



GREEN PAPER: COPYRIGHT IN THE KNOWLEDGE ECONOMY
RESPONSE TO THE CONSULTATION FROM THE BRITISH SCREEN
ADVISORY COUNCIL

November 2008

EXECUTIVE SUMMARY

1. The British Screen Advisory Council (BSAC) welcomes the Green Paper's exploration of a number of issues in the copyright area. However, we are concerned that some issues may be covered too narrowly, or without a full understanding of the implications. We represent many different stakeholders in the audiovisual value chain and our response identifies issues where particular relevance to audiovisual content should be considered. In other cases we explain where issues may be different for audiovisual content compared to books and journals. In some cases limiting consideration to only what is relevant to acquiring and disseminating knowledge may not make sense.

2. BSAC supports a copyright framework where strong rights are balanced by appropriate exceptions to rights. Exceptions to copyright should not involve contractual arrangements with right holders in order for them to be enjoyed as they define activities that can be carried out without permission. However, it may be worth debating when flexible exceptions, possibly with guidance, are more helpful than detailed exceptions, and when it should not be possible to override exceptions by contracts. We would like to see further consideration of whether the relationship between exceptions and technical protection measures is appropriately dealt with in European law, given that Article 6.4 of the 2001 copyright Directive does not apply to some exceptions. The exhaustive list of exceptions in the 2001 Directive is not in our view flexible enough to deal with technological changes. BSAC members do not currently agree on whether or not mandatory exceptions are desirable, but there should perhaps be a debate on this issue where content relying on exceptions is created and that content is to be made available in more than one country.

3. Licensing, including collective licensing, is likely to play an important part in how creative content is delivered online. But we would urge caution on the development of guidelines or model licences for uses not covered by exceptions, given that it is very important not to constrain the ways in which new business models might be developed in the online world to meet consumers' needs. We have established a Blue Skies Working

Group to explore what the future for delivery of audiovisual content might look like. The Group's first report notes the change from a supply to demand led environment where consumers choose what they want, when they want it, how they want it and pay in a way that they want. Perhaps the Commission should facilitate further debate about the future.

4. In general, libraries and archives wishing to make material in their collections available online should do so under licensing arrangements. Activity by libraries and archives could otherwise damage commercial business models. However, in some areas, such as for orphan works, we have in the past proposed an exception to copyright to permit use. We have more recently acknowledged that, in areas where collective licensing already takes place, that is for some types of work and some uses, this should be explored as part of the solution too. Exceptions should also permit appropriate preservation activities of audiovisual material. But subsequent use of digital copies, resulting from preservation activity, needs to be licensed or fall within the scope of narrow exceptions such as any applying to orphan works.

5. We have provided detailed evidence about the issue of orphan works to the Gowers Review and more recently to the UK-IPO. Any solution should permit commercial use of orphan works as well as use by libraries and archives. A Community-wide solution seems preferable. But any solution, or solutions, adopted should minimise bureaucracy before an orphan work can be used, wherever possible. We do not think that mass digitisation is an issue that should necessarily be explored only in the context of orphan works, given that not all the material in collections where this is desired will actually be orphan.

6. The Green Paper does not refer to audiovisual material when examining the needs of disabled people. In the UK the provision of subtitles, signing and audio description on audiovisual material has increased tremendously in recent years. We believe that encouraging and facilitating further adoption of accessibility options, so that these are available on the material as it is made available, generally provides the best solution for disabled people.

7. We are pleased to see the requirements of those who need protected material for the purposes of education or research explored. But exceptions should not replace the purchase of physical copies or online access, where this is commercially available and the whole of the content is needed. For audiovisual material, the interaction between exceptions and technical protection measures is particularly difficult. It may be that licensing would provide the best solutions. The Commission could facilitate discussion between stakeholders to identify needs better and explore possible solutions.

8. The evidence of what is needed to help follow-on creators is currently somewhat lacking, but we would be happy to see this issue explored further. However, it is important to include the role of licensing in any further consideration, as well as the differences in what might infringe copyright in different Member States, and what might be compatible with the three-step test. BSAC would be concerned if any solution is

limited to user-created content as defined in the Green Paper. This could lead to such creators having an unfair advantage over commercial creators.

INTRODUCTION

9. The British Screen Advisory Council (BSAC) is an independent, industry-funded advisory body for the audiovisual sector in the UK. It brings together many of the most influential players from the TV, film and new media sectors¹.

