Response by the IP Foresight Forum (a grouping of independent intellectual property academics in the UK) to the UKIPO's Consultation: Taking Forward the Gowers Review of Intellectual Property; Proposed Changes to Copyright Exceptions

Preliminary Observations

The copyright exceptions have often presented a focal point for discussions surrounding the balance established by UK copyright law between an author's moral and economic rights to his intellectual creations, everyone's right to freedom of expression, and the public's interest in creative works. While the rapid development and dissemination of digital technologies re-energized and refocused this debate, the crux of the issue remains fundamentally the same - how is the scope of copyright protection to be refined so as to ensure the law invigorates creativity without stifling cultural, economic and personal development? In the absence of conclusive empirical analysis as to the effects of copyright monopolies on creativity, efforts to establish this "ideal" balance have been marred by conjecture. Furthermore, the rapid pace of technological progress has resulted in an often reactionary legislative approach that is piecemeal in nature. In contrast, it is encouraging that the Gowers Review adopted a comprehensive analysis of the copyright system in the UK and emphasized the importance of forward thinking copyright policy that embraces technologically neutral laws. The present Consultation could have provided an opportunity for further thorough discussion of the copyright exceptions so as to foster 'coherence, balance and flexibility' in the law through the elucidation of clear and operable fundamental principles. While it is unfortunate, however, that the UKIPO rejected such an approach, choosing only to address the individual and detailed deficiencies within the law identified by the Gowers Review, while offering little discussion of the role of the permitted acts within the copyright framework, it is recognised that the scope of the consultation is necessarily limited by European and International obligations. Within this wider context, for example, the underlying nature of the copyright exceptions (i.e. as limitations on the scope of copyright, defences to infringement or user's rights) warrants considerable attention. Indeed, reconsideration of the relationship between the permitted acts, contract law and Digital Rights Management (DRM) (in particular Technological Protection Mechanisms) would be instrumental in the formation of an enduring legal framework based on clear and coherent legal principles. As many of these more fundamental issues lie within the European and International domain we would suggest that a priority for the Government is to institute a further consultation identifying what the UK should be doing at European and International levels to address these matters.

Despite these limitations, the UKIPO raises a number of important issues, and the proposed amendments to the copyright exceptions ought to make the law more intelligible and, thereby, promote public confidence.

Recommendation 2: Education Exceptions

Distance learning is a burgeoning field of education, having benefited from both improved information and communications technologies and innovative teaching strategies. The popularity of distance-learning education is illustrated by the International Centre for Distance Learning's database, which contains over 5,000 UK based distance-learning courses offered by more than 300 education providers and covering a wide variety of subjects and qualifications[1]. It is the aspiration of any educator to accommodate different learning skills and styles within a programme design, and to facilitate participation within a supportive and stimulating online environment. We, therefore, welcome the proposed extension of the copyright exceptions to enable distance-learning providers to benefit from the education provisions, as we believe access to a greater diversity of resources facilitates a more vibrant and challenging educational environment. Accordingly, we also support the extension of s. 36 of the Copyright, Designs & Patents Act 1988 (CDPA) to include more classes of copyright works, such as sound recordings and films, and the inclusion of on-demand audiovisual works within s.35 CDPA. The use of broadcasts, film and sound recordings can add to the quality of any distance learning programme, adding breadth and depth to the learning experience for the benefit of students. We recommend adopting a flexible approach to the size of extracts that may be used pursuant to the extended s.36 CDPA, as percentage rules tend to arbitrarily limit the utility of the exception. Institutions ought to be able to use as much of a work as is necessary for instruction - having considered, among other things, the manner in which the work is to be used, the potential for further communication of the work and the commercial value of the work concerned. As regards on-demand audiovisual works, limiting the application of the extended s.35 CDPA to previously broadcast works may prove difficult in practice, unless a duty falls to on-demand service providers to identify whether or not a work has been broadcast. Even so, such a distinction may rapidly become outdated as on-demand services become more widely available and increasingly replace traditional broadcast services.

