

**European Commission
Green Paper -
Copyright in the Knowledge Economy**

A Note from the UK Film Council

1. The UK Film Council is the Government-backed lead agency for film in the UK ensuring that the economic, cultural and educational aspects of film are effectively represented at home and abroad.
2. In the sphere of copyright, the UK Film Council's policy priorities are to assist the industry in combating copyright theft and infringement; and to help the UK Government and the European Commission put in place an intellectual property regime that maximises access and the value of rights in the digital age.
3. The UK Film Council endorses the submission made to the above consultation by the British Film Institute (BFI). The BFI is funded by the UK Film Council to carry out a range of activities supporting and developing film education and culture which includes the BFI National Archive .
4. In its submission the BFI argues for changes to the laws of copyright to enable the better use of the intellectual capital locked away in archival holdings as well as changes to facilitate the operations of the BFI and similar public agencies seeking to maximise the public value of their work.
5. In particular, the UK Film Council, like the BFI, wishes to stress the importance of addressing the issue of orphan works, which is the subject of part of the consultation. The UK Film Council believes that a statutory solution to the problem of making orphan works available is essential to help ensure maximum access to the benefit of both audiences and rights holders in a digital age. It believes that publicly-owned archives, among others, urgently need such a solution if they are to deliver on their public purposes, help stimulate creativity and innovation and meet the changing expectations of audiences.

30 November 2008

Copyright in the Knowledge Economy

A Response from the British Film Institute

The BFI welcomes the opportunity to respond to the Commissions' Green Paper 'Copyright in the Knowledge Economy'

The BFI is the agency in the UK charged with preserving the nation's film and television heritage and making it accessible as well as developing moving image culture, its use and understanding, particularly in an educational context. The BFI's activities range widely and include the BFI National Archive and National Library which house the national collections of film, television and related materials, BFI Southbank which includes the National Film Theatre, and BFI Screenonline which provides access to material from the collections to all UK schools, colleges, universities and public libraries.

Copyright is central to the operations of the BFI and the BFI has argued for many years for changes to the laws of copyright to enable the better use of the intellectual capital locked away in archival holdings as well as changes better to facilitate the operations of the BFI and similar public agencies working to maximise the public value of their work.

The BFI responded to many of the issues raised in this European Union consultation during the Gowers' Review of Intellectual Property in the UK and participated in the industry-wide view on orphan works coordinated through the British Screen Advisory Council. We are therefore pleased that DG Internal Market is revisiting the legislation in relation to the role of copyright, and in particular the issues regarding exceptions to exclusive rights, so that a framework can be created to support the knowledge economy in an online environment with significant benefits to research and education.

Our response below responds to each of the questions posed in the Green Paper.

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

We have commented many times in response to reviews of the legal framework of copyright that it is important to strike a balance between the legitimate interests of the creators of copyrighted works and those of the citizen. As an organisation, the BFI always ensures that its operations, dependent as they are on the use of copyright works and our relations with those who own those rights, comply fully with the laws which apply. However, it is clear that the current copyright regime no longer provides sufficient comfort for the copyright owners nor meets the needs of a knowledge economy, which is fundamentally predicated on easy access to information and knowledge to develop new services able to add either public or economic value to society.

Appendix A

The implementation of the exceptions regime in national laws following the 2001 Copyright Directive was unsatisfactory and failed to meet any of the expectations of the legal framework of a Single European Market. Any alterations made must remedy this situation. Encouragement and guidelines are very weak and almost meaningless in implementing copyright exceptions. However, a contractual regime which overrides an exception can in some circumstances provide a beneficial regime for both rightsholder and user. For example the Educational Recording Agency in the UK enables schools and universities to record and retain important television programmes for further use in teaching in return for a per student fee. This may not always be the case, however, and education provides a useful terrain which enables a contractual relation to be established and monitored - and we would be loath to advocate contractual arrangements for all exceptions

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

It is very unclear what the Commission has in mind in relation to 'aspects not covered by copyright exceptions'. Normal contractual negotiations are an available means for reaching agreement and although model licences and guidelines can be useful they are not the responsibility of the Commission to devise or promulgate.