10. We welcome the Green Paper's exploration of a number of issues in the copyright area, particularly given the ongoing debate on many of these that is already taking place in other fora. We are pleased to have the opportunity to provide our views on these issues to feed into further debate at European level.

11. We are, however, concerned that the Green Paper may be considering the issues too narrowly in some cases. The Green Paper is called 'Copyright in the Knowledge Economy' and much of the discussion seems to be based on the implications for only some types of copyright material, particularly books and journals. The Green Paper does say that the intention is to cover issues relevant to enhancing knowledge beyond the areas of how research, science and educational materials are disseminated to the public. But it may be that issues, and so relevant stakeholders, have been construed too narrowly to do this comprehensively. For example, the Green Paper does not list some of the key stakeholder groups in the audiovisual area as ones whose perspectives have been taken into account². Moreover, it only quotes the contribution the book publishing sector makes to the European economy³.

12. It may be that there is no intention for anything in the Green Paper to apply to audiovisual material, but such an aim could have unfortunate consequences. In some cases this would be because changes might apply to audiovisual material to detrimental effect, especially if it has not been fully understood and taken into account. In other cases this might be because the issue should apply to audiovisual material but it doesn't. We explain this further below in our specific responses to the issues.

13. Audiovisual material does, of course, have a role to play in the knowledge economy. Much audiovisual material is produced and made available to the public for entertainment purposes. But other material has a more educational or instructional role. The dividing line between different types of material is, however, imprecise with much material likely to fall into both categories depending on the circumstances of its use. For example, a feature film may be primarily intended to entertain, but could easily be studied as part of a media or film studies course. Documentaries and newsreels may be

¹ See <http://www.bsac.uk.com/members.html> for a list of current BSAC Members.

² The last paragraph in section 1.1 of the Green paper lists various stakeholders but for right holders only refers to 'publishers', which does not encompass the very many different types of potential right holders in the audiovisual area. Those who distribute or make protected material available and provide the networks for this in the online world also appear to be omitted.

³ Footnote 6 of the Green Paper provides figures about the value of book publishing only

primarily intended to inform, but they are often made with the aim of providing entertainment too. They can be enjoyed by people at home who are not watching them as part of any serious course of study.

14. It may, therefore, be difficult to categorise audiovisual material into ‘knowledge products’ or otherwise. So it may be more difficult to deliver the intended effect and no detrimental consequences where changes to the law are based on a belief that there is a category of material that can be classified in this way. Rather than look at ‘knowledge products’ it may, therefore, be better to look at protected material generally, and then consider how the law should apply to various activities, whether they relate to acquiring knowledge or otherwise. Indeed, some of the issues explored in the Green Paper, such as access to copyright works for people with a disability and user-created content, do not in any case seem to be limited to what might be necessary to acquire knowledge.

GENERAL ISSUES

(1) Should there be encouragement or guidelines for contractual arrangements between right holders and users for the implementation of copyright exceptions?

15. BSAC represents a wide range of those in the value chain for audiovisual material. Our membership includes those who create copyright material, those who exploit copyright material created by others and those who provide the platforms used in that exploitation. We can therefore understand the viewpoints of right holders and users. Many stakeholders are, however, sometimes right holders and sometimes users. BSAC members include those who depend on copyright to ensure that exploitation of audiovisual content can provide a return on often very significant investment in its creation. But at other times they may depend on the benefits of limited exceptions to rights, such as to permit news reporting, criticism and review, to enable limited extracts from content created by others to be used without permission. We, therefore, support a balanced copyright framework where strong rights for those who have created, and invested in the creation of, valuable content are balanced by appropriate exceptions to rights.

16. We are not quite sure what the Commission has in mind in framing this question. We would be very concerned about any suggestion that exceptions to rights should require a contractual agreement before they can be enjoyed. The whole point of exceptions is that they define limited activities that do not require permission before the activity in question can be undertaken. It may be that the Commission’s question is more about agreeing guidance, codes of conduct or similar on what might fall within the scope of a particular exception, where this is not transparent from the wording of an exception. This may be helpful where an exception is drafted in terms of permitting something like ‘fair dealing’ as applies to some UK exceptions. Of course, for exceptions of this type that have been in existence for sometime, case law may exist to already provide significant guidance about what might fall within the scope of an exception. It would not necessarily be helpful to have guidance that might disrupt existing understanding about

what is permitted under an exception. However, we would be happy to see a debate about when guidance of some sort might be helpful.