We do not anticipate that the extension of the exceptions will impact unduly on rights-holders, as encouraging students to research material for themselves is an important part of education. The provision of such materials will be valuable in circumstances where the copyright work has been archived, or where alteration of the work is necessary for teaching purposes. Thus, while we understand the concerns of rights-holders regarding the broadening of s. 36 CDPA to cover more classes of works and s. 35 CDPA to cover on-demand audiovisual works, we do not believe that teaching institutions are likely to provide material gratuitously. Furthermore, as copyright works may only be disseminated under these exceptions for the purposes of instruction, the majority of the material concerned is unlikely to be widely popular beyond the classroom or online environment. In addition, the exceptions will not apply where a licensing scheme operates and, therefore, we believe the interests of rights-holders are adequately accommodated.

Nonetheless, it is important that materials made available pursuant to the education exceptions are only accessible by individuals connected with the relevant educational environment. It is our opinion that the class of persons able to access such works ought not to be

[1] International Centre for Distance Learning (available from http://www-icdl.open.ac.uk/)

drawn too narrowly. A distinction between teaching and other staff may be difficult to draw and, indeed, individuals largely concerned with administration and IT play an important role in ensuring the continuing operation of the virtual environment. Consequently, restricting access to teachers and students only might threaten the efficient operation of such a system and create a distinction that is difficult to apply in practice. Thus, we suggest that access to material made available under ss. 35 and 36 ought to apply to teachers and pupils at an educational establishment and other persons directly connected with the *teaching* activities of the establishment. In order to ensure that these persons are the only persons able to access the copyright works, a distance-learning provider will certainly need to adopt appropriate security measures. However, the burden imposed on such institutions must reflect technological practicalities, limitations on resources, individual rights to privacy and the commercial value of the work concerned. A balance needs to be drawn between a prescriptive legislative approach, which may prove short-lived due to rapid changes in technology, and an overly flexible approach, which may make distance-learning providers hesitant to use relevant copyright material as they remain unsure how to avoid liability. In most cases we believe password protection coupled with detailed and clear warnings regarding the further communication of restricted material is sufficient. In addition, the computing regulations of distance-learning providers should convey relevant information about copyright law and ought to be readily available in the virtual learning environment. We consider it to be of great importance that the legislature balances the competing interests and establishes an unambiguous rule that educational institutions can readily follow.

Recommendation 9: Research & Private Study

Due to their popularity and, therefore, their impact on society, the study and research of well-known contemporary sound recordings, broadcasts and films contribute significantly to society's knowledge and understanding. However, the popularity of these works, coupled with the ease with which they can now be communicated, makes such works particularly susceptible to piracy. Consequently, the extension of the copyright exception for research and private study to include these works requires careful consideration. It would clearly be undesirable if the exception were employed to shield student pirates from responsibility. However, not all sound recordings, broadcasts and films are widely popular, while their utility for research and study may be of equal value. Thus, although it is important to impose limitations on the circumstances in which these works may be used for research and private study, we believe the extension of s. 29 CDPA to include all copyright works represents a valuable amendment to the law.

In order to ensure that only activities constituting genuine research and private study benefit from the application of this exception, the law faces the difficult task of discerning legitimate forms of study. While limiting the application of the exception to individuals enrolled in particular courses would certainly be a convenient means of achieving this goal, it is a blunt approach that may hamper cross-discipline research and impede progress in new fields. However, if we define private study as a process whereby a person undertakes to learn by acquiring existing knowledge and understanding, such an approach may be acceptable as these individuals are less likely to explore the frontiers of disciplines. In contrast, the purpose of research is ultimately to contribute to this body of knowledge and understanding and, therefore, restricting the application of the exception in such a way would be inappropriate. Furthermore,

given piracy concerns are particularly acute where private study is concerned, due to the broad range of activities that potentially constitute private study, it seems sensible to isolate research from private study. However, the research and private study distinction is opaque. While the ultimate concern of PhD students is research and that of undergraduate students is study, both types of students will engage in both types of activity. Furthermore, what of the film connoisseur who in his spare time analyses a number of films in order to identify common social themes and presents his findings on his blog? Would it make a difference if he also happened to be working towards a PhD in the fields of geography or anthropology? One might also consider the position of an undergraduate student who believes his work is original and will contribute to society's knowledge and understanding. The distinction is clearly difficult to apply in practice and, therefore, we feel it is unwise to distinguish between research and private study for the purpose of determining which classes of works can be used under the s.29 CDPA exception. An alternative may be to limit the application of the exception for research and private study as regards sound recordings, broadcasts and films to individuals enrolled in an education institution (to be defined broadly), and where such use of the work constitutes fair dealing. The clarity of the law would be greatly enhanced by the provision of guidance on the meaning of fair dealing in this context. This would also enable academic institutions to communicate relevant information to students.

