



## **TAKING FORWARD THE GOWERS REVIEW OF INTELLECTUAL PROPERTY: SECOND STAGE CONSULTATION ON COPYRIGHT EXCEPTIONS**

### **RESPONSE FROM THE BRITISH SCREEN ADVISORY COUNCIL (BSAC)**

#### **1. Executive summary**

1.1. BSAC welcomes the recognition in the consultation paper of a number of problems we previously raised with the proposed amendments to exceptions to copyright. However, one very important issue, the use of digital rights management technology (DRMs), seems not to have been taken into account sufficiently. The audiovisual industry must and is responding appropriately to changing consumer demand in the business models it develops, but DRMs remain an important tool that the industry must be permitted to use where appropriate in order to monetise audiovisual content. DRMs enable a range of business models in the audiovisual sector to be delivered, including those offering consumers less for a lower payment, such as where content is rented or streamed.

1.2. Exceptions permitting individuals to copy audiovisual material protected by DRMs that prevent or restrict copying are problematic. DRMs cannot test the purpose for which a copy is being made. So, if an exception permitting copying is to be enjoyed, industry would either have to only use DRMs that permit the copying by anyone for any purpose, or provide an administrative solution. The former is completely unreasonable to expect, especially bearing in mind the popular business models where audiovisual content is not made available as copies to keep. And the latter would be an administrative nightmare where very large numbers of individuals may be entitled to seek copies.

1.3. We do, however, appreciate that genuine researchers, as well as teachers and students, at educational establishments may find it helpful to have greater access to, and the ability to copy extracts from, audiovisual material beyond that possible under current exceptions relating to broadcasts. We believe that this would, however, in general be best delivered by adjusting the provision under the proposed amendments to the educational exceptions rather than providing new exceptions permitting individuals to copy films anywhere. The licensing that can override

the exceptions can then hopefully deliver a solution that permits copying to take place even where DRMs prevent it, in particular by recognition in the exception that this can be facilitated through a trusted intermediary.

1.4. We welcome the extension of the exception to copyright for the purposes of preservation to audiovisual material. For material in the UK's national archives, though, this should not be limited to situations where it is not possible to purchase a copy. The British Film Institute, and the Scottish and Welsh audiovisual archives, must be able to take action at any point in order to ensure appropriate preservation of the UK's audiovisual heritage.

## **2. Introduction**

2.1. The British Screen Advisory Council (BSAC) brings together business leaders representing all the segments of the audiovisual value chain in the UK, as well as sectors that are crucial to the success of the industry in the online economy, and those concerned with preservation of audiovisual material and increasing the skills that the industry needs to flourish<sup>1</sup>. The comments that BSAC provides on the issues raised by this consultation on exceptions to copyright therefore take into account a wide variety of perspectives.

2.2. BSAC has previously contributed to the evidence considered by the Gowers Review of Intellectual Property and the first consultation conducted by the UK Intellectual Property Office (IPO) on the changes to copyright exceptions that were recommended by Gowers. We welcome the opportunity to comment on the Second Stage Consultation on Copyright Exceptions that were originally proposed by the Gowers Review. A number of the concerns that we previously raised have clearly been acknowledged and taken into account in this second stage. This is extremely helpful. However, there is one particular issue that seems to not have been fully appreciated, and, before addressing the proposals relating to exceptions in specific areas, in the next section of this response we have explained again this important overriding concern.

2.3. Our comments in this response also need to be read in the context of the fast changing landscape in which the industry operates, and our willingness to consider, and try and address, difficult issues, such as the future of copyright. This can in part be appreciated from various pieces of work we have completed since writing our response to the earlier consultation. In this work we have elaborated on the uncertainty of future business models, but also the need for the industry to recognise and respond to changes in the way consumers want to consume content. We are aware that copyright and some current difficulties with licensing may be seen as

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<sup>1</sup> See the BSAC website at <http://www.bsac.uk.com/membership-list.html> for a list of BSAC Members

constraining certain reasonable and limited activities. Exploring how to provide a right to quote regardless of the type of media is one issue we have highlighted. But solutions that deliver fairly on all of these issues without unreasonably undermining copyright are more difficult. And the reality today is that the audiovisual industry still relies on income from traditional business models in order to obtain a return on investment in the creation of high value content, and to fund investment in the necessary experimentation in new business models.