17. It may be that such a debate should also cover whether or not it is better to define the limits of an exception precisely or have a flexible exception that may need to be coupled with more guidance. The answer on this may vary for different types of exception. We do, however, note that some of the detailed requirements in Article 5 of the 2001 copyright Directive did have the effect of requiring a specific narrowing of the fair dealing exceptions in UK law relating to criticism, review and news reporting. It may have been better for the relevant issues – whether or not the work used has been made available to the public and when an acknowledgment of the source is not required because it is impossible – to have been left for interpretation by the courts or guidance under the flexible ‘fair dealing’ framework that already existed in UK law.

18. There is, of course, the issue of where contracts may be used to try and override enjoyment of exceptions. This may be worthy of further debate. It is already tackled in some areas in EU law, such as regarding certain exceptions relating to computer programs. Moreover, UK law has had a provision for some years preventing any contractual override of the exception permitting the use of short extracts of broadcasts for news reporting⁴. That issue is, of course, one that is also addressed to some extent by Article 3k of the 2007 Audiovisual Media Services Directive, although exactly how provision is made, such as by a copyright exception or otherwise, seems to be left to Member States to decide. Any further debate on where contracts should not be permitted to override enjoyment of exceptions should, perhaps, be coupled with further debate on whether or not the provisions in the 2001 copyright Directive, on the relationship between technical protection measures (TPMs) and exceptions, are sufficient. TPMs, like contracts, could take away the ability to enjoy exceptions. We would like the Commission to explore, for example, whether or not Article 6.4 of the 2001 Directive should also apply to exceptions that are possible under Article 5.3(d). That TPMs could prevent enjoyment of exceptions permitting quotations for the purpose of criticism and review is of concern to some BSAC members.

(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?

19. This is a very broad question and difficult to answer comprehensively. There may be some areas where guidelines or model licences for contractual arrangements between right holders and users are appropriate. But there will certainly be other situations where this will not be the case. In the audiovisual area, how users are given access to audiovisual material is undergoing enormous changes. The industry is moving from old business models in the physical world to the many and varied possibilities for making content available in the online digital world. Much material made available online may be delivered to consumers under contractual arrangements. But in other cases, there may be no contracts with consumers, such as is the case at the moment with the very popular

⁴ See section 137 of the Broadcasting Act 1996

BBC iPlayer. Delivery methods are likely to vary in relation to factors such as whether or not the content may only be streamed and, where a copy can be made, how long it can be kept. Charging mechanisms, both direct payments for particular content and more indirect payments, such as through subscription arrangements or services supported by advertising, are likely to vary enormously too. However, one of the keys to successful business models is likely to be providing users with choices so that they can pay (directly or indirectly) for only what they want. Thus paying less for less consumption and more for more. We would, therefore, be very worried if guidelines or model licences were to constrain what might be offered and how this might happen rather than leave the market to develop new and exciting business models that best meet what consumers want.

20. It may be that this question is more to do with licences between the producers or distributors of creative material, such as broadcasters, and those who own rights in the individual items of content that have been incorporated into that material. Licences, and where relevant collective licensing schemes, possibly underpinned by legislation in some cases, are likely to be important to encourage dissemination of creative content online. We would certainly welcome more debate on issues such as this and what might be appropriate. However, rather than only focus on how certain uses outside the scope of exceptions might be delivered and attempting to constrain these by encouraging guidelines and model licences, it may be better for the Commission to encourage a wider debate on what the future might look like and mean for all stakeholders. BSAC's Blue Skies Working Group has recently produced a report, a copy of which is provided with this response. The report focuses on the need to understand that business models for audiovisual content are changing from a supply led to a demand led model. It states that, in the new environment, successful business models are likely to have to meet four basic consumer demands: consumers want to choose what they want, when they want it, how they want it and pay in a way that they want.

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

21. We assume that these questions are about whether or not exceptions should be mandatory and whether the current list of exceptions in Article 5 of the 2001 copyright Directive is sufficiently comprehensive. The latter is something that needs to be considered, regardless of whether or not exceptions are required to be mandatory.