Finally, we would like to echo the British Library's concern that it is necessary to extend the library privilege to enable librarians to copy and deliver such works on behalf of students and researchers, as many valuable sound recordings, broadcasts and films are stored in library collections.

Recommendation 10A & 10B: Library Privilege Exceptions

There is a strong public interest in the maintenance of cultural richness and diversity through the preservation of copyright works. Technological progress has expanded the formats in which cultural creativity is stored and, consequently, it is important that the library privilege exception for preservation reflects the cultural value of these newer classes of works. In addition, progress in digitization offers improved preservation techniques by enabling the storage of copyright works in multiple formats. Thus we welcome the extension of the library privilege exception for preservation to cover all classes of works, to enable format shifting and to enable multiple copies to be created for the purpose of preservation. However, while it is clear that the preservation of these works serves a public interest, it is also important that copies produced pursuant to the library privilege exceptions do not compete with the original work. Thus we concur with the British Library's recommendation that libraries be permitted only to make a "reasonable number" of copies for the purpose of preservation. Furthermore, guidance on what might be considered reasonable in given circumstances may be beneficial and add to the clarity of the law.

Recommendation 8: Format Shifting Exception

The notable absence of an exception to copyright infringement for format shifting has been a source of concern for some time. Format shifting has become a socially acceptable behaviour, particularly as regards sound recordings and film works. Thus, we welcome the

introduction of an exception to legitimise this activity, as we hope this will enhance consumer confidence in the law. Furthermore, we concur with the UKIPO's suggestion that the introduction of this exception would cause no significant harm to rights holders and, therefore, that compensation is unnecessary. Indeed, the introduction of such an exception may benefit rights holders as it may engender greater respect for copyright laws and, thereby, greater acknowledgement of the rights of copyright proprietors.

The practice of format shifting appears to have become most popular where sound recordings, films and broadcasts are concerned. This may be due to the ease with which these works can be format shifted, the variety of devices on the market to play them and the regularity with which consumers enjoy such works. While format shifting of literary and artistic works appears to have been less popular, due perhaps to the low penetration of scanning technologies within the domestic environment, technological progress has and will continue to change the way in which we use these categories of works. An example might be the scanning of wedding photographs (in which the copyright vests in the photographer) to enhance a digital library of photographs; or of the format shifting of an e-book to be read at a more convenient time and on a more convenient device. Therefore, we feel it is unwise to limit the application of the proposed exception to sound recordings, films and broadcasts. We would also suggest that the adoption of a single exception suitably framed to cover all classes of works would be clearer for the consumer than a differentiated approach where permitted format shifts are dependent on the class of work concerned. In addition, it appears unnecessary to limit the number of permissible format shifts as this too would not accord with current consumer practice or expectations although we appreciate that care needs to be taken to ensure that format shifting for personal and private use does not become equated with a private copy exception. Thus, the format shifting exception should extend to all classes of work (except computer programs), and apply in circumstances where a consumer has legitimately obtained a copy of the work (whether by purchase or under one of the copyright exceptions) and format shifts the work for personal and private use.

The UKIPO discusses the potential for consumers to format shift lawfully obtained copies of copyright works in order to sell the original and enjoy the copy. Such activities would clearly impact on the interests of rights holders and, thus, this problem certainly needs to be considered. However, imposing a requirement that format shifted copies of a work may only be held so long as the original is retained, is fraught with problems. Such a limitation will be impossible to enforce, it is contrary to current consumer practice and it may be unjustified where the original is lost, damaged or destroyed, rather than sold. Indeed, the UKIPO suggests that format shifting of artistic works may be legitimate where the copy has been made for one's own records for insurance purposes. However, the record would be useless if it had to be disposed of should the original be destroyed. A more appropriate solution may be to limit the format shifting exception to circumstances where the original is retained, unless it is stolen, damaged or destroyed. However, we recognise that this too will be difficult to enforce.