2.4. Rather than set out everything that we have covered in our various strands of work in this response, we suggest the following papers should be read if policy-makers want to understand the audiovisual industry better, and especially that this is not a static sector denying the need for change:

- Blue Skies Group Report 2008
- Blue Skies Copyright Report 2009
- Creativity, Competitiveness and Enterprise Report 2009<sup>2</sup>.

Our response to this consultation paper is specifically about the proposed amendments to exceptions in particular areas. But the above papers do show other copyright issues that we would like to see explored. For example, frictions in copyright licensing can affect those trying to clear rights to make content from audiovisual archives available online, and also those trying to license use of text, images, and music in innovative forms of knowledge content such as video-clips and mash-ups, for which there is strong consumer demand. We therefore welcome the IPO's commitment to continue to work with stakeholders on the future of copyright. We recognise that the copyright licensing provisions which could be delivered as a result of the enabling powers in the Digital Economy Bill are potentially helpful, and we look forward to participating in the debate as these provisions are taken forward.

### **3. Digital rights management**

#### ***DRMs and different business models***

3.1. How digital rights management (DRM) technology might be used is a key issue. We make references to the relationship between DRMs and exceptions in our response to the proposals for specific exceptions, but, because of its importance, we are providing these general

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<sup>2</sup> See the BSAC website at <http://www.bsac.uk.com/published-reports.html#briefing> for these briefing papers

comments too. This issue was explained in our response to the earlier consultation, but the significance of this issue does not seem to have been fully recognised in the current consultation paper. Only time will tell whether or not, and if so when and how, DRMs will be used in the audiovisual sector in the long term. But the option of using DRMs continues to be an important tool, which enables the audiovisual sector to manage and deliver the different ways of monetising content. It is perfectly legitimate for this technology to be used.

3.2. There has obviously been considerable consumer resistance to the use of DRMs in the music sector, but that is, we believe, largely where business models have offered consumers copies of protected content to download and keep. The desire in such circumstances to have copies that are compatible with any playback device is understandable. But even in the music area, making copies available for downloading is no longer the only successful new business model. The success of music streaming services like Spotify would have been hard to predict a few years ago. Content sectors are therefore very much engaged in experimenting with new business models.

3.3. If business models other than those offering downloads to keep are popular, such as the option of streaming content, then DRM technology, including technological protection measures that prevent copying, may well be accepted as perfectly reasonable by consumers. DRMs can ensure that a streaming service does not permit copying, but the “payment” from consumers (however that is collected or obtained from associated advertising and so on) can generally be less than for services which offer content to keep. Identifying the winners and losers for business models continues to be a challenge, but industry can and must continue to experiment without unnecessary constraints on the possible options for business models. In the audiovisual sector, consumers have historically enjoyed a range of business models for watching content once, including where content is included in broadcasts and where DVDs are rented. These business models do not give an entitlement to a copy to keep permanently. Streaming services and the online equivalent of physical rental could therefore be popular business models for audiovisual content. Indeed, catch-up television services that stream content are already extremely popular.

#### ***Possible impact of changes to exceptions on DRM use***

3.4. As legislative changes to the copyright exceptions are taken forward it is therefore crucial that these do not constrain industry’s choices for new business models. The audiovisual industry needs to be responsive to consumer demand and preferences, but must be allowed to choose when, and how, to use DRM technology, including technological protection measures that prevent, or restrict, the making of copies. Being forced to permit copying from streamed content because a copyright exception gives a user such an entitlement could, for example, seriously undermine the attractiveness of business models that offer downloading of copies. Even where a user has paid a premium for downloading content, use of DRMs to control further copying is

perfectly legal. The audiovisual sector may follow the example in the music sector of not using DRMs where downloads are permitted, but that is a decision that those offering such services should be free to take, without the constraint of trying to accommodate an exception that would permit many people to make copies. Of course, there is not just one business model here in any case. For example, even where a download is permitted, the time for which it can be kept may be limited by DRMs, so that the service is in effect an online “rental”. This type of service is also likely to be cheaper for consumers than downloading copies to keep, just as rental of DVDs has for many years been offered to consumers for less than the cost of purchasing a DVD to keep. Being able to copy under an exception from such an online “rental” service would also have an impact on the attractiveness of services where copies can be downloaded to keep.