22. We do not believe that the approach to harmonise exceptions in the EU, which is delivered by the 2001 copyright Directive is entirely satisfactory. Provision on exceptions needs to be capable of being fluid, responding to technological changes and otherwise. If areas for permitted exceptions are defined very broadly, then this may be possible. But the approach in the 2001 Directive is a mixture of some quite broad and some very specific areas being defined with quite specific conditions. However, the

biggest problem with the 2001 Directive is that the list of exceptions appears to be closed. Exceptions in areas that are not covered do not appear to be permitted at all. We have commented on this in our evidence in 2006 on orphan works submitted to the Gowers Review in the UK⁵; exceptions to deal with orphan works were not envisaged by the 2001 Directive. We comment on this further below. Given the considerable time lapse that would be needed to agree and implement changes to Article 5 of the copyright Directive, an exhaustive list of areas for permitted exceptions is not in our view sensible.

23. BSAC members do not currently have a single view on whether or not more exceptions should be mandatory. In terms of removing barriers within the single market, there are, though, areas that it might be appropriate to explore. In this respect, those exceptions that might be enjoyed by those creating content that is then made available to the public in more than one Member State, are most important. At present, where a film or broadcast is made in the UK and an excerpt from other copyright material is included in reliance on the exceptions relating to criticism, review or news reporting, then it is necessary to check very carefully whether exceptions also apply in other Member States. This includes checking whether the conditions in any exceptions in other Member States are met, before the material can be made available in those territories. We would, therefore, like the Commission to explore in particular those exceptions which might be enjoyed to create content that is likely to be made available in more than one Member State. As well as considering whether to make the exception mandatory, we would also like the Commission to consider whether they should have exactly the same scope in all Member States.

EXCEPTIONS: SPECIFIC ISSUES

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?**
- (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?**

24. We understand that libraries and archives, and those who wish to consult the material they hold, would often find it useful if online access to library catalogues were possible. However, an exception to copyright that would permit libraries and archives to have the unrestricted possibility of developing online access to their catalogues, would clearly have the potential to greatly undermine the success of commercial business models. This would include old business models but may damage, and even delay, the development of new business models delivering content online. It must be remembered that libraries and archives often acquire material when it has recently been made available to the public, i.e. at a time when those who have invested in its creation will be

⁵ The BSAC evidence to the Gowers Review was published with the final report – see http://www.hm-treasury.gov.uk/gowers_review.htm

trying to maximize their return on that investment. In addition, some libraries and archives will even be acquiring this new content under statutory or voluntary legal deposit arrangements. This means they have not even paid for the copy that is added to their collections. Exceptions to copyright should not, therefore, permit the making available online of the valuable content that libraries and archives hold where this is happening, or likely to happen, commercially.

25. Libraries and archives wishing to make material available online should in general seek licences from right holders. Clearing rights may be complicated in the audiovisual area, given the number of potential right holders. But the British Film Institute (BFI), which is responsible for the National Archive, one of the world's greatest collections of film and television, has much experience of doing this. It is continually expanding the film clips it clears and makes available online in either its Screenonline programme or its Mediatheques. The former is available to users in all UK schools, universities and public libraries. In addition, the BFI with the BBC and Channel 4 ran a pilot scheme through the Creative Archive Licence Group which offered free downloads of video clips to anyone under a Creative Archive Licence to stimulate re-use for non-commercial purposes.

26. There may be some situations, such as for orphan works (see below) where exceptions to rights might be appropriate to permit archives to make material available online. Another such area that it might be appropriate to explore is what might be referred to as failure to agree licensing of copyright at the margins. In the case of audiovisual material, it may be necessary to obtain permission for an activity from a large number of right holders. Where just one of those right holders refuses permission, or fails to respond to a request for permission to make the material available online, it may be appropriate to nevertheless permit the material to be used, probably subject to an appropriate royalty being paid. We would, therefore, support further debate about when it might be appropriate to make some provision on exceptions or compulsory licences beyond the area of orphan works.

(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?**

27. Parts (a) and (b) of this question seem to be relevant to the issue of copying for the purposes of preservation within a library or archive. BSAC is in favour of ensuring that preservation activities of any protected copyright material can take place in libraries or archives to safeguard cultural heritage for future generations. Preservation may often involve format shifting and it may often be sensible for more than one copy to be made, especially where the copy is in a format that could easily be damaged. However, any exceptions to copyright to permit appropriate preservation should be limited to what is necessary to achieve that objective. How material that has been preserved might be used,

and when, if at all, exceptions might be appropriate to permit use, should be considered separately.

