# UK GOVERNMENT RESPONSE TO EUROPEAN COMMISSION'S GREEN PAPER - COPYRIGHT IN THE KNOWLEDGE ECONOMY

## Introduction

The UK Government welcomes the European Commission's Green Paper on Copyright in the Knowledge Economy. The role of the copyright framework in the digital age has become a subject of increasing public debate.

The copyright system is of fundamental importance to the future health and prosperity of our creative industries and our economy. It is the framework through which creative endeavour is rewarded, incentivising people to create and innovate. It is also the backdrop against which decisions on investment and jobs are made in these important sectors.

## Background context

The creative industries grew by an average of 6% per annum between 1997 and 2005 compared to 3% for the rest of the UK economy. In summer 2006 creative employment totalled 1.9 million jobs, an average growth rate of 2% per annum. This rose to 4% in 2005-2006. These figures highlight the importance of creativity and a strong copyright framework to support creators. However, the landscape within which we work is changing all the time and we must respond to new issues as they arise.

The number of households with domestic internet access rose to over 15 million in the UK in 2007 (61% of all households). Higher broadband speeds make the delivery of content quicker and easier. Sites like MySpace and You Tube continue to grow year on year while 2008 saw the launch of the SSC iPlayer and mainstream electronic book readers. Consumer expectations on accessing and using content are changing. In many instances these contrast with industry views.

Digitisation and the internet aid the creation and dissemination of content and open up new markets. However they also bring challenges. Copying has been made much easier. Research studies estimate that around 25% of UK internet users engaged in online music 'piracy' in 2007. New business models are key but can our industries successfully 'compete with free'?

Continuing work being led by UK Government on P2P file sharing by means of an MOU with industry is important but further action may be needed . Looking forward we need to make sure that value can continue to be appropriately extracted from content by our creative interests.

We believe that there is scope to build on the Gowers Review and consider a wider range of issues in relation to copyright. It is vital that we maintain a system that supports creativity, investment and jobs and which inspires the confidence of businesses and users.

A number of the issues raised in the paper were also the subject of recommendations in the UK Gowers Review of IP which reported in 2006 and we continue to take forward these recommendations. The UK government's recently launched Digital Britain initiative recognises the importance of IP and makes clear

our intention to consider where further changes may be needed in the UK.

In making its response to the specific questions raised in the Green Paper the UK Government has taken into account views expressed informally to it by a number of industry stakeholders.

## GENERAL ISSUES

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

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

The issue behind these two questions is the extent to which, whether in areas in which exceptions apply or those where they do not, the legal framework alone is adequate to prescribe the nature of the relationships which should exist. It is unclear whether any such encouragement or guidelines would be advisory in nature, or have some normative force . These two questions do not indicate who, within such a framework, should have responsibility for issuing and keeping up to date such material. There are choices as to whether such material originates from the state or from the industry itself.

Whatever is done, the legal framework itself needs to set out the key principles which should govern the relationships between rights holders and users. There may be scope for guidelines to indicate, for example, how the relevant legal principles are or have been interpreted in practice, or to identify pitfalls which the parties concerned would commonly want to avoid . There may also be a use for guidelines in situations where technological developments are moving ahead of the capacity of the legislation to address them.

In some areas where licensing is needed it would be useful to follow a successful model, such as the UK's JISC (Joint Information Systems Committee) and NesLi2 Model licences. There is no single general answer to these questions: whether guidelines or encouragement are required or desirable will depend on exactly what is contemplated, by whom, and for whom.

**(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?**

Some of those consulted in the preparation of this response argue that there is a fundamental inconsistency in a copyright framework which harmonises rights across

the EU, but relies on a series of optional exceptions to those rights at the national level. They believe that the practical difficulties of optional implementation outweigh the benefits of the flexibility the framework needs to offer, where increasingly information, and/or people who use information, cross boundaries or have to work at a pan-national level.

The fact that contractual arrangements have evolved for the supply of material across the whole of the EU, should not be taken as an indication that contract law has been able to solve these problems. Researchers for example may be involved in cooperative projects which cross national borders, and find that acts which fall within an exception in one country may require permission from the rights holder in another.

Some have likened this current situation to a 'patchwork' of laws which is difficult to navigate through at a practical level. The benefits of "The Knowledge Exchange" pan-European initiative are also under threat in the current climate . They believe a mandatory list of exceptions, consistent across the EU, would serve to assist transnational cooperation and development. However, it has been estimated that around 90% of contracts undermine copyright limitations and exceptions.