***Problems with technological or administrative solutions to permit enjoyment of exceptions***

3.5. Even if an exception were only to apply to a copy of audiovisual material that has been lawfully acquired to keep, there is not yet any technology that can accurately test, and so deliver, people’s entitlement to copy only for a specific purpose. (If the IPO is aware of technology that can reliably test entitlement, we would be very interested to see their evidence.) Thus, if copyright exceptions permit copying of protected audiovisual material, but only where the person wishing to copy meets certain conditions, such as being in education, that limitation would be very difficult to accommodate by any technical means where technological protection measures have been used, without also opening the doors to copying by others for any purpose. Enabling an exception to be enjoyed where it permits copying of material, to which DRM technology that prevents copying has been applied, is therefore probably only possible by an administrative solution.

3.6. In our view an exception that permits copying of audiovisual material where technological protection measures prevent this can only make sense where a solution to this would not be an administrative nightmare for all stakeholders. Giving effect to a right to make copies under an exception in such circumstances would certainly impose burdens on right holders. But those who need copies, and the Secretary of State who must deal with notices of complaint where right holders do not try and solve the lack of ability to copy, may also not be well-served by a failure to address this issue in an appropriate way. This issue, which is particularly difficult where exceptions are ones individuals can enjoy anywhere (as would be the case with the proposals for research and private study in the consultation paper, which we discuss further below), seems to have hardly been recognised in the consultation paper. Indeed, the consultation paper seems to be more concerned about the process for a notice of complaint to the Secretary of State rather than the issue of costs to right holders and others, and so does not explain why it is deemed perfectly reasonable to apparently ignore this issue.

### *The advantages of a trusted intermediary*

3.7. We are not opposed to limited copying of audiovisual material for genuine educational and research purposes, but any provision made must recognise the legitimate use of DRMs with audiovisual material. In this respect we are not talking about the large amount of audiovisual material that has been included in free-to-air broadcasts, which can already be copied by educational establishments under an exception or licensing, and by people in their own homes under the time-shifting exception. But the consultation paper makes various proposals that would give entitlements to make certain copies from audiovisual material that has been obtained other than from a broadcast. In our view, this will require an exception that can work fairly because the circumstances in which there is an entitlement to copies are sufficiently narrowly drawn for it to be possible, where DRMs prevent permitted copying, to provide copies through a trusted intermediary. We make some suggestions below of what provision on exceptions may therefore be reasonable.

3.8. The advantage of establishing exceptions that can work, because there can be a manageable mechanism for making unprotected material available in appropriate circumstances, would benefit users too. At the moment where audiovisual material has been made available on demand on agreed contractual terms, there is no possibility of providing a DRM workaround as that would be incompatible with EU law. Over time this could mean that users actually get to enjoy very little under the new exception provision that is being made, because more and more audiovisual material is likely to be made available to the public using this type of business model protected by DRM technology. But an exception that is fair to right holders is more likely to lead to right holders voluntarily making material available for permitted copying, even when it has otherwise only been made available on demand. The IPO may therefore have greater success in persuading right holders to agree to make all of their material available for limited copying by educational establishments, even where DRMs are normally used and regardless of which type of business model has been used to make it available to the public, if it shows that it has understood and accommodated the concerns of right holders in the exception provision to be made.

## **4. Research and Private Study**

### *Need for an exception*

4.1. From the limited discussion in the consultation paper about what those who might benefit from this exception expanded to cover films might want to do, this generally seems to be an issue about lack of access to the material, such as the desire to have copies from the material where it

is held in libraries and archives, or an issue about educational use, such as the desire to use the material to illustrate lectures. The proposals on libraries and archives for the former, and on educational establishments for the latter, seem to be relevant to those needs. Where a researcher has on the other hand lawfully acquired a copy of a film, there is nothing in copyright law that stops them watching it as many times as they like. We therefore continue to wonder why an exception as proposed to permit copying of a small part of a film by an individual for research and private study would be necessary.

4.2. We have previously indicated that we are sympathetic to the needs to genuine researchers, but that any provision made should not replace the need to buy a copy of, or access online to, audiovisual material where it is available to the public this way. An exception in this area should not, therefore, be seen as a solution to lack of access. Any lack of access should, rather, be addressed in relation to possible exception provision for libraries and archives where the relevant material is only available there. We note that it is not expected that films held by libraries and archives are likely to be made available for people to copy for themselves. (See for example the comment in paragraph 227 of the consultation paper that libraries have indicated that users would not be permitted to handle original films to make their own copies.) A self-help exception, such as that provided by the extended provision proposed for section 29 is not, therefore, needed where the film is only accessible in a library or archive.