28. Very different issues therefore, would need to be considered where material is to be scanned, or otherwise copied, with the intention of making the digital copies so obtained available to the public. Moreover, it may be necessary with an exception limited to preservation activity to define what organisations can undertake the activity quite carefully. In this respect, one limitation is already in the 2001 Directive, namely a limitation to non-commercial activity. We support this. In order to avoid too many organisations having rights to make digitally preserved collections of the same thing under exceptions that they are then tempted to make available widely, possibly in competition with commercially available material, it may also be necessary to further limit which organisations can undertake preservation action. In addition, it may not be necessary for a large number of organisations to preserve the same material. So preservation activity may need to be limited to material that is unique, or nearly unique, to that organisation.

(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?

29. The language used in this question, and much of the analysis in the Green Paper, seems more relevant to printed text than audiovisual material. We assume that it may, nevertheless, encompass audiovisual material that might be copied other ways, especially as there are some references in this part of the Green Paper to audiovisual material. As we have already said, widespread scanning or other copying to make material available on the internet, should not be within the scope of exceptions. But there may be instances where exceptions should apply. In general, however, licensing with the possibility of remuneration to right holders is the appropriate way forward.

(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?

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

(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?

30. We have previously supported an exception to copyright to permit use of orphan works, that is works where, after a duly diligent search, the right holder cannot be identified or found. Any solution should apply to commercial use as well as use by libraries and archives. We were pleased to be able to look at this issue in some depth when asked to do so for the Gowers Review. Our proposals for a solution by way of an exception received some endorsement from that Review⁶. However, the possibility of

⁶ See the material identified in footnote 5

providing a solution to the orphan works problem, by way of an exception, is not clearly compatible with the 2001 copyright Directive. In order for such a solution to be delivered at national level it may, therefore, be necessary for there to be Community legislation which goes beyond Recommendation 2006/585/EC. It may, however, be preferable to deliver an appropriate solution to permit use of orphan works by a stand-alone instrument rather than open up the 2001 Directive more generally. It would be desirable to address this limited but useful issue as a priority and avoid the debate becoming entangled at this time with wider issues that are likely to be raised if the 2001 Directive were to be opened up.

31. Although the majority of BSAC members still support an exception as a solution to the orphan works problem, we have more recently realized that in areas where collective licensing exists, it may be necessary to explore what role that can play in any solution. We are, for example, aware of the existence of extended collective licences in some Member States. We have therefore recently provided the UK-IPO with an additional paper on orphan works exploring this and other issues. We are pleased to provide a copy of this additional paper herewith. It may be that cross-border aspects of the orphan works issue can only be fully addressed by all Member States having the same solution. But that need not necessarily be a single solution. A solution with extended collective licensing for some works/uses and an exception or treated as licensed provision for other works/uses, as suggested in our additional paper, may be just as relevant for an EU-wide solution as a UK-only one. We would, however, urge that any solution(s) that is explored for EU-wide adoption should minimise bureaucracy wherever possible.

32. In exploring the orphan works problem the Green Paper refers to large scale digitisation projects and digital restoration efforts. In our view, the problem of clearing rights in orphan works needs to be solved. This is both because archives might want to make such material available, and because others, including commercial entities, may want to use orphan works. But a solution for orphan works is not, in our view, the right starting point for those who want to undertake mass digitisation, where it would be reasonable for this to happen. The collections that people would like to digitise in this way are likely to contain some material, or much material (depending on the type), that is not orphan. So a solution that only applies to orphan works would leave this other material uncovered, as well as raising the question of how material, where right holders are known and traceable, can be easily distinguished from material where this is not the case, i.e. orphan works. Any solution that would facilitate mass digitisation, therefore, needs to start by exploring how rights can be licensed easily, where right holders are known and can be traced, and then by considering whether this can be extended in some way to orphan material. Also, digital restoration is something that needs to be addressed by provision relating to preservation generally and not just orphan works.

33. All solutions for the orphan works problem need to involve a duly diligent search for right holders in order to identify whether or not a work is orphan. In this respect we were pleased to take part in the audiovisual stakeholder group under the European Digital Libraries Initiative to draw up high level guidelines on diligent search. It is important that right holders are found wherever possible and people need to understand what

processes are likely to work best to find right holders. However, when after an appropriate search it has not been possible to identify or locate a right holder, the solution that might then permit use of that work should be simple to follow, albeit that there must be some protection for any right holder who does subsequently emerge. But we believe that this will happen very rarely. For this reason, it does not in general make sense to devise a system with bureaucratic checking of searches and/or payment of royalties before an orphan work can be used.