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

We believe there should be a single set of exceptions which are applicable in all Member States although of course the Member States will need to apply these in national law. Obviously there is an evolving set of expectations in terms of how the exceptions apply to new platforms but we believe the fundamental principles which underpin copyright laws should be maintained there as in older media.

4. *Should certain categories of exceptions be mandatory to ensure more legal certainty and better protection of beneficiaries of exceptions?*
5. *If so, which ones*

We believe all exceptions should be mandatory. It ill behoves the European Union to have a legal framework which varies by territory in such an important area of economic and social activity.

Exceptions: Specific Issues

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

No, it is important that exceptions which apply to the work of public institutions like Archives and Libraries should be amended to enable them to carry out the important long-term roles in preserving and making available our heritage in terms of ideas and artefacts.

It would be foolhardy to rely on publishers to develop online access to their catalogues given the ever-present possibility of business failures.

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?*

Licensing schemes can work and indeed the BFI has a generally positive set of experiences in making material from its archives available online through Screenonline (www.screenonline.org.uk) to UK educational establishments and public libraries based on licences with underlying rightsholders.

8. *Should the scope of the exception for publicly accessible libraries, educational establishments, museums and archives be clarified with respect to:*

- a) *Format shifting;*

Yes, it is important in an era when technological changes are frequent, that format shifting of the holdings of publicly responsible organisations charged with preserving the heritage or making material available for legitimate educational purposes be allowed to ensure continued accessibility to the content they hold. The clarification needed is more the establishment in law of a permission to make copies to ensure the continued availability of materials for future generations' use.

- b) *The number of copies that can be made under the exception*

This is not a fixed number and depends on the particular circumstances of the material in question and its possible uses. Trust in the organisations charged with preserving material is necessary and once this is established a voluntary code of practice between the rights holders and the archive or library should be negotiated.

- c) *The scanning of entire collections held by libraries;*

This is highly contentious but the recent deal between Google and various publishers suggests a commercial solution has been reached which will benefit both rightsholders and consumers. Obviously libraries can and should scan material which is out of copyright and orphaned (subject to reasonable endeavours to trace rightsholders) so that it becomes as widely accessible as possible but enabling wholesale copying of material which is still in copyright - presumably without the permission of or compensation to the rightsholders - would fundamentally undermine the publishing industry. This would have disastrous consequences for the European knowledge economy.

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 in copyright?*

This does clearly go beyond the scope of the current exception and other than for material which is out of copyright or which is orphaned would appear to be wholly detrimental to the business plans for any publisher and therefore certain to reduce the availability of books and periodicals.

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 24 August 2006?*

Yes, the Commission Recommendation is a worthwhile measure and may, by dint of its signature by a range of key stakeholders, have assuaged many of the worries that Archives and Libraries have in making orphan works available. We believe, however, that the exploitation of orphan works should be on a statutory basis across all territories in the European Union, and that therefore some form of legislation is needed. A statutory instrument would be one such solution to this problem.

We would suggest specific measures to enable public archives to make orphan works available on a no-liability 'treated as licensed' basis for non-commercial uses.

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

This is a matter in which the Commission is best placed to make a decision which meets the objective to unlock the intellectual capital in orphan works at the earliest possible opportunity.

12. *How should the cross-border aspects of the orphan works issue be tackled to ensure EU-wide recognition of the solutions adopted in different Member States?*

This really shouldn't be a problem if each Member State translates the measure into national law in ways which satisfy the Commission that there is compliance and the measures themselves are drafted in a way which applies across the whole EU.

