



## ALCS response to European Green Paper: Copyright in the Knowledge Economy

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## Introduction

The Authors' Licensing and Collecting Society Limited ('ALCS') is the UK rights management society for writers of all genres of literary and dramatic copyright works including fiction, journalism, plays, poetry, academic texts, TV and radio scripts and story-lines, dramatisations, translations, abridgements and adaptations.

Established in 1977 and wholly owned and governed by the writers it represents (of whom there are currently over 66,000), ALCS is a not-for-profit, non-union organisation. Since its foundation, ALCS has paid writers over £170 million in fees and today it continues to identify and develop new sources of income for writers.

ALCS is grateful for the opportunity to contribute to this review and would be pleased to provide further information or assistance as required.

Our responses to this Green Paper focus on those areas that we feel are most relevant to our members.

## General Issues

In setting out its scope the Green Paper extends the debate beyond scientific and educational material to any material which has value 'in enhancing knowledge.' This makes sense as clearly many different genres of works have the potential to promote learning. It is perhaps more important to focus on the context within which these works are used - public/ private, commercial/ non- commercial - and the impact on creators and other rightsholders of those different uses, when reviewing the parameters of a copyright exceptions regime.

The paper notes the concerns of authors and performers in terms of the revenue they have received from new 'on-line' rights introduced by the Copyright Directive. Independent Research commissioned by ALCS in 2007 confirms this view, suggesting that less than 15% of professional writers in the UK had received revenue from the exploitation of their work online. In view of the important role played by creators in producing content to sustain the knowledge economy, it is vital that exceptions do not substitute for commercial opportunities and that licensing that provides fair compensation to deal with the extended operation of exceptions is preserved.

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

Above all copyright exceptions should operate so as to preserve the balance referred to in the Green Paper, between reward for past creation and investment,

and the need to disseminate knowledge. A lack of understanding regarding the allowances and boundaries attached to exceptions, either by rightsowners or those using their works, can upset this balance. This is particularly so in a digital-use environment where the possibilities for using work beyond the scope of exceptions is greatly increased. This issue has been seen most acutely in the context of music, where works copied under personal use exceptions have migrated into the broader spectrum on on-line dissemination. In the context of education and the sharing of knowledge, there is the clear potential for similar issues to arise. Under these circumstances 'contractual arrangements', such as licensing schemes underpinning the rights granted by exceptions, can have a value in ensuring that works are used in a way that is consistent with the aim of the exception and does not prejudice the legitimate interest of rightsholders. Alongside contractual arrangements initiatives to promote a better understanding of the interplay between rights and excepted activities also have an important role to play.

Clearly European policy promoting encouragement or guidelines for contractual arrangements would need to recognise the diverse way that Member States have applied the same exceptions, and avoid situations where the existing national schemes, negotiated and accepted both by rights holders and users, may be jeopardized for the sake of providing a common set of rules.

**(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?**

Following on from our above comments, it is clear that technology allows individuals and institutions to use works in ways that go beyond the scope of existing copyright exceptions. In the context of the 'knowledge economy' there are compelling reasons for making the best uses of this technology to promote learning. Equally the expanded uses to which works may be put - for example through the creation of searchable on-line libraries of works - should be reflected, for example by returning a share of the value gained from this resource to the creator of those works. Uses of works beyond those envisaged by Article 5 of the Copyright Directive will tend more towards commercial exploitations. When assessing fair terms for 'contractual arrangements' dealing with this kind of exploitation, the commercial nature of the uses should be given due recognition, notwithstanding the fact that underlying rights granted relate to the provision of education and learning.

**(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?**

The current approach, involving a list of non-mandatory exceptions, recognises that different Member States will apply exceptions so as to conform to the different legal traditions and licensing structures operating in that territory. The list provides a set of principles governing a potentially broad range of non-commercial activities. As such the rights tend to attach themselves to organised bodies - 'publicly accessible libraries, educational establishments, archives, social institutions' etc.

It may be argued that this piecemeal, territorial approach is not incompatible with the borderless on-line environment. In a broader context the Commission is reviewing the ways in which multi-territory licensing can stimulate the market for the circulation of on-line content within the Community. However it is important to distinguish the 'economic expectations' of this commercial trading model - where uniformity of rules promotes a fair and competitive market - from the principles set out in Article 5 of the Directive.

**(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?**

As mentioned above the Article 5 exceptions tend to attach to specifically identifiable beneficiaries conducting certain activities. To a certain extent it would seem that the more specific a particular allowance is, the less likely it will be suited to a blanket, mandatory application in all territories. The categories of exception that would appear most suited to mandatory application are those that relate to commonplace, uniform activity - such as the routine function of various devices to generate 'transient copies' of copyright works.

