Related Rights Regulations 2003 (SI 2003/2498).
(c) Paragraph 6 of Schedule 2 was amended by regulations 2, 3 and 12 of the Copyright and Related Rights Regulations 2003.
SCHEDULE

The Educational Recording Agency Limited Licensing Scheme

Nature of the Licence

1. The Educational Recording Agency Limited (known as “ERA”) is authorised to operate a Licensing Scheme for the purposes of both section 35 of, and paragraph 6 of Schedule 2 to the Copyright, Designs and Patents Act 1988.

2. “The Act” refers to the Copyright, Designs and Patents Act 1988 or any relevant law amending, modifying or re-enacting it from time to time.

3. Set out below are the terms of the Licensing Scheme which ERA has been authorised to operate to the extent that the same has been certified for the purposes of both section 35 of the Act and paragraph 6 of Schedule 2 to the Act (“the Licensing Scheme”).

4. These terms shall form part of licences issued under the Licensing Scheme (“the Licence”).

5. The Licensing Scheme and Licences issued under it shall apply only to Relevant Rights when used for non-commercial educational purposes within or on behalf of an Educational Establishment. All licensees under the Licensing Scheme shall either be or represent an Educational Establishment (“Licensee”).

6. “Educational Establishment” shall mean any school and any other description of educational establishment as may be specified by order of the Secretary of State for the purposes of section 174 of the Act.

ERA Repertoire and Licensor Members

7. —(1) The copyright works and rights in performances relevant to a Licence granted under the Licensing Scheme (“ERA Repertoire”) are the works and performances in respect of which and to the extent to which the Licensor Members of ERA (or persons represented by the Licensor Members) own or control Relevant Rights.

(2) “Relevant Rights” shall comprise the right:

(a) to cause or authorise the making of recordings of a broadcast and copies of such a recording and (only as a direct result of their inclusion in a broadcast) of copyright works and/or performances contained in the recorded broadcast by or on behalf of an Educational Establishment for the educational purposes of that Educational Establishment (“ERA Recordings”); and

(b) to authorise ERA Recordings to be communicated to the public by a person situated within the premises of an Educational Establishment but only to the extent that the communication cannot be received by any person situated outside the premises of that Educational Establishment.

8. The Licensor Members of ERA and the works and performances forming part of ERA Repertoire in respect of which the Relevant Rights are owned or controlled by such Licensor Members will for the purposes of Licences issued under the Licensing Scheme comprise:

AUTHORS’ LICENSING AND COLLECTING SOCIETY LIMITED (“ALCS”)

Those literary and dramatic works which are owned by or controlled by persons represented by ALCS and which are included in any broadcast.
BBC WORLDWIDE LIMITED
The broadcasts of the British Broadcasting Corporation and all those copyright works owned or controlled by the British Broadcasting Corporation which are included in any broadcast.

CHANNEL FOUR TELEVISION CORPORATION (“Channel 4”)
The broadcasts made on Channel 4, E4 and/or Film Four and/or any other broadcast service operated by Channel 4 or any of its subsidiary companies and all those copyright works owned or controlled by Channel 4 or any of its subsidiary companies included in any broadcast.

CHANNEL 5 BROADCASTING LIMITED (“Channel 5”)
The broadcasts made on Five and/or any other broadcast service operated by Channel 5 or any of its subsidiary companies and all those copyright works owned or controlled by Channel 5 or any of its subsidiary companies included in any broadcast.

DESIGN AND ARTISTS COPYRIGHT SOCIETY LIMITED (“DACS”)
Those artistic works (as defined in the Act) in which the copyright is owned or controlled by the members of DACS or the members of copyright societies represented by DACS and which are included in any broadcast.

EQUITY
The performances by persons represented by Equity which are included in any broadcast.

THE INCORPORATED SOCIETY OF MUSICIANS (“ISM”)
The literary and musical works which are owned by or controlled by persons represented by ISM and the performances by persons who are represented by ISM which are included in any broadcast.

THE BRITISH PHONOGRAPHIC INDUSTRY LIMITED (“BPI”)
Those sound recordings which are owned or controlled by persons represented by BPI and which are included in any broadcast from which an ERA Recording is made.

ITV NETWORK LIMITED (“ITV Network”)
The broadcasts made on the channel branded as ITV1 in England and Wales, as the STV regions (formerly known as Grampian TV and Scottish TV) in Scotland, as Ulster in Northern Ireland, and as Channel TV in the Channel Islands, on ITV 2, on ITV 3, on the ITV News Channel and/or any other broadcast service operated by ITV Network Limited or any of its associated or subsidiary companies and all those copyright works owned or controlled by ITV Network Limited or any of its subsidiary or associated companies included in any broadcast.

MECHANICAL COPYRIGHT PROTECTION SOCIETY LIMITED (“MCPS”)
Those musical works and sound recordings which are owned or controlled by members of MCPS and entrusted by its members to MCPS and which are included in any broadcast from which an ERA Recording is made.

MUSICIANS’ UNION (“the MU”)
The performances by persons represented by the MU which are included in any broadcast.
THE PERFORMING RIGHT SOCIETY LIMITED (“PRS”)

The musical works which are owned or controlled by the PRS or by persons represented by the PRS and which are included in any broadcast from which an ERA Recording has been made.

PHONOGRAPHIC PERFORMANCE LIMITED (“PPL”)

Those sound recordings which are owned or represented by PPL and which are included in any broadcast from which an ERA Recording is made.

SIANEL PEDWAR CYMRU (“S4C”)

The broadcasts made on S4C, S4C Digital and/or S4C2 and/or any other broadcast service operated by S4C or any of its subsidiary companies and all those copyright works owned or controlled by S4C or any of its subsidiary companies included in any broadcast.

For the above purposes “broadcast” shall have the meaning provided by section 6 of the Act.

However, Licences under the Licensing Scheme shall not authorise the recording of Open University programmes. If the Licensee is in any doubt as to whether a Licence covers a particular right or a particular copyright work the Licensee shall be entitled to contact ERA who shall be obliged within a reasonable time (by one of the Licensor Members) to confirm whether or not a particular right is owned or controlled by one of the Licensors.

9. No recording or copying of a broadcast under any Licence shall be made except by or on behalf of an Educational Establishment and any such recording or copying shall be made either:

(a) on the premises of the Educational Establishment by or under the direct supervision of a teacher or employee of the Licensee; or

(b) at the residence of a teacher employed by the Licensee by that teacher; or

(c) at the premises of a third party authorised by the Licensee to make recordings or copies on behalf of the Licensee under written contractual terms and conditions which prevent the retention or use of any recordings or copies by that third party or any other third party unless ERA shall have expressly agreed that a specific third party may retain any recordings or copies for subsequent use only by authorised Licensees of ERA in accordance with the provisions of the Licensing Scheme.

Maintaining records

10. Licensees shall be required to ensure that all ERA Recordings or copies comprising ERA Recordings made under a Licence provide for sufficient acknowledgement of the broadcast relevant to the ERA Recording to be given with each ERA Recording being marked with the name of the broadcaster, the date upon which the broadcast took place and the title of the recording.