Others believe that the current list of non-mandatory provisions - to which the Berne 3-step test must be applied - provide a useful degree of flexibility to Member States. This enables Member States to take account of the various differences in language, culture and developments, that prevail in their respective societies, and to ensure that their copyright framework meets their particular needs. Those who advocate this flexible approach to exceptions point out that it is unlikely that consistency will be achieved even with mandatory exceptions, given the broad interpretation that can be placed on the various concepts embodied within the language of the exceptions.

In the circumstances, the UK government believes it would be important before taking any further action on this issue to resolve the question of whether national level exceptions could, as a matter of law and practice, be legally harmonised in a way that would make sense for both rights holders and users, and if such harmonisation were possible, what limiting impact it might have on cultural diversity across the EU. Work to amend the exceptions would of course be limited by the provisions of Berne, and (more restrictively) the INFOSOC directive.

## 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?**

These questions deal with access to collections via two distinct means - curators of national collections of works, and the publishing industry. The publishing industry wants to be able to preserve its business models and to earn the revenues from the

distribution of copyright works which are necessary to preserve the publishing industry. There are already examples of successful licensing schemes which enable commercial publishers to make the necessary returns and which enable libraries to provide access, at a price.

There is, so far as the UK government is aware, no particular access problem in terms of libraries who wish to subscribe in order to use such material. The issue behind the question seems to be whether libraries, educational establishments, museums and archives should be encouraged or even mandated to enter into such arrangements.

These questions are asking whether such libraries should be given access, or give their members access, on terms which are more favourable than those which the institution would otherwise have been able to negotiate on the open market. This would put the institutions in a position to compete with the publishers for the distribution of the publishers' works, leading to lost sales for the publishers. To the extent that this would reduce economic returns to the publishers, it has the capacity to damage existing business models and hence to imperil the availability of future works.

The UK's Legal Deposit Libraries Act (2003 Act) allows for the UK's published output (and thereby its intellectual record and future published heritage) to be collected by the six prescribed legal deposit libraries. The legal deposit libraries hold a full and complete record of the published material for future generations. There needs to be a distinction made here between libraries who provide access to digital material within their physical buildings (which is no different to the print system which has been in operation for 100 years) and those who do so online (which may conflict with commercial exploitation).

There is no evidence that publishers are developing and sustaining online access to the entirety of their catalogues, including born-digital works, and it has not been proven under the current regime that there is an increased risk of loss of sales to publishers. Furthermore, it would not be feasible to rely on publishers to supply and maintain full and complete records for libraries. However, as already noted, there is no obstacle to individual libraries supplementing their collections by entering into commercial arrangements with publishers if they wish to do so. It should be for the institutions concerned, who know most about what their users want and need, to decide what material they wish to access, and to come to an agreement with the publishers concerned.

Remote access to digital files that are legally deposited material will create the probability of material being subsequently copied and shared locally. This does not comply with the Legal Deposit Libraries Bill. Although it seems reasonable to allow remote access to and digital copying of online collections held at legal deposit libraries for educational and research purposes, usage must comply with the Berne Convention and the 3-step test. We are currently considering the copyright exceptions in relation to education and research as we take work forward on the Gowers recommendations. No final decisions have yet been made in this area.

In other cases, such as unpublished, or out-of-print (but still in copyright) works,

which are no longer commercially available, and for which no commercial exploitation seems likely, there may be a case for exploring whether and how libraries and archives could best develop online access to their collections, taking into account the requirements of the Berne 3-step test.

Although the questions focus on the publishing industry, we need to consider all rights holders and also the public interest. It is important to strike a balance between public and private use to uphold the benefits of lifelong learning. Higher Education represents a large sector in industry which is vital to the UK economy, and the future of creativity and innovation. Improved access to online works is vital, but the legitimate rights of IP holders must be protected. Any proposed changes in law must not impede on the Government's objectives for Higher Education.

Some of the issues relating to deposit libraries, delivery and impact raise questions which need to be debated domestically in the UK. A proper examination of the various roles libraries and archives play, and consideration of the rights holders and public interest issues in relation to those roles is needed before we can offer a balanced view. These issues will be properly considered as part of UK Government's ongoing work to maintain and develop the copyright framework.