### ***Practicality of the proposals***

4.3. This exception is, moreover, the one where the difficulties where DRMs have been used are most pronounced. The first question asked in Annex B of the consultation paper is whether the proposed changes to section 29 are impractical. The answer to this must clearly be “yes”. Where individuals are directly entitled to benefit from a copyright exception applying to films, even if they have to satisfy additional requirements, such as they are studying, or doing research, at an educational establishment, the administrative burden on right holders who might then be approached to supply DRM-free material that can be copied would be totally unmanageable. The cost of this is impossible to quantify, not least because there is no more than anecdotal evidence of who might actually have a legitimate need for a copy. Even if that figure were known, it seems very likely, however, that many more people would seek a copy that is DRM-free, even where they are not entitled to copy anything. Right holders would then have the cost of investigating people’s entitlement.

4.4. The cost to right holders of the proposed changes to this exception is therefore potentially very high. It is certainly not true, as the impact assessment suggests, that ongoing costs for right holders are likely to be negligible. Even if only those who really are entitled to make copies approach right holders (and that is probably an unrealistic assumption in practice), the consultation document does not explain how a right holder would check a person’s entitlement, such as that they are enrolled on a course of study at an educational establishment.

If a right holder is expected to take it on trust that this is the case where a person says so, then it would soon be known to anyone wanting a DRM-free copy that they just have to say that they need it because they are studying something somewhere. Moreover, right holders would not, presumably be expected to provide DRM-free copies to people who had not even got lawful possession of a copy-protected film, and so this would be another thing that right holders would need to check.

4.5. A likely scenario, of course, is that right holders will not make unprotected material freely available to all the individuals claiming to need it, either because of the immense burden of having to check their entitlement and/or because of concern about misuse. And then those individuals will be able to make a complaint to the Secretary of State. The Secretary of State would then have to ascertain a person's entitlement to a copy of something, including because they do need it for their research or private study and they are connected to an educational establishment in the required way. Although in a genuine case the Secretary of State would no doubt decide that the right holder should make unprotected material available to a user, the Secretary of State rather than the right holder would have had the burden of ascertaining that person's entitlement.

4.6. The problems relating to use of DRMs with a film are far more difficult to resolve in our view than for, say, a literary work. Where a person has, say, a DVD of a film, it can only be copied by copying directly from the medium on which the film is recorded. In contrast, a literary work recorded electronically can be copied by writing out, or typing, the text for oneself. It is not essential to copy directly from the medium recording the work in order to make a copy. Thus, any exception permitting copying of a film will require access to a copy of the film to which DRM technology that prevents copying has not been applied, or a system for providing those who are entitled to copies with those copies. To expect right holders to accept the former, that they make their material available without copy protection technology to anyone who says they need it for research or private study, is in effect saying to right holders that they cannot use copy protection technology. And the latter is impractical for an exception applying to individuals.

#### ***Limitation to members of an educational establishment***

4.7. Much audiovisual material is broadcast, and the existing copyright exception permitting a person to copy a broadcast for the purposes of time shifting is a generous private copying exception applying to audiovisual material. Use of broadcasts in educational establishments under the proposed expansion to section 35 is also generous, and should give students at those establishments wide access to audiovisual material. If those undertaking research at educational establishments also need access to the recordings of broadcasts that have been made by or for those establishments, then an appropriate extension of section 35 may actually better serve the needs of researchers. Section 35 could cover researchers as well as pupils at educational

establishments, as that, rather than a fair dealing exception, would give access to a broadcast that a genuine researcher might need.

4.8. More generally, the limitation to the scope of section 29, as proposed for audiovisual material to individuals who are members of an educational establishment, appears to be suggested because of concern that people would otherwise copy the whole of a film under the exception for entertainment purposes. Such copying is not, of course, ever likely to be found by the courts to be within the scope of the exception. The additional limitation may, though, help to make the public aware of the limited nature of what is permitted under the exception. But the real problem, as explained above, of how copying is to happen where DRMs do not permit it, is not really solved by this type of narrowing of the exception.