Finally, the Gowers Review recommended, "policy makers should adopt the principle that the term and scope of protection for IP rights should not be altered retrospectively". The basis for this recommendation was that as "copyright is a contract between creators and society", once the work has been created the terms of the contract ought to remain the same. In the Gowers Review the argument is employed for the protection of the consumer. However, it is equally as

applicable for the protection of the rights holder. The introduction of any new exception to copyright law alters the scope of the copyright monopoly and, therefore, ought not to operate retrospectively. Thus, the Review's suggestion that the format shifting exception only apply to works published after the coming into effect of the law is sound in principle. However, in the given circumstances such an approach will likely cause consumer confusion and bring the law into disrepute. Option two, which allows format shifting of works purchased after the exception takes effect, is plagued with similar difficulties. Therefore, we suggest that the new exception ought to permit format shifting of works copied after the law comes into effect. Indeed, given the IPO's acknowledgement that the loss to right holders as a consequence of the exception is "minimal", this would seem to be the most practical solution.

Recommendation 12: Caricature, Parody and Pastiche

Notwithstanding a strong tradition of parody in the UK, the treatment of works of parody by copyright law remains uncertain. As a form of speech, parody commonly presents an effective means of contribution to public debate, at least in part, due to the alluring force of its humorous or imitative nature. However, a parody is reliant upon the parodied work to convey its message, and although a parodist will, at the very least, utilise thematic elements, he will often reproduce substantial portions of the original work. A parodist can avoid liability for copyright infringement under the present law if he ensures that either his work does not reproduce "the whole or any substantial part" of the copyright elements of the original work[2], or that the use of the original copyright work constitutes fair dealing under s. 30(1) CDPA. Given that the use of the distinctive elements of the original work is integral to the art of parody, many parodies cannot be created using a qualitatively insubstantial part of the copyright work. Thus, a parody is likely to infringe the original work's copyright unless its author can rely on the fair dealing exception of criticism and review provided by s. 30(1) CDPA.

The traditional view has been that s. 30(1) only applies where the derivative work criticises and reviews the original work, another work or the performance of a work[3]. Thus, the Court in *Ashdown v Telegraph Group*[4] found that the defence was inapplicable where a memorandum had been used in order to criticise events and persons documented therein, rather than the nature and characteristics of the memorandum itself. However, in *Pro Sieben Media v. Carlton UK Television*[5] and *Fraser-Woodward Ltd v. BBC*[6] where the criticism was of industry practices by way of criticism of specific works, the courts nevertheless concluded that the s. 30(1) defence applied. In *Time Warner v. Channel 4*[7] s. 30(1) was held to excuse the use of extracts from the film *A Clockwork Orange* to criticise the decision to prevent the film's distribution. Therefore, it appears that s. 30(1) will protect parodists who employ their art to criticise philosophies or practices associated directly, and occasionally indirectly, with the original work. In contrast, this fair dealing defence would not protect parodies that utilise

[2] CDPA 1988, s. 16(3)(a).
[3] Bentley and Sherman, *Intellectual Property Law* (2004) OUP (2nd edition) NY, at p. 201.
[4] [2002] RPC 235.
[5] *Pro Sieben Media v. Carlton UK Television, supra.* 25.
[6] *Fraser-Woodward Ltd v. BBC* [2005] FSR 35.
[7] [1994] EMLR 1, at p. 15.

copyright material to criticise unrelated ideas or activities. However, a parodist may seek to use a work with which the public has come to associate particular social values in order to comment upon those values. In such a case the parodist merely uses the original as a means to conjure-up particular ideas in the minds of his audience. As an example, consider a parody designed to criticise the actions of politicians by utilising elements of a well-known and patriotic song. Despite the importance of political speech, such a work may well infringe copyright in the song. We believe that this represents a significant gap in the present treatment of parody. Consequently, it seems inappropriate to confine the proposed exception for parody to those that comment upon the underlying work, as to do so fails to remedy existing gaps in the law and excludes worthwhile uses of parody.