To provide sufficient acknowledgement all copies shall be marked with a statement in clear and bold lettering reading:

“This recording is to be used only for non-commercial educational purposes under the terms of the ERA Licence”

or such other wording or statement as ERA shall reasonably require from time to time.

Physical copies shall include the statement on the exterior of the copy, and/or its packaging.

When under the Licence copies are made and stored in digital form for access through a computer server, the statement shall also be included as a written opening credit or webpage which must be viewed or listened to before access to the ERA Recording is permitted.

11. Licensees may be required to record and maintain at the request of ERA details of broadcasts and television or radio programmes or any part or parts of such programmes which are
made as ERA Recordings and the number of copies of such recordings made under a Licence and to make available to ERA such records for inspection.

12. Licensees shall undertake that if and when any ERA Recordings are communicated to the public by a person situated within the premises of an Educational Establishment under the Licence suitable password, and other digital rights management or technological protection systems are operated and applied by the Licensee to ensure that such communication is not received or receivable by persons situated outside the premises of the licensed Educational Establishment.

13. Licensees may be required to maintain further records and answer questionnaires or surveys as ERA may reasonably require for the proper operation of the Licensing Scheme.

14. ERA shall be entitled to inspect and Licensees shall provide for ERA to have access to all records that Licensees and licensed Educational Establishments are required to maintain under the above provisions, and further to have access to all ERA Recordings however stored under the terms of a Licence, in order to inspect the same to check compliance with the Licence.

### Period of Licence and Fees

15. Licences shall be granted in consideration of payment of the agreed Licence fees and may be granted for such period or periods as may from time to time be specified by or agreed with ERA.

16. The Licence fee shall be calculated by reference to the period for which the Licence is granted and to the tariff applicable in respect of that period.

17. The annual tariff shall be calculated on a full-time or full-time equivalent per head basis by category of student in an Educational Establishment.

<table>
<thead>
<tr>
<th>For Licences taking effect on or after 1st April 2007 the annual tariff shall be:</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Students in Primary schools (including Educational Establishments known as Preparatory Schools)</td>
<td>30p per head</td>
</tr>
<tr>
<td>Students in Secondary schools</td>
<td>52p per head</td>
</tr>
<tr>
<td>Students in Educational Establishments of Further Education (including former Sixth Form Colleges)</td>
<td>98p per head</td>
</tr>
<tr>
<td>Students in Educational Establishments of Higher Education (including Higher Education Colleges, Theological Colleges and Universities)</td>
<td>£1.55 per head</td>
</tr>
<tr>
<td>Students in Educational Establishments not listed above specified from time to time by the Secretary of State under section 174 of the Act</td>
<td>£1.55 per head</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>For Licences taking effect on or after 1st April 2008 the annual tariff shall be:</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Students in Primary schools (including Educational Establishments known as Preparatory Schools)</td>
<td>31p per head</td>
</tr>
<tr>
<td>Students in Secondary schools</td>
<td>54p per head</td>
</tr>
<tr>
<td>Students in Educational Establishments of Further Education (including former Sixth Form Colleges)</td>
<td>£1.01 per head</td>
</tr>
<tr>
<td>Students in Educational Establishments of Higher Education (including Higher Education Colleges, Theological Colleges and Universities)</td>
<td>£1.60 per head</td>
</tr>
<tr>
<td>Students in Educational Establishments not listed above specified from time to time by the Secretary of State under section 174 of the Act</td>
<td>£1.60 per head</td>
</tr>
</tbody>
</table>

Discounted rates may be negotiated at ERA’s discretion to cover groups of Educational Establishments.

18. Licence fees for Licences running for a period of less than one year shall be calculated on a pro-rata basis against the applicable annual tariff.

19. Licensees shall pay agreed Licence fees together with any VAT and any other Government tax which may be applicable from time to time in addition to such Licence Fee on such a date or dates as may from time to time be required by ERA in the Licence and within 28 days of invoice.
Termination

20. ERA shall be entitled to terminate Licences granted:
   (a) if Licence Fees are not paid when due; or
   (b) for any other substantial breach of the conditions of the Licence,

provided that ERA shall have given to the Licensee written notice identifying the nature of late payment or the nature of the breach.

The termination will become effective twenty eight days after receipt of the written notice unless during the relevant period of twenty eight days the Licensee makes payment of outstanding fees or remedies the breach.

21. Licences will automatically terminate:
   (a) if and when an administrator, receiver, administrative receiver or other encumbrancer takes possession of, or is appointed over, the whole or any substantial part of the assets of a Licensee;
   (b) if the Licensee enters into an arrangement or composition with or for the benefit of its creditors (including any voluntary arrangement under the Insolvency Act 1986)(a);
   (c) if a petition is presented for the purpose of considering a resolution for the making of an administration order, the winding-up or dissolution of the Licensee.

22. If punctual payment of agreed Licence Fees is not made, ERA shall be entitled to charge interest on amounts unpaid at the rate of statutory interest prescribed under section 6 of the Late Payment of Commercial Debts (Interest) Act 1998(b).

23. Upon expiry of a Licence without renewal or when a Licence is terminated by ERA it shall be entitled to require a Licensee to delete all ERA Recordings or copies made by the Educational Establishment to which the Licence related.

24. If a Licensee is in breach of the terms of a Licence and ERA incurs costs and expenses either in monitoring and discovering any breach of the terms of a Licence or in enforcing the conditions of any Licence, the Licensee shall be required to indemnify ERA in respect of any such costs and expenses so incurred.

25. Licensees shall be required to take all reasonable steps to ensure that rights granted by a Licence are not exceeded or abused by teachers, employees, pupils or other persons.

26. Licences issued shall be governed and interpreted in accordance with the laws of England and Wales.

(a) 1986 c.45.
(b) 1998 c.20.
EXPLANATORY NOTE
(This note is not part of the Order)

Under section 35 of the Copyright, Designs and Patents Act 1988 recordings of broadcasts may be made by or on behalf of educational establishments without thereby infringing copyright. Similar provision is made by paragraph 6 of Schedule 2 to that Act in relation to performances. These provisions do not, however, apply if and to the extent that there is a licensing scheme certified for the purposes of the relevant provision providing for the grant of licences.

This Order certifies a licensing scheme to be operated by the Educational Recording Agency Limited (effective from 1st April 2007) for the granting of licences to educational establishments for the recording by them of broadcasts, other than television programmes broadcast on behalf of the Open University which are the subject of a separate licensing scheme (SI 2003/187)
Taking Forward the Gowers Review of Intellectual Property

Proposed Changes to Copyright Exceptions

Annex 2 to response from Educational Recording Agency Limited
Exceptions and limitations

1. Temporary acts of reproduction referred to in Article 2, which are transient or incidental and an integral and essential part of a technological process and whose sole purpose is to enable:

   (a) a transmission in a network between third parties by an intermediary, or
   (b) a lawful use of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.

2. Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:

   (a) in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, provided that the rightholders receive fair compensation;
   (b) in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject matter concerned;
   (c) in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage;
   (d) in respect of ephemeral recordings of works made by broadcasting organisations by means of their own facilities and for their own broadcasts; the preservation of these recordings in official archives may, on the grounds of their exceptional documentary character, be permitted;
   (e) in respect of reproductions of broadcasts made by social institutions pursuing non-commercial purposes, such as hospitals or prisons, on condition that the rightholders receive fair compensation.

3. Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:

   (a) use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved;
   (b) uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability;
   (c) reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character, in cases where such use is not expressly reserved, and as long as the source, including the author's name, is indicated, or use of works or other subject-matter in connection with the reporting of current events, to the
extent justified by the informatory purpose and as long as the source, including the author's name, is indicated, unless this turns out to be impossible;

(d) quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose;

(e) use for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings;

(f) use of political speeches as well as extracts of public lectures or similar works or subject-matter to the extent justified by the informatory purpose and provided that the source, including the author's name, is indicated, except where this turns out to be impossible;

(g) use during religious celebrations or official celebrations organised by a public authority;

(h) use of works, such as works of architecture or sculpture, made to be located permanently in public places;

(i) incidental inclusion of a work or other subject-matter in other material;

(j) use for the purpose of advertising the public exhibition or sale of artistic works, to the extent necessary to promote the event, excluding any other commercial use;

(k) use for the purpose of caricature, parody or pastiche;

(l) use in connection with the demonstration or repair of equipment;

(m) use of an artistic work in the form of a building or a drawing or plan of a building for the purposes of reconstructing the building;

(n) use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections;

(o) use in certain other cases of minor importance where exceptions or limitations already exist under national law, provided that they only concern analogue uses and do not affect the free circulation of goods and services within the Community, without prejudice to the other exceptions and limitations contained in this Article.

4. Where the Member States may provide for an exception or limitation to the right of reproduction pursuant to paragraphs 2 and 3, they may provide similarly for an exception or limitation to the right of distribution as referred to in Article 4 to the extent justified by the purpose of the authorised act of reproduction.

5. The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.
Taking Forward the Gowers Review of Intellectual Property

Proposed Changes to Copyright Exceptions

Annex 3 to response from Educational Recording Agency Limited
Response from The Educational Recording Agency Limited to the Gowers Review of Intellectual Property – Call for Evidence

The Educational Recording Agency Limited (ERA) is a copyright collecting society. It was set up under the laws of England and Wales in 1989 with a view to operating a copyright licensing scheme for educational use of copyright protected material.

Uniquely serving the UK education sector, ERA is one of a range of collecting societies which help copyright owners and performers derive an income from the licensed use of their works.

The certified scheme operates to enable educational establishments to record for (non commercial) educational purposes any radio or television broadcast output of ERA members within the United Kingdom (apart from Open University programmes which are covered by a separate certified licensing scheme).

Only “educational establishments” as defined by the Secretary of State under the Copyright, Designs and Patents Act 1988 (as amended) and ensuing Statutory Instruments are able to take out an ERA licence.

Introduction

ERA welcomed the commitment in the Labour Party manifesto to “modernise copyright and other intellectual property so that they are appropriate for the digital age”.

ERA also welcomes the opportunity to respond to the Gowers Review.

As a copyright collecting society, we would comment only on the following questions raised by the Review.

These are:-

1. What are your views on the current exceptions in copyright law?

2. Could more be done to clarify the various copyright exceptions?

3. To what extent has technological change presented difficulties in use of copyright material in the field of education?

4. Is lack of trust in the (IP) system a barrier?
Finally we comment concerning the role of ERA as a collecting society which is mandated to administer rights in a way specifically applicable within the United Kingdom.

Copyright exceptions in the field of education

This submission will address the first 3 questions as a group.

ERA has worked closely with Local Education Authorities, universities and their representatives, and individual educational establishments since its inception. It exists solely to deliver educational copyright licences, but has brought together a uniquely wide range of rights owners to facilitate the granting of licences within a very specific field.

Our work has taken into account the careful balance recognised within International Treaties between the rights of copyright owners and access to works for the purposes of education and teaching.

This balance reflects Article 10 of the WIPO Copyright Treaty 1996. It also recognises the similar provision is made within Article 16 of the WIPO Performances and Phonograms Treaty. These provisions were in turn reflected in the provisions relating to permitted copyright exceptions and limitations set out in Article 5 of EC Directive 2001/21 concerning harmonisation of certain aspects of copyright and related rights in the information society.

As under the WIPO Treaties, ERA welcomed the provisions of Article 5(5) of the EC Copyright Directive which provided:

“The exceptions and limitations provided for in paragraphs 1,2,3 and 4 (of Article 5) shall only be applied in special cases which do not conflict with the normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder”.

ERA believes that this international framework for the recognition of copyright exceptions and limitations (The Three Step Test) remains effective for all exceptions and limitations for education and teaching within the digital environment.

However, the members of ERA believe that the way in which students and authorised members of educational establishments are now able to access information held by educational establishments on their behalf, warrants clarification of the two provisions within the Copyright, Designs and Patents Act 1988 (as amended) upon which the ERA certified licensing scheme now relies.

Why is there a need for change?

ERA discusses with its licensees the way in which they record broadcasts off-air so that programmes, or clips and extracts from programmes, can be used for educational purposes. In particular discussions have considered the ways in which ITC developments are enabling audio and audio visual material to be presented in new ways in an educational context.

---

1 WIPO Copyright Treaty 1996 – Article 10 (1)
Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights of authors of literary and artistic works under this treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author”.

2 WIPO Performances and Phonograms Treaty 1996 – Article 16(1)
Contracting Parties may, in their national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of performers and producers of phonograms as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works.

3 See Appendix 1

4 See section 35 and paragraph 6 Schedule 2 CPDA 1988 (copies in Appendix 2).
In 2004, the Department for Education and Skills published its Five Year Strategy for Children and Learners. This set out the challenges for education and skills and offered a vision of a system which better meets the needs and aspirations of learners.

The vision encourages greater personal choice for learners so that resources are increasingly designed around the needs of the individual and available at a time and place which suits their needs.

The deployment and use of information and communications technology (ICT) is seen as a crucial means of achieving progress towards this new goal of accessibility of resources.

Last year alone some £252 million was invested in ICT in primary and secondary schools.

Broadband roll-out to all schools is well advanced. Latest figures published by the DfES at the end of 2005 suggest that 83% of primary schools and 99% of secondary schools have broadband connections.

Alongside this the Government has recognised that access to educational material is an important element in promoting lifelong learning and opportunities for “extended schools” offering many opportunities to learn and develop beyond the formal school day.

ERA has therefore been considering the ways in which its licensing scheme may be extended to enable students and teachers to access off-air recordings of broadcasts made by or for educational establishments for the non commercial educational purposes of such establishments, whether the students or teachers are physically on the premises of the educational establishment, or not.

Steps taken by ERA to date.

Since its establishment in 1989, ERA has grown to encompass a uniquely broad membership willing to mandate ERA to represent the copyright works relevant to licensing under section 35 and paragraph 6 of Schedule 2, Copyright, Designs and Patents Act 1988 (as amended).