4.9. The consultation paper indicates that the exception in this area will be needed as well as the exceptions applying to educational establishments, even with this exception limited to those at educational establishments, because section 35 and 36 apply to copying by educational establishments only. We do not think this will be true and so question whether there does, indeed, need to be separate provision for individual members of educational establishments. The expanded proposals for sections 35 and 36 do permit some copying by the individuals at the establishments. Copying on behalf of educational establishments is already possible under sections 35 and 36. It may therefore be perfectly possible for libraries and archives, say, to copy on behalf of educational establishments, particularly where the material wanted is only found in the libraries or archives. Indeed, some of the justification for the exception as it applies to individuals seems to be on the basis that there will indeed be educational establishments or libraries controlling the copying. For example, the suggestion in paragraph 220 that universities and libraries are probably best placed to offer their own guidelines only seems to make sense when the researchers and students are copying on university or library premises, or in any network for distance learning controlled by such institutions.

4.10. In our view, there is not, therefore, a need to extend section 29 to films, even with the additional limitations. The members of an educational establishment who need copies for non-commercial research or private study purposes could and should have their needs met by the provision that might be made for educational establishments in particular.

### ***Library privilege***

4.11. As we have already explained, commercially valuable audiovisual material, other than that included in free-to-air broadcasts, is generally made available to the public with DRM technology limiting its further use. The option of doing this, especially where the material has not been made available as copies to keep, continues to be essential in order to monetise that content and obtain a return on investment. We have, though, already acknowledged that libraries and archives may have a role to play by copying audiovisual material on behalf of educational

establishments where the library or archive is the only source of the material. This seems to be permitted by sections 35 and 36. But it would not be acceptable for every prescribed library in the UK to be provided with a copy of a new DVD say, without technological protection measures applied, in case a student or researcher from an educational establishment has a legitimate research or private study need for a copy. We are not, therefore, convinced that there should be a general library privilege exception as proposed. The copying that might be justified where libraries and archives are the only source of the material can generally be covered by sections 35 and 36. However, the bodies responsible for the UK's national archives of audiovisual material, which may have the only useable copies of that material, should be able to supply copies when appropriate directly to genuine researchers rather than through an educational establishment.

### ***Performers' rights***

**4.12.** We welcome the recognition that an exception to performers' rights should not permit copying during a live performance, or where recordings of a performance are shown in public, such as in the cinema. Copying in the cinema would, of course, be an infringement of copyright in the film and all the underlying copyright material too. Copying in the cinema under an exception to copyright should be no more legal than copying under an exception to performers' rights. The audiovisual sector already faces enormous challenges in dealing with illegal camcording in cinemas, and has been lobbying for this to be made a specific criminal offence for many years. The industry would certainly not welcome a copyright exception that gave people a way of claiming that camcording in a cinema does not infringe copyright because it is within the scope of an exception permitting copying for research and private study purposes.

### ***Unpublished material***

**4.13.** We appreciate that a genuine researcher may sometimes find it helpful to have a complete copy of an unpublished film that is held in a library or archive, in order to be able to continue their research away from the premises of the library or archive. We also agree that, if any provision is to be made in this respect, it is necessary to update the meaning of "publication" in relation to a film. For the purposes of deciding whether a film is unpublished and so the whole of it, rather than just an extract, can be copied for a researcher, the new ways that a film may be made available to the public, such as on demand on the internet, should come within the scope of "publication". But this term is needed for the interpretation of other aspects of copyright law too, such as qualification for copyright protection due to country of first publication, so the IPO should consider the impact of its use everywhere very carefully. It may then be desirable to consult those likely to be affected by all of the changes that will arise from any change to the definition, before deciding how the definition should be changed.

## **5. Exceptions for education**

### *Overlaps between regimes for educational copying*

5.1. As a result of the suggested amendments to sections 35 and 36, educational copying of audiovisual material would be addressed under two regimes. One of these, section 35, already applies to audiovisual material. It is based on an understanding that, not only the audiovisual material itself is a copyright work, but also that it invariably includes much content protected by copyright. The other of these, section 36, does not apply to audiovisual material at the moment, and does not really cater for material with many underlying rights. This gives rise to the first problem with the proposed amendments to section 36 to cover films, which we explain further below.