Although we feel the law is currently too restrictive of parody, we recognise the importance of keeping this exception within appropriate limits. Thus, we agree that a parodist ought only to be entitled to rely on the exception where the parodied work has been made available to the public. Indeed, this must to be the case, as a parody cannot conjure-up the original work if no one has ever heard of or seen the original. Furthermore, under the current law, a parodist must give "sufficient acknowledgement" identifying the author and the work[8] restricting the applicability of s. 30(1) to parody, as parodists rarely explicitly acknowledge the source work. The inclusion of such a requirement in the proposed exception would have a similar effect. Better that "sufficient acknowledgement" should not require a parodist to provide the name of the original author, but merely some identification from which "reasonably alert" members of the public are able to discern the author and identity of the original work[9]. The degree of acknowledgement required could, therefore, depend on the degree of public recognition of the underlying work.

While it might be argued that the concept of fair dealing has a role to play in protecting the interests of copyright holders, we believe that limiting the parody exception in this way would sorely circumscribe its utility. The effect of parody, whether through comment on the original work or of wider social issues, lies in the manner in which it distinguishes itself from the original, and should thus not act as a substitute for the original. However, such are the uncertain boundaries of fair dealing, a risk-averse intermediary faced with a request to publish or otherwise make available a parody may refuse to do so precisely because the parameters of the law are so uncertain. There are good examples in a number of jurisdictions where courts have shown themselves supportive of parody while at the same time recognizing there are limits to the practice. An example is the Belgian case of *O. Ahlberg v Moulinsart SA, F. Rodwell and Ch. Hersovici*, [2007] T.B.H. 687. Our preference is for a stand-alone exception for parody and would endorse the French approach in that the exception would apply where the rules of the genre are observed. We recognise this may entail a re-drawing of the boundaries of the fair dealing defence for criticism and review, but believe that minor adjustment would be outweighed by the clarity brought to the law by a new stand-alone defence.

[8] per CDPA 1988, s. 30(1); s 178.
[9] Bently and Sherman, *supra.* 3, p. 197; see also *Pro Sieben Media v. Carlton UK Television* [1997] EMLR 509, at p. 597; and *Clarke v. Associated Newspapers* [1998] 1 All ER 959, at p.946 for discussion of acknowledgement in the context of the moral right to object to false attribution.

Summary & Conclusion

Regular appraisal of the copyright system is necessary to ensure the balance achieved by the law between the competing public and private interests continues to reflect the UK's changing social, technological and commercial environment. So, for example, the proposed format-shifting exception responds to changes in consumer expectations, and the recommended extension of the library and educational institutions exceptions accommodate the promise of digital technologies for preservation and distance learning. Furthermore, the introduction of a discrete exception for parody would clarify an otherwise ambiguous area of law. The implementation of these recommendations may, therefore, improve the coherence, balance and flexibility of the copyright law. However, these amendments fail to address a number of general and specific ambiguities in the current copyright system. For example, the meaning of "non-commercial" use in the context of the exception for research and private study, and the role, if any, of the public interest defence to copyright infringement. In addition, a key area of concern emerging from digitization and improved communication technologies is the appropriate relationship between the copyright exceptions, DRM and the freedom of contract. The Consultation pays little attention to this issue and fails to address the adequacy of the "Notices of Complaint" procedure under s. 296ZE CDPA - simply noting that in their view the existing procedure is the "best approach" to the DRM workaround[10]. Furthermore, the Consultation barely mentions the role of human rights in the formation of balanced copyright exceptions. The UKIPO notes, "The primary relevant [European Convention on Human Rights] consideration is whether Article 1, Protocol 1 ECHR is engaged", and reserves comment on this issue for later. Human rights concerns ought to inform all stages of the legislative process, and we feel some of the issues raised in this consultation ought to be considered in light of privacy and freedom of speech doctrines. Indeed, the proposed exception for parody highlights the importance of human rights considerations for the framing of the copyright exceptions. While the UKIPO's consultation represents an important contribution to the ongoing appraisal of the copyright system, we feel the benefit of this consultation has been limited by its narrow scope and approach. As we stated in the introduction, we feel there is a pressing need for a broader consultation to identify what the UK should be doing at European and International levels to address these issues.

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[10] at p.26, para. 165.