The exception for 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 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 remuneration 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?**

34. The Green Paper seems to only explore the scope of a copyright exception to improve access to the written word for disabled people. Also, the Green Paper seems to be limited to what might be relevant for online dissemination of knowledge. In the audiovisual area, increasing amounts of material is made available as a matter of course with subtitles or signing for deaf people, and audio description for visually impaired people. Much audiovisual material is, of course, consumed by those wanting entertainment rather than to acquire knowledge. But audiovisual producers and distributors want to be inclusive so, where possible and reasonable, they increasingly make their material accessible to all. Many DVDs of films are now made available with options delivering accessibility included. Broadcasters have statutory targets to provide subtitling, signing and audio description. The most recent report from Ofcom shows that the majority of channels have continued to exceed their obligations, in many cases substantially, to provide one or other of the access services⁷.

35. Activity under an exception will not provide as useful a solution for those who find material inaccessible. Where adaptations to make material accessible are made by those

⁷ See Ofcom's third quarterly report for 2008 on the provision of access services at http://www.ofcom.org.uk/tv/ifi/guidance/tv_access_serv/tvaccessrep/q308/

acting under an exception to copyright, there is a delay in providing the accessible version. A disabled person who cannot access the material because it does not have built in accessibility options, will not be able to enjoy the material as it is broadcast, or buy the DVD they want in a high street shop. The addition of subtitling, signing and audio description by those making audiovisual material available to the public is, therefore, often the best way to provide access for people with a disability. This is now well understood in the UK, as demonstrated by the increasing amounts of material that is readily accessible to all. Where this understanding does not exist, it may be appropriate for the Commission to facilitate an exchange of views between the relevant stakeholders.

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 of works for teaching or research purposes?**
- (20) Should the teaching and research exception be clarified so as to accommodate modern forms of distance learning?**
- (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?**
- (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?**
- (23) Should there be a mandatory minimum requirement that the exception covers both teaching and research?**

36. The Green Paper seems to only explore the problem, and possible solutions, with regard to some types of copyright material, namely books and journals. A number of courses of study may require access to audiovisual material. But very often the audiovisual material that is used, as part of a media or film studies course for example, is more generally used for entertainment purposes. Any exceptions to rights, therefore, need to be limited. In particular, where works are to be made available online for distance learners, an exception needs to rule out use of the material for entertainment purposes.

37. An exception that permits copying of a whole work rather than short clips may, moreover, not be appropriate. We are, therefore, somewhat puzzled that question 22 refers to minimum rules as to the length of excerpts from works as the rules should perhaps be about the maximum length of clips. (Copying, for educational use, of the whole of a broadcast as it is transmitted may, however, be justified. An exception permitting this, but which is overridden when there is licensing, exists in the UK.) In the physical world, where it is desirable for all students to be able to refer to the whole of a book, either in an educational establishment or at home, and that book is commercially available, it is usual for sufficient copies to be bought so that all students have a copy. In the same way, where material is commercially available online for streaming or

downloading, albeit that this requires some payment, then, where a student needs to be able to access the whole work outside the classroom, it would be reasonable for access for each student to be paid for in the normal way. Where equivalent types of access for each student to entire audiovisual works is desired, then buying DVDs of the material or paying to download copies would seem to be a reasonable solution too. We believe, however, that it is more likely that a school or other educational establishment will simply want to purchase or rent a single copy of a film for the occasional use of that copy for screening to the students together. This does not need an exception to permit copying.

38. We are sympathetic to the needs of genuine researchers. But we have seen little evidence of what these needs are regarding audiovisual material. It is, therefore, difficult to understand what type of solutions might be appropriate. For example, where individuals doing research simply need to view a film repeatedly then there does not seem to be a need for an exception, as that activity would not infringe copyright. Where a copy of the material a researcher needs to view is commercially available, either as a tangible copy or online, then similar arguments to those explained above in connection with education would apply. We would be pleased to consider this issue further in the light of more evidence about the needs of researchers.