5.2. Sections 35 and 36 can both be overridden by licensing. This is a very important limitation as it is fair for right holders to be able to seek a royalty for what may be a significant amount of copying by, or on behalf of, educational establishments. However, for audiovisual material, which some right holders may want to license for copying by educational establishments under a single licensing scheme, regardless of whether or not the material has been included in a broadcast, there would be some confusion about whether this would be possible with provision applying to audiovisual material to be made in both exceptions. This is not helped by the differences between the exceptions on how licensing overrides the exceptions, for section 35 it being necessary for a licensing scheme to be certified and for section 36 no such procedure being necessary. This difference does not seem to be particularly logical.

5.3. There is already some provision in section 32 permitting the copying of films in the course of instruction about the making of films. This provision is particularly useful to those delivering education relevant to future creators in the audiovisual sector, and we would not want to see it removed. Any new provision about copying films must not, therefore, jeopardise educational use as permitted by section 32.

### *Use of broadcasts*

5.4. We are broadly supportive of the proposed changes to section 35 regarding copying of broadcasts, and making copies available to both those on the premises of an educational establishment and distance learners. Many of our Members come from organisations that are already licensing, through the Educational Recording Agency (ERA), all of these uses of broadcast content by educational establishments. We know that ERA will be responding on the detailed drafting suggestions for section 35, and so we do not propose to cover this same ground. It will be important to ensure that the exception does not, however, lead to the copies of broadcasts that educational establishments have made being accessed and copied by distance learners for entertainment rather than educational purposes. Any copying of material that has

been communicated to distance learners should only apply where this is necessary for educational purposes. Viewing the material at a time that suits the distance learner may in many cases be all that is necessary for the course of study that the distance learner is following.

### *Films not acquired from a broadcast*

5.5. We understand that it may be very helpful for those delivering courses in educational establishments to be able to copy short extracts of films to put in course packs. This is possible now under section 35 where a film has been included in a broadcast. We consider here, therefore, possible use of films that have not been acquired by the educational establishment from a broadcast.

5.6. Where every student needs a copy of the whole film, then in general that should be bought in the normal way, by purchasing the DVD or an online download, just as would be the case where every student needs a copy of a particular book. But we accept that it is reasonable to make some provision in exceptions for limited copying of films, which applies where that use is not being licensed by right holders. The exception provision that is made must still have regard to the difficult issue of how films are to be copied where the only copy that an educational establishment has is copy-protected. In this case, though, it would seem reasonable for right holders to facilitate a solution, and we suggest how that might work below.

5.7. Trying to paste an exception into sections 36 does not, though, work very well. It would be possible to limit the amount of a film that can be copied to a particular percentage, but, in order to copy that part of a film, the exception would need to permit the copyright works included in the film to also be copied without infringing copyright. This underlying material largely falls within the scope of section 36, but the rule in section 36 would be that no more than 1% of any of these underlying works can be copied. 1% of a film might easily be 100% of a piece of music, or 50% of a literary work, and so that copying would not seem to be infringement free according to the amended section 36. Moreover, the fact that section 36 does not permit any copying at all of an artistic work, and such material is frequently part of a film, would make the application of all the rules in section 36 practically impossible.

5.8. A much better model for permitted copying by or on behalf of educational establishments of films that have not been acquired by recording a broadcast would be section 35, which properly recognises that an exception must apply to the audiovisual material and the underlying content. An exception like section 35 applying to films will, though, need to provide some sort of limit on how much of the film may be copied. A percentage may not, however, be the best approach, because a small percentage of the film itself could in some cases be a very large and unfair percentage of one of the underlying copyright works. It may be better to have a flexible test. A test must only permit copying of a film to the extent that it does not unreasonably prejudice the legitimate interests of the owners of copyright in the film or any of the content of

the film.

### *Educational use of films, licensing and DRMs*

5.9. However the exception provision that permits extracts from films to be copied by or on behalf of educational establishments is provided, we agree that it should not apply where the use is being licensed by right holders. A mechanism for dealing with the issue of DRMs also needs to be carefully considered. For commercially valuable films that have only been made available to the public with DRM technology that prevents the permitted copying, it may be helpful for the IPO to facilitate discussions between those who may wish to license this use and those who wish to benefit from the exception or licensing, so that licensing and a DRM workaround solution can be established that is fair to all.