The growth in membership of ERA has to a large extent been driven by the efficiency of ERA as a copyright licensing agent, and the copyright distributions that can be made through ERA in an area where individual licensing would prove much more costly and time consuming for rights owners and consumers.

However, the structure provided by section 35(2) and paragraph 6 (1B) Schedule 2, has helped simplify both the application and the administration of ERA licences by educational establishments of all kinds.

For the benefit of both its members and its licensees, ERA has always attempted to keep the bureaucracy involved in licensing to a minimum, and has supported the issue of blanket licences for schools within the remit of Local (Education) Authorities to help minimise bureaucracy.

Recognising issues touched upon in the DfES vision and the trends reported in the Becta Review 2005, ERA has been considering offering educational establishments an add-on licence which falls outside the ambit of section 35(2) and paragraph 6(1B) of Schedule 2, for the first time.

If the new scheme were to be launched, it would entitle educational establishments to make the educational recordings covered by the ERA certified scheme available for educational purposes to students and teachers directly connected with the relevant educational establishment via a secure network.

Whilst ERA knows this is of great interest to licensees, it is also aware that the add-on licence may raise new rights clearance issues for licensees.

Although an enormously broad range of rights would be covered by the additional licence (as mandated by ERA members participating in the certified scheme), there is nevertheless a risk that there may be some rights included in the broadcasts of programmes from which ERA off-air recordings are made, which have not been “cleared” for the uses envisaged under the ERA add-on licence.

Where section 35 (2) and paragraph 6 (1B) of Schedule 2 apply, ERA has been able to advise its licensees that they do not need to worry about any “missing” rights unless a separate certified scheme existed. In practice the only other section 35 certified scheme has been that relevant to Open University programmes, which are easily identifiable.

ERA can give no such assurances as regards the “remote access” rights to be licensed in ERA members’ repertoire under the possible add-on licence. It is also true to say that the situation is more complex when the “missing” rights are inextricably embedded in an unidentified number of the wide range of broadcast programmes potentially available for educational copying under the current ERA licences.

On the other hand, the risks to licensees over the “missing rights” clearances are likely to be low because of the broad spectrum of ERA representation. In any event such risks exist in all areas where blanket licences from collecting societies are relied on. In that context the proposed extended licence from ERA would still have a significant value to licensees. ERA’s consultation with current licensees is already addressing this value in the light of broadband roll-out and increased use of on line and wireless technology in the education sector.

However, bearing in mind the broader social benefits which arise from educational copyright licensing, the members of ERA have considered possible options which could reduce the “missing rights” risk for licensees.

One possible option is to consider whether section 35 (1) and paragraph 6 of Schedule 2 might be amended so that it might embrace the full scope of the current ERA Licence and the additional licence, enabling ERA recordings to be accessed from the server of an educational establishment by authorised students, when they are not physically on the campus of the school or college.

One way that this might be done, would be to extend the proviso currently at the end of section 35 (1A) so that the section provides:-

Copyright is not infringed where the recording of a broadcast or a copy of such a recording, whose making was by virtue of subsection (1) not an infringement of copyright is communicated to the public by a person situated within the premises of an educational establishment provided that the communication cannot be received by any person situated outside the premise of that establishment save to the extent that the communication is

(a) to persons who are connected with the establishment; and
(b) for the non commercial private study purposes of such connected persons; and
(c) controlled by the educational establishment so that the identity and use by such connected persons is known.”

A similar change would also be made to Schedule 2 paragraph 6(1A).

Obviously terms such as “connected persons” would have to be tightly defined to ensure that the above changes did not move beyond the proper boundaries of The Three Step Test previously referred to.

Bearing this in mind, “connected persons” might comprise:-

“individuals who are either currently enrolled to study at an educational establishment (which holds an ERA licence) or who are current members of the academic, research or teaching staff of the educational establishment (whether on a permanent, temporary or contract basis) and who are authorised by the educational establishment to access a secure network where the (ERA) recording has been reproduced”
The benefits of collective licensing through ERA.

ERA acts as agent for its members to enable transparent collective licensing of the rights of its members.

It only operates within a specific area of copyright law applicable within the United Kingdom to enable rights owners to secure remuneration for the exercise of specified restricted acts, by educational establishments, for the (non commercial) educational purposes of such establishments.

As with other collecting societies, ERA is mandated to license rights for which it is appointed as agent on the basis that ERA is able to secure effective economic returns from the exercise of such rights.

The range of rights owners who have mandated ERA to act on their behalf is extremely broad, because the remit for which ERA can issue licences is limited to the narrow provisions of Section 35 and paragraph 6 Schedule 2 of the Copyright, Designs and Patents Act 1988 (as amended).

Under these provisions, if rights owners are not part of a certified licence scheme, they effectively lose the opportunity to license or otherwise authorise the use of rights for the uses provided for under certified schemes (including the scheme operated by ERA).

This distinguishes the role played by ERA from the role of many other collecting societies in that:-

(a) the rights relevant to ERA’s current licensing scheme are only recognised in the specific way provided for under Section 35 and paragraph 6 – Schedule 2 of the CDPA 1988 (which is not exactly mirrored in Member States outside the United Kingdom); and

(b) if rights owners do not participate in a certified licensing scheme for the purposes of Section 35 (2) of the CDPA 1988 then the remainder of section 35 provides that the acts covered by the ERA certified licence scheme do not infringe copyright; and

(c) if rights owners do not participate in a certified licensing scheme for the purposes of paragraph 6 (1) and 6 (1B) of Schedule 2 of the CDPA 1988 then the remainder of paragraph 6 provides that the acts covered by the ERA certified licence do not infringe copyright.

In other words the collective representation operates to apply an exception to acts which would otherwise not infringe copyright.

Do International Treaty obligations restrict the proposed change?

ERA submits that the changes suggested to both section 35 and Schedule 2 paragraph 6 CDPA (as amended) can be approved within the flexibility already provided for copyright exceptions and limitations under Article 5.2 of the EC Copyright Directive.

The approach of the UK in using the flexibility over educational copyright exceptions and limitations recognised in the International Treaties previously referred to (and in particular Article 5 of the EC Copyright Directive) has been valuable for both rights owners and users alike.

In particular it reflects the “fair compensation” provision in Article 5.2 (e) of the EC Copyright Directive.6

---

6 Member States may provide for exceptions and limitations to the reproduction right provided for in Article 2 in the following cases ….(e) in respect of reproductions of broadcasts made by social institutions pursuing non commercial purposes.....on the condition that the rights holders receive fair compensation".
In terms of the reproduction and communication to the public which the extended section 35 and Schedule 2 paragraph 6(1) would address, it is submitted that Article 5(3)(a) provides for the necessary flexibility when taken with the provisions of Article 5.2(e).

Article 5.3 (a) provides:

"Member States may provide for exceptions and limitations to the rights provided for in Articles 2 and 3 in the following cases

(a) use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved".

Would the change be in the general interest of both the educational community and rights owners?