**(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;**

**(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?**

In relation to the scope of the exceptions for libraries, etc, many of the stakeholders consulted felt that there was no need for clarification of the detail of how the exceptions work. As the Green Paper mentions, the UK Government is in the process of consulting on a recommendation by the Gowers Review of Intellectual Property[1] to broaden the UK's current exception in relation to the preservation of works. Other changes are also being considered, for example as part of our work on the Gowers Review, to ensure that our exceptions regime remains relevant to the digital age.

Additional clarity may be useful in some areas. However it is not clear whether current uncertainties relate to the Directive or to the national laws adopted in pursuance of the Directive. In considering where clarification may be needed we must be careful not to be overly prescriptive. We must also be clear about whether

[1] http://www.hm-treasury.gov.uk/gowers_review.htm

clarification at the European level is necessary or whether what is needed is action at the national level to address specific instances of uncertainty. In fact it may be that there is no need for clarification at all - at either the national or EU levels - and that what is needed is a more constructive dialogue between rights holders and libraries etc.

In relation to the copying and dissemination by libraries of collections of digital works, the Google Book Search project and the recent settlement agreed by the parties in the US (but still awaiting approval from the Courts at the time of writing), provides an interesting illustration of how these problems may be addressed in the future . It may be that business practices in this area evolve in a way that will provide an answer, through practical demonstration, to the question of whether any further clarification of the existing law is actually needed.

**(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?**

The issue of orphan works is being actively considered with stakeholders in the UK with a view to finding a legally satisfactory solution appropriate to the UK's circumstances. We recognise that different types of works require different approaches. In many cases, collecting societies deal with specific types of work and are keen to have a positive role to play in any solutions which are developed.

There are nevertheless some gaps in the coverage of particular types of works, for example old but in-copyright photographs, which do not sit comfortably within the licensing schemes envisaged by those keen to see greater exploitation of orphan works. Moreover the UK Government has concerns about the legal implications of licensing-type arrangements, and is currently exploring the legal position regarding the role which collecting societies, or other intermediaries, might play in the management of orphan works . Depending on the outcome, it may be that, for the sake of clarity and certainty, some kind of legal solution at EU level is ultimately required.

**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?**

Although generally, many stakeholders felt that licensing would not be appropriate in cases where individuals are seeking access to copies of works that they own, there

is a form of such licensing in the UK. It has been set up between the Royal National Institute of Blind People (RNIB), which acts as a trusted intermediary, and UK publishers.

**(14) Should there be mandatory provisions that works are made available to people with a disability in a particular format?**

We do not believe that stipulating particular formats in law will be helpful. Keeping legislation up to date with changes in technology is likely to be extremely difficult, and locking particular technologies into a legal framework could hamper efforts to deliver improvements.

**(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?**

Current EU legislation does not limit the type of disability to which the exception applies, and it may therefore apply to those with disabilities beyond those relating to sight and hearing . For example, in relation to visual impairment, UK law already goes
further than this and includes those who have a physical disability which means they are unable to hold or manipulate a book. We are also considering whether we wish to make further changes to UK laws to ensure that these issues are adequately addressed.

**(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?**

The issue of remuneration is complex, and the answer depends on the circumstances in which an exception is being applied. Where, for example, an individual in possession of a legally acquired copy, is using their own resources to transform a work into an accessible copy for their own use, and copies in an accessible form are not commercially available, there is a good argument to say that there should be no additional charge to the individual concerned.

In circumstances where trusted third party intermediaries may provide a comprehensive service to users, the question of remuneration is not so straight forward. Less than 5% of book titles are produced in an accessible format. This puts a burden on charities who are responsible for obtaining and distributing content. Discussions between UK publishers and the RNIB about access to digital versions of published works have already illustrated that there may be significant conversion costs.

How those costs will be borne has yet to be determined although it is worth noting that provision in UK law relating to the making of multiple copies by non-profit making bodies envisages that sums charged must not exceed the cost of making

and supplying the copy.

**(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?**

There seems to be a gap here in the provisions for those with disabilities which prevents them from having the ability to make accessible copies for databases, in the same way as they can for other types of work. Subject to appropriate evaluation of the impact of making such an amendment, it would seem appropriate to ensure that the same conditions apply to an exception including databases as apply to the current exception dealing with other works.