Of the exceptions listed in Article 5 the only comparable example appears to be 5(2)(b). Irrespective of changes in future technologies it is likely that a uniform exception permitting individuals to make personal copies for private, non-commercial use will be necessary in the interests of legal certainty, not least for the beneficiaries of the exception.

## Exception for libraries/ archives

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

The section of the Green Paper discussing the current exceptions for use by libraries and archives deals primarily with the issue of digitisation for preservation purposes, yet the questions that follow appear to focus on a review of the exceptions in light of the need for on-line access. These are two separate issues that should not be confused within a review of the impact of copyright rules on the knowledge economy.

In common with the other exceptions under Article 5, Articles 5(2)(c) and 5(3)(n) are highly specific as to its beneficiaries and conditions of operation. The Green Paper identifies that the former is limited to non-commercial acts of reproductions by specified types of institution, for the purposes of preservation. Section 42 of the UK copyright Act, also referred to in the paper as an example of a national legislative provision, adds further limits by reference to ascertaining the availability of commercial options prior to making a copy. The latter Article is limited to access via 'dedicated terminals on the premises' of specific types of institution.

Both Articles are designed to address a particular set of circumstances and decisions on whether or not they should be changed need to reflect these circumstances. Separate decisions by publishers and/or authors to develop on-line access models, are likely to have a more commercially focus and apply in far broader situations than those subject to the basic exceptions regime.

### **(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?**

The case recently settled in the United States concerning the Google Library Project highlights the kind of issues that can arise if mass digitisation projects proceed based on a reliance on exceptions or a presumed permissions basis. Publicly accessible libraries, educational establishments, museums and archives should work in partnership with authors and publishers to arrive at common terms for on-line access.

Through its partnerships with licensing bodies like the Copyright Licensing Agency (CLA) and the Educational Recording Agency (ERA), ALCS collects fees from the licensing of various secondary uses of writer's works. In the education and library sector this kind of licensing schemes operates to build on the uses permitted by UK law by offering a broad repertoire of works for uses not beyond those dealt with by the existing exceptions. Increasingly these licensing schemes are evolving to permit copying and access to learning materials within on-line networks, for example through making works available through Virtual Learning Environments.

**(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;**

Firstly it is difficult to set a specific set of common rules for a range of beneficiaries that may, in fact, operate under very different circumstances, in relation to their funding levels, commercial activities and user-base. Secondly there is a danger that an attempt to regulate the current discretion inherent in the right of Member States to legislate for 'specific acts of reproduction' may upset the current balance of established licensing arrangements that facilitates copying through agreed terms and guidelines.

**(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?**

To the extent that the exception permits 'specific acts' of reproduction for non-commercial purposes, it should be clear that the scanning of works 'for the purpose of making their content searchable on the Internet' would be not be consistent with the terms of Article 5(5).

**(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?**

The Green Paper notes the ‘scarcity of the necessary economic data’ on the scale of the orphan works ‘problem’ within Europe. A useful and necessary exercise prior to the consideration of any further statutory regulation would be to commission more detailed analysis of the extent of this problem, building on the work undertaken by the Copyright sub-group of the European High Level Expert Group in defining terms and guidelines for qualifying works and sectoral searches.

Commission Recommendation 2006/585/EC encouraged the use of licensing mechanisms in close cooperation with rightsholders. The High Level Expert Group Report envisaged contractual arrangements supported by mechanisms such as extensions to collective licensing schemes and the possibility of an element of ‘legal presumption’. The Group also stressed the importance of designing solutions suited to all orphan works.

The British Copyright Council (BCC) has recently submitted a paper to the UK Intellectual Property Office setting out proposals for licensing/ permission mechanisms backed by statutory support, designed to address each possible class of work and right relevant to granting access to the use of orphan works. ALCS supports the approach suggested by the BCC proposals.

**(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?**

As a first pragmatic step Member States can collaborate to share information regarding the incidence and proposed use of orphan works.

In the context of literary works the ‘Accessible Registries of Rights Information on Orphan Works’ (ARROW) project represents a pan-European project initiative aimed at developing databases, shared contractual practices and guidelines for ‘diligent search’ processes. Ultimately ARROW aims to deliver a ‘Rights Information Infrastructure’, comprising tools for searching rightsholders, a registry of Orphan Works, and appropriate redirection to ‘clearing services’ for Orphan 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?

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

In the UK ALCS works in partnership with the CLA and ERA provides mandates for the operation of schemes permitting uses of works that include teaching and research. Both schemes have successfully extended the reach of their licences to include distance learning and off-site access, by working with licensees to identify their evolving needs and develop appropriate licensing terms.