At present ERA has 14 members each representing a very significant copyright repertoire. They are:

Authors' Licensing and Collecting Society Limited
BBC Worldwide Limited
Channel Four Television Corporation
Channel 5 Broadcasting Limited
Design and Artists Copyright Society Limited
Equity
The Incorporated Society of Musicians
The British Phonographic Industry Limited
ITV Network Limited
Mechanical Copyright Protection Society
Musicians' Union
The Performing Right Society Limited
Phonographic Performance Limited
Sianel Pedwar Cymru (S4C).
Licences issued by ERA.

Under its certified licence scheme, ERA provides for the licensing of around 36,500 educational establishments in England, Scotland, Wales and Northern Ireland, each year.

To reduce bureaucracy, ERA has developed a system of blanket licensing for groups of educational establishments whenever representative bodies are willing to take on the responsibility for collective licensing.

This has been particularly true for the 36,000 primary and secondary schools in England and Wales whose licensing requirements cover around 5.2 million primary school students and 3.8 million secondary school students each year.

To cover this wide range of licensing, ERA issued blanket licences to 171 of the 174 Local Education Authorities in England and Wales last year. These licences covered all the primary and secondary schools within a licensed LEA area. LEA’s were given a significant discount against full licence fee rates to recognise the bureaucratic savings made as a result of the blanket licence arrangements.

The remaining 3 LEA’s elected to require schools in their area to take our individual ERA Licences. As a result of this ERA issued 62 individual licences to state schools in Lambeth, 65 licences to individual state schools in Harringey, and 163 licences to individual state schools in Liverpool.

32 blanket licences were issued to COSLA covering all primary and secondary schools in Scotland.

One blanket licence was issued to the Association of Education and Library Boards covering all primary and secondary schools in Northern Ireland.

In addition, last year ERA issued:

- 166 licences to Universities/Colleges of Higher Education
- 470 licences to colleges of Further Education
- 1,414 licences to Independent Schools
- 218 licences to language and nursing colleges
- 129 licences to cover other educational establishments, including independent universities, the Offenders Learning and Skills unit, the Fire Service and Police Training Colleges.

The total number of licences (including blanket licences) operated by ERA last year was below 3,000, but these provided the benefits of copyright licenses for several million individuals across all aspects of education within the United Kingdom.

It would be hoped that the current approach to blanket licensing could continue to apply if the scope of section 35 and Schedule 2 paragraph 6 CDPA were amended as proposed.

Bearing this in mind it is submitted that the proposed extension of section 35 and Schedule 2 paragraph 6(1A) CDPA (as amended) would be in the general interest, reflecting the digital environment, whilst not requiring changes to be made to the law at European or wider international level.
Is lack of trust in the IP system a barrier?

Improving trust in the intellectual property system between rights owners and users, within industry and between companies and consumers will be a key part of the welcome education and awareness initiatives highlighted by the recent work of the Creative Industries Forum on Intellectual Property.

Whilst industry has a role to play in promoting understanding about the conditions which attach to use of copyright works in the digital world, this understanding will be helped by the wider education and awareness initiatives which exist, and are being developed on the back of the work of the Creative Industries Forum on Intellectual Property.

The Education Working Group within the Forum recognised:

"Intellectual Property Rights are an intangible concept that is difficult to grasp and generally very poorly understood. Improving the communications and educational messages, and the way they are targeted at specific audiences, as the way to improve understanding, are therefore central to the whole IP agenda. A snapshot of current communication activity shows that there are many agencies and organisations communicating about IP, but that this communication lacks a consistency and co-ordination of message. The working group’s primary focus therefore, has been to consider the tone and theme of IP communications and their appropriateness to particular audiences.

The Group agreed that messages should be positive and empowering. The Group therefore developed a Statement of Principles, the “CREATE” statement, to capture and enunciate the importance of IP as a social, creative and economic tool.

It is hoped that the Review will endorse further work to encourage the adoption and promotion of the CREATE principles in the context of the citizenship curriculum in schools and more broadly within industry and Government in the future.

7 CREATE for the future
Tools for innovation, enterprise and reward in the 21st century.
C Creativity improves the quality of our lives, and our economic prosperity at home and abroad.
R Respect for rights promotes investment in innovation, empowers artists, authors and rights holders to receive appropriate reward and respect for their work, and stimulates choice of access for consumers.
E Education is vital to help people understand what intellectual property is, and how, like physical things, it is relevant to and improves their everyday lives.
A Access to art and creativity enhances diversity of expression and quality of life for everyone when properly balanced with reward for those creating and investing in new work.
T Trust between the creators and consumers of intellectual property is to deliver access to creativity with respect for rights.
E Economic benefits from intellectual property must be publicly recognised by government and understood by the community, if they are to continue to provide the new jobs and the growth which have resulted from intellectual property in the last decade.
Coordinated support to improve education and awareness about the value of intellectual property and the role that it plays within the economy, in supporting jobs and providing reward for innovation, will be increasingly important.

The Patent Office should play a key role in encouraging this coordination within Government and in connecting with creators and industry. However this will need the support and involvement of key Government Departments if their work is to have the best effect.

Work by the Patent Office to develop its educational initiatives about IP should be continued, linking with industry where appropriate. The Patent Office “Think Kit” for secondary schools has proved a useful educational tool. The work now being undertaken to extend the Think Kit concept to provide information for use in primary schools and the tertiary education sector is welcome.

However these initiatives also need support from the DfES to encourage better understanding of the importance of the value of intellectual property within education as a whole.

**It is hoped that the Review team will support and encourage the involvement of DfES in this respect.**

Improving trust should also be addressed through encouraging improved media literacy across the whole of society, and through industry becoming more transparent about the way in which it explains to consumers the conditions which attach to the licensing or authorised use of copyright works.

The use of technological protection measures to provide different levels of access and rights to licensed material will become an increasingly important part of the digital marketplace, if real choice of access and opportunity for the development of new services are to prevail in the future.

**Additional issue**

**The role of ERA as a collecting society administering rights recognised for the purposes of copyright law applicable within the United Kingdom.**

As previously stated, ERA acts as agent for its members to enable transparent collective licensing of the rights of its members. It only operates within a specific area of copyright law applicable within the United Kingdom to enable rights owners to secure remuneration for the exercise of specified restricted acts by educational establishments for the (non commercial) educational purposes of such establishments.

As with other collecting societies, ERA is mandated to license rights for which it is appointed as agent on the basis that ERA is able to secure effective economic returns from the exercise of such rights.

The range of rights owners who have mandated ERA to act on their behalf is extremely broad, because the remit for which ERA can issue licences is limited to the narrow provisions of Section 35 of the Copyright, Designs and Patents Act 1988 (as amended).

However the rights which ERA is currently mandated to administer are narrow and locally based, in that they apply an exception to acts which would otherwise not infringe copyright.

The ERA licensing scheme therefore provides for important locally recognised rights to be administered in a fair and effective way for the benefit of both its members and licensees.

ERA therefore recently responded to the European Commission Internal Market DG consultation relating to the Communication “Management of copyright and Related Rights in the Internal Market”.
ERA was concerned that the approach taken by the Commission ignored the local nature of services provided through collecting societies such as ERA.