The exception for the benefit of people with a disability

13. *Should people with a disability enter into licensing schemes with the publishers in order to increase their access to works? If so, what types of licensing would be most suitable? Are there already licensing schemes in place to increase access to works for the disabled people?*
14. *Should there be mandatory provisions that works are made available to people with a disability in a particular format?*
15. *Should there be a clarification that the current exception benefiting people with a disability applies to disabilities other than visual and hearing disabilities?*
16. *If so, which other disabilities should be included as relevant for online dissemination of knowledge?*
17. *Should national laws clarify that beneficiaries of the exception for people with a disability should not be required to pay compensation for using a work in order to convert it into an accessible format?*
18. *Should Directive 96/9/EC on the legal protection of databases have a specific exception in favour of people with a disability that would apply to both original and sui generis databases?*

We support measures which provide access to disabled people to all classes of work. Exceptions which enable organisations to provide access for disabled groups need to be drafted in a way which ensures that the benefits apply only to those people with disabilities.

Dissemination of works for teaching and research purposes

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 for teaching or research purposes?*

The collective licensing of material for teaching and research purposes is a well tried formula and works effectively across a number of media forms in the UK. In the UK, JISC has been successful in negotiating licences for a range of material which is made available in a secure environment as a subscribers service.

Of course, much of the academic work that is published is paid for in the first instance through research grants and the Government receives no recompense for this investment, while the publisher will pay little to the author, who is required to publish, and thus the publisher's income is pure profit once the costs of production are covered. Journal publishing is especially lucrative.

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

Yes. In our response to the Gowers Review, and indeed taken up in the subsequent Review, the anomalous position of web-delivered teaching materials were identified as requiring change, so that modern forms of distance learning could be better facilitated.

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?

Yes, as the use of virtual learning environments becomes commonplace it makes little sense to restrict the use of educational material to a building when so much work is done online in the home by students. Of course, there need to be safeguards to ensure that 'education at home' doesn't become a trojan horse for free access to entertainment under an expanded exception

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?

The DMCA in the United States defines maximum length of extracts for use in teaching. The figure is arbitrary and extremely limiting and bears little relevance to the deployment of excerpts in research dossiers or their use in teaching. The case law basis of UK law in relation to fair dealing in literary formats is equally unsatisfactory in not providing precise limits to quotation although a generally recognised and accepted level of quotation from these works has been established over time

We would suggest a maximum quotation of a total of 12 minutes of extracts, each no longer than 5 minutes, in audiovisual works over 60 minutes in length. For shorter works a maximum of 20 per cent should be permitted.

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

Teaching and research are very different activities and it is unhelpful to treat them as identical.

Historically, educational publishing of text books has been a significant business and schools have paid for them for teaching. It is not clear why this should be different in relation to the use of audiovisual materials for the same purposes. In the UK, the Educational Recording Agency licence has gained near universal uptake in schools, colleges and universities to enable these institutions to record television output off air and use it for teaching related activity. This recognises the compact which forms the basic tenets of copyright and should not be confused with the benefits of an educational exception.

Research, however, and published works which need to utilise extracts from audiovisual works, require a different treatment. The generation of knowledge – the elaboration of

new ideas on the basis of existing knowledge – is a benefit to society and needs to be supported through an adequate regime of exceptions.

User created content

24. *Should there be more precise rules regarding what acts end users can or cannot do when making use of materials protected by copyright?*
25. *Should an exception for user-created content be introduced into the Directive?*

The BFI was a member with the BBC, Channel 4 and Open University of the Creative Archive Licence Group pilot which made material available for repurposing for non-commercial uses under a Creative Archive licence. The licence was an adaptation of the Creative Commons licence to take account of the special circumstances applying to these public bodies when making material available for wider use. Many problems were encountered with underlying rightsholders in making this material available, which might be alleviated by a carefully drawn exception. We continue to believe that the creative reuse of material is of potential benefit to the knowledge economy in underpinning the widely accepted necessity to develop media literacy for all citizens.

We would suggest that the Commission engage in a wide ranging dialogue with users and rightsholders to see if a satisfactory solution can be found to introducing an exception.