5.10. A DRM workaround solution must involve right holders making their whole film available either in a form that is not copy protected, so that permitted copies can be made, or providing those permitted copies. For right holders to deal even with individual educational establishments in this respect would be a significant burden. It may therefore be appropriate for the provision on an exception to recognise that right holders who make an unprotected copy of their film available to one, or a very few, trusted intermediaries, which are then permitted to facilitate enjoyment of the exception, is sufficient to prevent individual educational establishments having a right to make a complaint to the Secretary of State. A trusted intermediary could then work with educational establishments, either to supply the appropriate copies from films to the educational establishment, or, supply those copies on behalf of the educational establishments directly to students.

5.11. As we have said earlier, if all stakeholders accept that working with a trusted intermediary can provide a fair solution where DRMs have been used, this may also lead to right holders being prepared to use such a trusted intermediary to provide limited copying of all of their films. That could include those films that have only been made available on demand on agreed contractual terms, where educational establishments would not be able to complain to the Secretary of State if DRMs prevent their enjoyment of the exception. Clearly, the British Film Institute (BFI) would be well-placed to act as a trusted intermediary, but it may be appropriate for the Scottish and Welsh national archives of audiovisual material to also be authorised as trusted intermediaries for the material they hold.

5.12. We are not proposing to answer the detailed questions asked in the consultation paper about the proposed changes to sections 35 and 36 as these do not really address the important difficulties we have indentified above. We are, however, surprised that the impact assessment relating to the proposals that would extend the scope of section 36 to cover films suggests a minimal impact on right holders. Copying in educational establishments of films, other than those acquired from a broadcast, is generally not licensed at the moment, and so those right

holders would incur a cost if they want to establish new licensing to override the exception. Moreover, there would be significant costs for right holders if they were required to deal with every educational establishment which claims to need a DRM-free copy of a film.

### ***Research and private study***

5.13. We have outlined above the difficulties with an exception permitting fair dealing with a film for the purposes of non-commercial research and private study that an individual can enjoy anywhere. These could, perhaps, be solved if the educational establishments with which these people must, according to the proposals, be linked, are actually responsible for facilitating this type of use. In other words, the sort of permitted copying of films that would come within the scope of the proposed expansion to section 29 would be better covered by expanding the section 35/36 provision to cover researchers, as well as students, attached to educational establishments. The educational establishment is, of course, best placed to validate a person's claim that they are enrolled on a course of study, or doing research, at that establishment. The permitted copying for these purposes would not necessarily have to be done by the educational establishment – both sections 35 and 36 permit copying on behalf of an educational establishment – and so the actual copies could again be supplied by a trusted intermediary, especially where this provides a means of obtaining the permitted copies when DRM technology that prevents copying has been used.

## **6. Preservation exception**

6.1. We continue to support an exception to copyright that permits the preservation of audiovisual material in relevant archives in the UK without infringing copyright. The most important limitation to any exception, though, is to ensure that what can be done without infringing copyright is limited to what is necessary for preservation. Any additional use of the preserved material must then either be licensed by the right holders, or fall within the scope of another exception to copyright, or be something that it not actually restricted by copyright. It may be that the drafting of the provision could be simplified by incorporating this limitation clearly. This is arguably a limitation that should be provided in the exception itself, rather than be something that may, or may not, be a prescribed condition made in regulations.

6.2. The limitation requiring prescribed conditions to restrict the exception to situations where it is not reasonably practicable to purchase a copy of the item to be preserved would not be appropriate to apply to the UK's national archives of audiovisual material. The BFI, and the national archives in Scotland and Wales, for audiovisual material provide the equivalent of the collections of text-based material held by the Legal Deposit Libraries. Although deposit of audiovisual material is voluntary, it is still essential that it can be properly preserved as part of the UK's cultural heritage. That preservation activity might be undertaken at an early stage, or

later. It should not, therefore, be constrained by a test of whether it might be possible to purchase anything.

6.3. This limitation is perfectly reasonable for libraries more generally. It provides a helpful safeguard for right holders where public libraries have, for example, acquired a commercial DVD of a film. They should not be permitted to copy it for preservation purposes where they can buy another copy. Indeed, it is questionable whether they would ever be justified in copying a commercial DVD for preservation purposes when the film recorded on it will almost certainly be in the collection of, and being preserved by, the national archives.