ERA’s submission is attached as Appendix 3.

Key points were:

1. ERA welcomed recognition by the Commission that the degree of common ground regarding the rules on copyright contracts across Member States appears to be sufficient, so as not to necessitate any immediate action at Community level.

2. The Communication from the Commission stated that most collecting societies form part of a network of interlocking agreements, by which rights are cross licensed between societies in different Members States. However, this is not always the case. The important locally recognised role played by collecting societies such as ERA must not be forgotten.

3. It is important that collecting societies can continue to be able to operate within local and niche markets. Schemes such as the one operated by ERA allow rights to be managed efficiently, with the educational purposes of the licences also contributing to the establishment of fees at levels that the user community are prepared to accept.

4. If proposals are made for the establishment of common ground at Community level to promote good governance of all collecting societies, it is important that the different scale and scope of different collecting societies are taken into account. Just as the rules applicable to publicly listed companies, and small or close companies differ to reflect the internal administrative, and the external shareholder, obligations of a corporate entity, so the scale of a collecting societies operation should be taken into account.

If this is not done there is a danger that well intentioned regulations to promote good governance within collecting societies actually serve to impose regulatory burdens on smaller societies which result in an increase in administrative costs without commensurate benefits to members of the society or its licensees.

This point is also important when continuing to recognise the importance of respect for subsidiarity and proportionality principles being observed concerning any recommendations for the harmonisation of certain features of collective management.

ERA would urge the Review team to take these issues into account in anticipation of further review of the role of collecting societies by the European Commission.

ERA would welcome the opportunity to provide further background concerning the issues raised in this submission, should the Review team require.

Andrew Yeates
General Counsel
The Educational Recording Agency Limited
New Premier House
150 Southampton Row
London
WC1B 5AL.

19 April 2006.
Taking Forward the Gowers Review of Intellectual Property

Proposed Changes to Copyright Exceptions

Annex 4 to response from Educational Recording Agency Limited
SCHEDULE

These terms form part of the attached ERA Plus Agreement.

1. DEFINITIONS

In this Agreement:

Terms defined in the Principal Licence shall, unless separately defined below or the context otherwise requires, have the same meaning in this ERA Plus Agreement.

"Act" or "the Act" means The Copyright, Designs and Patents Act 1988 or any statutory modification or re-enactment thereof for the time being in force.

"Authorised Users" means individuals who are during the Term either enrolled to study at a Relevant Educational Establishment or who are members of the academic, research or teaching staff of a Relevant Educational Establishment (whether on a permanent, temporary or contract basis) and who are authorised by an officer of the Relevant Educational Establishment to access a Relevant Network by means of Secure Authentication.

"Commercial Use" means the use of any ERA Repertoire for any commercial or promotional purposes or for the purposes of monetary reward (whether by the Licensee, Relevant Educational Establishments, any Authorised User or third party) or in any way which generates profit.

"Dealing" means the uses described in Clause 3 below.

"Educational Communication" means the electronic transmission of the whole or part of an ERA Digital Recording from within a Relevant Educational Establishment to Authorised Users situated outside the premises of the Relevant Educational Establishment for the purpose of education (including teaching and private study) provided always that the transmission does not either involve Commercial Use or authorise or permit any Dealing.

"Educational Establishment" shall mean any school as defined in section 174 of the Act or any other description of educational establishment as may be specified by order of the Secretary of State under that section.

"ERA Certified Licence Scheme" means the educational licensing scheme which ERA has been authorised to operate to the extent that the same has been certified for the purposes of Section 35 and Paragraph 6 of Schedule 2 to the Act.

"ERA Digital Recording" means an encoded copy of ERA Repertoire as included in an ERA Recording made under the Principal Licence.

"ERA Plus Licence Fees" means the fees payable under this Agreement by the Licensee specified in the ERA Plus Licence Fee Invoice and calculated against the annual tariff set out in or as provided by Clause 4 below.

"ERA Plus Licence Fee Invoice" shall mean the invoice issued by ERA specifying the ERA Plus Licence Fees due together with applicable VAT.

"ERA Members" means the bodies specified as Licensor Members of ERA in the Principal Licence.

"ERA Notice" shall mean a clear, legible notice reading "This recording is to be used only for non-commercial educational purposes under the terms of an ERA Licence".

"ERA Recording" shall mean a recording of a broadcast, or a copy of such recording made by or on behalf of an Educational Establishment under a Principal Licence.

"ERA Repertoire" means the categories of works and performances owned or controlled by the ERA Members to the extent that the Principal Licence applies to such works or performances.

"Excluded Material" shall mean any broadcasts or copyright work or performance or other material of any nature which is reproduced in whole or in part in an ERA Recording but which is not ERA Repertoire.

"Relevant Educational Establishment" means either an Educational Establishment being the Licensee under this Agreement or an Educational Establishment to which this Agreement shall have been specifically applied.

"Relevant Network" means a network or part of a network (whether a stand-alone network or a virtual network within the Internet) which is only accessible to Authorised Users.

"Secure Authentication" means the password or other technological protection measures whereby the identity of any individual seeking access to a Relevant Network and through this ERA Digital Recordings are authenticated by or with the authority of a Relevant Educational Establishment at the time of login (and periodically thereafter) in a manner consistent with current best practice, and whose conduct is subject to regulation by or on behalf of a Relevant Educational Establishment.

"Term" shall mean the period specified in Clause 5 of the Agreement.

"Territory" means England, Wales, Scotland and Northern Ireland.
2. GRANT OF RIGHTS

2.1 Subject to payment of the ERA Plus Licence Fees this Agreement shall permit the Licensee non-exclusively in the Territory and during the Term

(a) to make or to authorise Relevant Educational Establishments to make ERA Digital Recordings only to the extent that is technically necessary for the purposes of sub-Clause (b); and

(b) to make available only by means of Educational Communication to Authorised Users ERA Repertoire included in ERA Digital Recordings and to permit Authorised Users situated outside the Relevant Educational Establishment to access using a Relevant Network ERA Repertoire so made available for personal non-commercial educational use.

2.2 For the avoidance of doubt communication of ERA Recordings by or on behalf of the Licensee to an Authorised User who is within the premises of a Relevant Educational Establishment to which the terms of the Principal Licence apply shall be governed by the terms of the Principal Licence and not this Agreement.

2.3 This Licence shall not permit or be deemed to authorise any use of Excluded Material.

2.4 No copying of ERA Repertoire or making of ERA Digital Recordings under any ERA Plus Agreement shall be made except by or on behalf of an Educational Establishment and any such copying shall be made either

(a) at the premises of the Educational Establishment by or under the direct supervision of a teacher or employee of the Licensee; or

(b) at the premises of a third party authorised by the Licensee to make copies on behalf of the Licensee under written contractual terms and conditions which prevent the retention or use of any copies by that third party or any other third party unless ERA shall have expressly agreed that a specific third party may retain any copies for subsequent use only by current Licensees under an ERA Plus Agreement.

3. NO DEALING

3.1 This Agreement does not permit or authorise any Dealing with any ERA Repertoire, ERA Recordings or ERA Digital Recordings (or part or parts of them) by the Licensee or any Authorised Users.