While these educational licence schemes have their origins in the UK statutory exceptions regime (which itself reflects the principles of Article 5(3)(a)), extensions to the licensing schemes to cope with modern forms of distance learning reflect the need to find solutions to uses beyond the reach of statutory exceptions. The Green Paper notes, by reference to Recital 44, that Member States must judge the economic impact of exceptions in the context of digital usage and that this may operate to limit their scope.

Considering the full breadth of possible uses of works for teaching and research in the on-line environment, a combination of exceptions, licensing schemes linked to exceptions and commercial licensing arrangements are necessary – covering everything from a fair dealing use of a few lines of text, to the acquisition of bespoke digital teaching materials.

In such an environment it may be argued that overly prescriptive exceptions set out in the Directive may hinder the development of new licensing solutions. We would also query whether the reference in Recital 42 of the inclusion of distance learning is not sufficient clarification in itself.

(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?

It is vital that teaching and research exceptions (and any licensing schemes linked to them) apply so as to enable access for non-commercial learning and study, without providing competition for commercial content access - which in turn may lead to lost remuneration for the creators of content, and other rightsholders. Furthermore an extension of the exception that has the effect of creating imbalances in the commercial market – with accompanying implications for the level of returns received by the individual authors of works – must be reviewed in light of the requirements of the Three Step Test.

The preservation of this balance requires clarity as to the permitted terms upon which works are to be used under exceptions. In this regard clarifying this exception in terms of its ‘off-site’ application - to the extent that Recital 42 refers both to ‘distance learning’ and ‘the establishment concerned’ - must be carefully considered.

Rather than focusing on a clarification that an exception may apply ‘at home for study’, it is more important to be clear about the nature of the acts that are permitted and who may undertake them.

For example a student accessing course materials via the secure VLE of their university through their home Internet connection has clear links to illustration and teaching as envisaged by the Directive and may be incorporated within the terms of an extended licensing scheme. Conversely an amendment to this exception that could be read as a blanket permission to copy and communicate works, for the purposes of non-commercial ‘home study’ carries the dangers of conflicting with other private use exceptions and their accompanying terms, as well as more commercial services not primarily designed for such uses. Unless the amendments aiming to clarify this exception can deliver the ‘clearly defined scope’ referred to in the Green Paper, the retention of the current wording may in fact offer more certainty.

**(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?**

It may prove difficult to reconcile the imposition of minimum allowances with the different national rules that permit uses of excerpts of works by reference to factors that can vary in each given case - such as the UK ‘fair dealing’ rules for research and private study. More practically it may be difficult to make meaningful rules for sub-dividing works such as sound recordings into discreet parts for the purposes of an exception.

## 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?**

A situation common to all Member States is that the emergence of enabling technologies increases the freedom for end users to access and deal with copyright works. Rather than more precise rules, greater emphasis should be placed on supporting campaigns and other initiatives aimed at providing clearly understandable advice and guidance to raise the level of knowledge and awareness about the existing rules on copyright and other IP rights.

### **(25) Should an exception for user-created content be introduced into the Directive?**

We are concerned that, in an attempt to deal with a perceived barrier to innovation and knowledge dissemination, the debate in the Green Paper seems to be edging towards a more fundamental review of basic copyright principles. The reference to the definition of UCC, extracted from the OECD study, talks of content which “reflects a certain amount of creative effort, and which is created outside of professional routines and practices”. The various legal regimes within the Community already have well-established rules concerning the necessary standard for copyright protection to arise. There is a danger that introducing new concepts, such as the circumstances in which a work was created may cause confusion in light of these existing rules.

As to the need for a new copyright exception, the Green Paper highlights the potential for flexibility offered by the existing exceptions regimes set out in the Directive. Furthermore, domestic rules - such as UK fair dealing exceptions - present further flexibility in terms of using parts of works in situations relevant to the ‘knowledge economy’, such as research and private study. The approach of developing the existing legal framework is also recognised in the OECD study, “In principle, copyright limitations provide ample opportunity for a use to qualify as a permissible exception or limitation. Future case law may determine the boundaries of exceptions and limitations and produce clarity in the UCC context.”

On the basis that an approach based around exceptions would be focused on non-commercial uses, further access to copyright works for the purposes creating derivative works in a commercial context, like other commercial uses, can be managed through the existing licensing frameworks. It seems logical that the creator of a derivative work – even if they were operating outside of “professional routines and practices” would still want to have the choice to share in any commercial success of their work.

Finally the Green Paper refers to the need to evaluate the impact of a new exception in view of any possible conflict with 'economic interests of the rightsholders of the original work.' Any discussion of a new exception allowing recognisable elements of pre-existing works to be copied and distributed must include a review of the impact on the moral rights of the original creator, not just the economic rights attaching to the work itself. By extension such a review should also evaluate the impact of the lack of harmonisation in the application and operation of the different moral rights regimes operating throughout Europe.