**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?**

Concerns have been expressed to us by rights holders that there is a danger of blurring the distinctions between exceptions in the areas of research, teaching and education to such an extent that almost anyone, at any time, can claim to fall within one or other of the exceptions. They have concerns that any moves to 'clarify' exceptions in this field may have the effect of widening them to the extent that it jeopardises the core markets for those in educational publishing field , and threatens the licensing activities - including online licensing - that currently form part of their businesses. We note the comments in the Green Paper that amendments to clarify the scope of the exception do not imply that it would be extended.

Licensing schemes are part of the landscape in terms of access to educational and scientific material. 'ScienceDirect' operated by Reed Elsevier, for example, gives online access to many scientific journals, including its back-catalogue. In a slightly different context, the Educational Recording Agency provides a licensing scheme ('ERA plus') which permits recordings of broadcasts to be accessed by students and teachers online whether they are on the premises of their educational establishment or at home or working elsewhere within the UK.

We believe such licences complement access provided by means of the educational exceptions, and provide a mechanism through which both rights holders and educational establishments can meet their objectives . Of course in such circumstances it is important that there is an appropriate mechanism for determining the terms of such licensing schemes where agreement cannot be reached.

There are also limitations on the coverage of licensing schemes, and it must be remembered that there will always be works that are not covered in a collective scheme, the use of which may expose an educational establishment to the risk of being in breach of copyright if it wishes to make full use of digital technology. As such, care needs to be taken that the exact scope of any such schemes, and the way in which they interact with any copyright exceptions is clearly understood.

**(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?**

In considering how exceptions in this area should be framed in the future, we must strike a balance between the interests of rights holders and the wider public interest in terms of accessibility, in particular in light of the new opportunities afforded by technological change. The scope for technological advancement to bring benefits to education is important and it is correct that we consider the issue of exceptions in this area carefully.

In addition it is important to remember that teaching and research is also carried out at institutions such as museums and galleries , e.g. the Natural History Museum employs many scientists who publish over 500 research papers a year.

As to the specific clarifications mentioned above, these are issues which have been the subject of recommendations in the UK by the Gowers Review of Intellectual Property. The responses received to the first part of our current consultation on the various recommendations that were made in that Review generally recognise the importance of remote access to educational material. In delivering such exceptions it is important to consider the potential impact on rights holders interests and in the UK discussions are ongoing on these issues. The Government will be publishing its views in the form of a second stage consultation in due course.

**(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 applicability of an exception in this area relates to whether the work is needed as opposed to the length of the excerpt that is being taken . In the past some UK collecting societies have provided guidance to copyright users to help them understand how much of a work can typically be used.

However, it would seem that in genera l, many stakeholders do not believe mandatory rules about the lengths of excerpts are appropriate. Such a move would cut across established principles relating to the taking of a 'substantial part' of a work, which provides flexibility about the length of any excerpts, taking into account its importance - quantitatively and qualitatively - relative to the work itself.

We would agree that such rules would not be appropriate.

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

Please see our comments in relation to questions 3 &4.

## 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?**

Technological development and the internet have fuelled a growth in the creation and dissemination of user generated content. Some of this content is exploited commercially by the creator but much of it is considered to be non-commercial. Where such content draws upon existing creative works this raises important questions about the correct application of copyright law.

Many stakeholders take the view that the copyright framework already provides a comprehensive list of 'rules' as to what can and cannot be done with works which are protected by copyright. The suggestion for an exception for user-created content seems to create a distinction between those who use and those who create works, which in many cases is not justified. Another significant concern is the extent to which such an exception might allow others to use works in a way that the existing rights holders do not approve of and the impact that exceptions in this area might have on remuneration.

An alternative to exceptions is to deliver improved licensing to aid the development and dissemination of creative content. Such developments aim to make it easier for 'users' to create and post material on the web, which has been adapted from other sources.

We are aware that rights holders and creators are already developing ways of permitting the use of their works online and future innovation in this area may provide solutions. In addition to the 'Creative Commons' licence we have seen the 2007 agreement between the MCPS-PRS Alliance and YouTube which enables You Tube users to include certain musical works in their video clips under a licence given to You Tube. Rights clearance for individual works can be a complex business although we note that some rights holders are seeking to address this through simplified web based systems (like EMI's system for clearance for sampling).

In considering any possible exceptions in this area it is important to consider carefully the potential impact on existing rights holders, in terms of both commercial and non commercial UGC.

December 2008