3.2 For the specific purposes of this Agreement "Dealing" shall mean

(a) any Commercial Use;

(b) printing captured still pictures from ERA Digital Recordings;

(c) the adaptation or manipulation of an ERA Recording, ERA Digital Recording or any ERA Repertoire;

(d) any copying, sale, distribution, redistribution, publication, public performance, communication to the public or other use of ERA Repertoire, ERA Recordings or ERA Digital Recordings not expressly provided for by this Agreement;

(e) permitting anyone other than Authorised Users to have access to ERA Repertoire;

(f) permitting ERA Repertoire to be electronically transmitted to any recipient other than an Authorised User;

(g) removing, obscuring or modifying any copyright notices, digital on-screen logos, labels or tags which refer to ERA or the basis upon which an ERA Recording has been made under the Principal Licence;

(h) Authorised Users copying, reproducing, downloading, posting, broadcasting, transmitting, communicating or making available to the public, or otherwise using ERA Repertoire in any way except for personal non-commercial educational use;

(i) Authorised Users altering ERA Repertoire or creating any derivative work from any ERA Repertoire except for their own personal non-commercial educational use.

4. LICENCE FEES

4.1 The grant of rights under this Agreement shall be made in consideration of the Licensee paying to ERA the ERA Plus Licence Fees.

4.2 The ERA Plus Licence Fees have been calculated by reference to the period for which the Principal Licence has been granted and to the applicable tariff referred to in Clause 4.4 below in respect of that period.

4.3 The annual tariff for fees under this Agreement shall be calculated on a full-time or full-time equivalent per head basis by category of student in the Relevant Educational Establishments to which this Agreement applies and against which Authorised Users under this Agreement will be defined.

4.4 For Licences taking effect on or after 1st April 2007 the annual tariff shall be:

<table>
<thead>
<tr>
<th>Category</th>
<th>Tariff</th>
</tr>
</thead>
<tbody>
<tr>
<td>Students in Primary Schools (including Educational Establishments known as Preparatory Schools)</td>
<td>15p per head.</td>
</tr>
<tr>
<td>Students in Secondary Schools</td>
<td>26p per head.</td>
</tr>
<tr>
<td>Students in Educational Establishments of Further Education (including former Sixth Form Colleges)</td>
<td>49p per head.</td>
</tr>
<tr>
<td>Students in Educational Establishments of Higher Education (including Higher Education Colleges, Theological Colleges and Universities)</td>
<td>78p per head.</td>
</tr>
<tr>
<td>Students in Educational Establishments not listed above from time to time by the Secretary of State under Section 174 of the Act</td>
<td>78p per head.</td>
</tr>
</tbody>
</table>
For Licences taking effect on or after 1st April 2008 the annual tariff shall be:

<table>
<thead>
<tr>
<th>Category</th>
<th>Tariff</th>
</tr>
</thead>
<tbody>
<tr>
<td>Students in Primary Schools (including Educational Establishments known as Preparatory Schools)</td>
<td>16p per head.</td>
</tr>
<tr>
<td>Students in Secondary Schools</td>
<td>27p per head.</td>
</tr>
<tr>
<td>Students in Educational Establishments of Further Education (including former Sixth Form Colleges)</td>
<td>51 p per head.</td>
</tr>
<tr>
<td>Students in Educational Establishments of Higher Education (including Higher Education Colleges, Theological Colleges and Universities)</td>
<td>80p per head.</td>
</tr>
<tr>
<td>Students in Educational Establishments not listed above from time to time by the Secretary of State under Section 174 of the Act</td>
<td>80p per head.</td>
</tr>
</tbody>
</table>

Discounted rates may be negotiated at ERA's discretion to cover groups of Educational Establishments.

4.5 Licence Fees for Agreements running for a period of less than one year shall be calculated on a pro-rata basis against the applicable annual tariff.

5. LICENSEE UNDERTAKINGS

The Licensee agrees:

(a) to pay the ERA Plus Licence Fees (together with VAT payable on the total ERA Plus Licence Fees) within 28 days of receipt of the ERA Plus Licence Fee Invoice from ERA as a condition precedent to the operation of grant of rights under this Agreement;

(b) to observe and ensure compliance with the terms of this Agreement during the Term;

(c) upon becoming aware of either abuse or breach of the terms and conditions for access to any Relevant Network within which ERA Repertoire is held (whether in the form of ERA Digital Recordings or otherwise), or any Authorised User abusing or breaching the terms and conditions for Secure Authentication or access to the Relevant Network of the Licensee, forthwith to take all reasonable steps to ensure that such activity ceases and to prevent any recurrence and to inform ERA of the steps taken;

(d) to take all reasonable steps to ensure that Authorised Users are made aware of the terms and conditions for use of ERA Repertoire under this Agreement and that the rights granted under this Agreement are not abused by Authorised Users or any third parties.

6. MAINTAINING RECORDS

The Licensee agrees:

(a) to ensure that all ERA Digital Recordings include sufficient acknowledgement of the broadcast relevant to the ERA Recording from which it is made by the inclusion of a written notice within an opening credit or webpage which must also be viewed or listened to before access to the ERA Digital Recording is permitted.

The notice shall include:

(i) an ERA Notice

(ii) the name of the broadcast service from which the original ERA Recording was recorded off-air

(iii) the date of the broadcast; and

(iv) the name of the programme.

(b) to ensure that as part of the terms and conditions for permitting any Authorised User to access or in any way reproduce any ERA Repertoire included in an ERA Digital Recording or part of it, the Authorised User expressly accepts terms and conditions providing that the transaction is subject to the terms and conditions of this Agreement and to provide for an ERA Notice to be included as an integral part of any access or reproduction permitted as a result of licensed Educational Communication.

(c) to maintain records of the broadcast source of all ERA Recordings (and ERA Digital Recordings) and of the date upon which the broadcast was recorded under the Principal Licence.

(d) to ensure that any Authorised User shall only be entitled to access a Relevant Network for the purposes of this Agreement by means of Secure Authentication and after entering suitable security password(s) and agreeing to comply with other digital rights management or technological protection systems operated and applied by the Licensee to ensure that ERA Repertoire is only able to be accessed and used within the terms of this Agreement.

(e) to maintain such further records and answer questionnaires or surveys as ERA may reasonably require to report to its members concerning the level to which ERA Recordings (including ERA Digital Recordings) are used for Educational Communication under this Agreement.

(f) to permit ERA access to and enable ERA to inspect all records that the Licensee and Relevant Educational Establishments are required to maintain under this Agreement to ensure compliance with its terms.

7. REMEDIES AND TERMINATION

7.1 ERA shall be entitled to terminate this Agreement:

(a) if the ERA Plus Licence Fees are not paid when due; or
(b) for any other substantial breach of the provisions of the Agreement or the Principal Licence;

provided that ERA shall have given to the Licensee written notice identifying the nature of late payment or the nature of the breach.