39. We understand that there may need to be some provision under exceptions or otherwise in the case of access to recorded broadcasts for distance learners, and use of short clips of audiovisual material in study packs. However, in considering what is appropriate, it is important to remember that at present DVDs of films are routinely made available with TPMs to prevent copying. An exception for educational or research purposes that permitted some copying would, according to the 2001 copyright Directive, fall within the scope of Article 6.4. Member States would be required to provide a solution to work around TPMs and still permit copying under an exception. Unlike for written material, where what is protected is not defined by the medium on which it is carried and so the words can be copied indirectly, a film is a recording of moving images and so can only be copied by copying that recording, i.e. direct copying of the medium. The difficulties of having an exception permitting copying for education or research purposes, that applies to audiovisual material where copy protection has been used, needs to be looked at very carefully.

40. We address these issues in more depth in our response earlier this year to the Government consultation in the UK on taking forward the changes to exceptions proposed by the Gowers Review. A copy of that response is enclosed herewith⁸. We suggested that a better solution might be provided by licensing the use of film clips where appropriate. In this respect, we encouraged the UK Government to facilitate discussions between the relevant stakeholders. If the Commission wishes to further explore the issue of access to protected audiovisual material for the purposes of education or research, we would suggest that it should facilitate discussions between the stakeholders at EU level to better understand the problems and identify the most appropriate solutions.

⁸ See in particular the summary of our response on these issues on pages 2-4 and our detailed submission on pages 25-41

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?

41. The extent to which it is appropriate for sampling of existing works of any type by follow-on creators to be permitted is something that we are happy to see explored. We have considered this issue in the context of a possible exception in the UK for the purposes of parody, caricature or pastiche. However, we have no firm views on this, mostly because we have not yet seen substantive evidence about why an exception is needed. Clearly, where a large amount of material is taken and included in a new work, then it is unlikely to fall within the scope of an exception that meets the requirements of the three-step test in the Berne Convention. This would particularly be the case where the transformative or other use has a commercial purpose. We are not, therefore, sure that the Gowers Review, which the Green Paper refers to, actually provided any examples of where a transformative use exception to permit some follow-on creation might be possible within the scope of international treaties and conventions. The explanation of US case law in that Review appears to show the very limited nature of the US fair use exception for this type of use rather than provide good examples of perhaps what should be permitted. Moreover, that Review has not clearly explained why licensing is not an appropriate solution in many cases if follow-on creators want to use an existing work.

42. One of the questions in the Green Paper appears to be suggesting that an exception permitting some use of existing material by follow-on creators might be limited to user-created content only. The Green Paper refers to an OECD study for a definition of this. That definition seems to rule out use by many of those developing audiovisual material⁹. However, this definition would nevertheless encompass, or even require, the content so created to be made available over the internet. An exception that applied to ‘user-created content’ only, but not other content so that those creating other content would still need to obtain licences for using existing protected material, would not seem to be fair. User-created content made available on the internet could be in competition with commercial material also available on the internet. But the creator of the latter would be at a disadvantage if they alone had to seek a licence for use of earlier material. We, therefore, believe that this issue should be looked at without being limited to user-created content. But, as we have said, we are at the moment unsure what changes, if any, to the copyright framework are appropriate in the absence of significant evidence.

43. In considering this issue it may be important to understand possible differences between the copyright laws in different Member States, regarding how much of an

⁹ The OECD according to the Green Paper defines user-created content 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’.

existing work must be copied for it to amount to an infringement. In the UK, copyright is only infringed where a substantial part is copied. We understand that in some Member States copyright is infringed by copying any part. In those countries it may be more important than in the UK for an exception to be provided in order to arrive at essentially the same result as in the UK where the threshold for what copying amounts to an infringement is higher.

CONCLUSION

44. There are areas raised by this Green Paper where urgent action seems desirable. In particular, and especially given the considerable work involving stakeholders across the EU that the Commission has already engaged in, some action to enable a sensible solution to permit orphan works to be used is desirable. However, we would urge some more caution more generally. Not least because, with business models changing rapidly, it may be very difficult to decide what the best changes to make are. We hope that issues such as appropriate norm setting in the copyright and other areas will be examined in due course as BSAC's Blue Skies work develops. This is a debate that equally needs to happen at EU and a more international level. It may be that encouraging that debate is a prerequisite, before any detailed overhaul of how exclusive rights are limited by exceptions or otherwise takes place. And part of that debate should be to examine where licensing, including collective licensing, provides the most appropriate solution to any problems. We would be very happy to share further output from our Blue Skies work with the Commission in due course.