7.2 The termination will become effective twenty eight days after receipt of the written notice unless either during the relevant period of twenty eight days the Licensee makes payment of outstanding fees or remedies the breach or the breach is not capable of remedy in which event termination will have immediate effect upon receipt of the written notice.

7.3 ERA’s rights under Clauses 7.1 and 7.2 are without prejudice to any other rights it may have under this Agreement or at law in relation to termination of this Agreement, including without limitation any right to damages.

7.4 If payment of agreed era + Licence Fees is not made by the due date for such payment, ERA shall be entitled to charge interest on amounts unpaid (from such due date until the date of actual payment) at the rate of statutory interest prescribed under section 6 of the Late Payment of Commercial Debts (Interest) Act 1998.

7.5 The failure to exercise or delay in exercising any remedy under this Agreement shall not constitute a waiver of any other rights or remedies and no single or partial exercise of any right or remedy under this Agreement shall prevent any further exercise of the right or remedy or the exercise of any other right or remedy.

7.6 This Agreement will automatically terminate upon the occurrence of any of the following events:

(a) if and when an administrator, receiver, administrative receiver or other encumbrancer takes possession of, or is appointed over, the whole or any substantial part of the assets of a Licensee;

(b) if the Licensee enters into an arrangement or composition with or for the benefit of its creditors (including any voluntary arrangement under the Insolvency Act 1986); or

(c) a petition is presented for the purpose of considering a resolution for the making of an administration order, the winding up or dissolution of the Licensee.

7.7 Upon expiry of the Term or when this Agreement is terminated ERA shall be entitled to require the Licensee to delete all ERA Digital Recordings or copies of ERA Repertoire made by the Relevant Educational Establishment(s) to which this Agreement related.

7.8 If a Licensee is in breach of the terms of this Agreement and ERA incurs costs and expenses either in monitoring and discovering any breach of the terms or in enforcing the conditions, the Licensee shall indemnify ERA in respect of any such costs and expenses so incurred.

8. GENERAL

8.1 If Dealing with any ERA Repertoire takes place then any ERA Recording or ERA Digital Recording including any ERA Repertoire shall be treated as an infringing copy for the purposes of that Dealing and all subsequent purposes.

8.2 Information provided to ERA under this Agreement will be used by ERA for the purposes of administering this Agreement and the accounts and records of ERA. The Licensee acknowledges that for this purpose ERA may share this information with ERA Members.

8.3 No provision of this Agreement is intended to, or shall in fact, confer any right or benefit on any third party; and the Contracts (Rights of Third Parties) Act 1999 shall not apply to this Agreement including, without limitation, with regard to Authorised Users.

8.4 Nothing in this Agreement shall constitute a waiver of any statutory rights of the parties under the Act from time to time.

8.5 This Agreement when read with the Principal Licence constitutes the entire agreement between the parties relating to ERA Repertoire and supersedes all prior communications, understanding and agreements (whether written or oral) relating to its subject matter and may not be amended or modified except by agreement of both parties in writing.

8.6 If a court rules that any condition of this Agreement is not valid and cannot be enforced, the other conditions will continue to be valid and enforceable.

8.7 This Agreement is made under the law of England and Wales and any court proceedings must be in the English courts. If a Licensee is established in Scotland or Northern Ireland, ERA will accept the local law and courts where the Licensee is established. Enforcement of a court order may be done in any law or court system that is relevant under this Clause.

9. NOTICES
All notices given under this Agreement shall be in writing and be sent by first class post, in the case of the Licensee to the address shown at the head of this Agreement and in the case of ERA to New Premier House, 150 Southampton Row, London WC1B 5AL (or any subsequent address notified by ERA to the Licensee) and shall be deemed to have been served on the second working day (which shall exclude weekends and English public holidays) following the date of posting.
THE ERA PLUS LICENCE

ERA OFFERS ADDITIONAL LICENCE OPPORTUNITY

ERA now offers its licensees the opportunity to take out an additional licence which will enable licensed ERA Recordings to be accessed by students and teachers online whether they are on the premises of their school, college or university, or at home or working elsewhere within the UK. The new licence is called the "ERA Plus Licence".

WHO CAN TAKE OUT AN ERA PLUS LICENCE?

Only educational establishments, or bodies acting on behalf of educational establishments which hold ERA Licences will be eligible to take out ERA Plus Licences. This is because the right to record broadcasts for non-commercial educational purposes by making ERA Recordings will continue to be governed by the terms of the ERA Licence.

The ERA Plus Licence extends rights granted by ERA Members to authorise licensed ERA Recordings to be accessed by students and teachers online from outside the premises of their establishment when at home or working elsewhere across the UK.

HOW MUCH DOES IT COST?

The annual tariff for licences is calculated taking into account the number of full-time or full-time equivalent students who have the benefit of an ERA Licence.

If discounts have been applied to calculation of fees paid under an ERA Licence because blanket licences have been taken out, for the launch of the new licence the same discounts will be offered to bodies which extend the blanket licence arrangements to cover ERA Plus.
The annual tariffs for ERA Plus are:

For licences taking effect before 30 March 2008

<table>
<thead>
<tr>
<th>Category</th>
<th>Tariff</th>
</tr>
</thead>
<tbody>
<tr>
<td>Primary/Preparatory students</td>
<td>15p</td>
</tr>
<tr>
<td>Secondary school students</td>
<td>26p</td>
</tr>
<tr>
<td>Further Education students</td>
<td>49p</td>
</tr>
<tr>
<td>Higher Education students</td>
<td>78p</td>
</tr>
</tbody>
</table>

For licences taking effect on or after 1 April 2008

<table>
<thead>
<tr>
<th>Category</th>
<th>Tariff</th>
</tr>
</thead>
<tbody>
<tr>
<td>Primary/Preparatory school student</td>
<td>16p</td>
</tr>
<tr>
<td>Secondary school students</td>
<td>27p</td>
</tr>
<tr>
<td>Further Education students</td>
<td>51p</td>
</tr>
<tr>
<td>Higher Education students</td>
<td>80p</td>
</tr>
</tbody>
</table>

**WHAT OTHER TERMS APPLY?**

The ERA Plus licence is very much an extension of the ERA Licence itself. A full copy of the terms of the Licence can be found on our website www.era.org.uk

Licensees will be required to have in place procedures to ensure that only "Authorised Users" will be able to gain access to ERA Recordings stored on the servers of a licensed establishment. The recordings cannot be posted for open access by people who are not Authorised Users or for any purposes other than educational use.

**REDUCING BUREAURACY**

In December 2006 the Gowers Review published its recommendations. These included as "Recommendation 2" that steps should be taken "to enable educational provisions to cover distance learning and interactive whiteboards by 2008 by amending section 35….of the Copyright, Designs and Patents Act 1988".

The above Recommendation includes the proposal that the scope of section 35, CDPA should be extended to apply to access within the scope envisaged by the ERA Plus Licence. The Government has stated that it will take this forward as part of a package of work on copyright exceptions, with a public consultation expected in due course.

ERA expects that implementation of the recommendation will increase the value of the ERA Plus Licence and enable ERA to streamline the bureaucracy for issuing licences, to help ERA continue to improve the services that it provides.