



**British Universities  
Film & Video Council**  
moving image and sound, knowledge and access

**21 March 2012**

## **Responding to the HM Government Consultation on Copyright**

The BUFVC (see <http://bufvc.ac.uk/>) is a national representative body delivering information and services promoting the production, study and use of moving image and sound for higher learning and research.

This response has been prepared through formal consultation with the Trustees of the BUFVC (there are twelve Trustees elected by member representatives from universities and colleges, and two appointed Trustees including one appointed direct by the Higher Education Funding Council for England on behalf of the Joint Funding Councils). In addition to consultation with the Trustees, the response is backed up by data derived from a survey of all Institutions of Higher Education in the UK and all BUFVC member Institutions of Further Education (please refer to the file 'BUFVC shared services report 22 April 2010' submitted by e-mail).

The Council delivers a number of unique national services, many of which are offered online, to support the day-to-day work of staff and students in member institutions. Some of these services are built around the existing UK copyright exceptions (particularly Sections 34 and 35, and accompanying licences) in the CDPA 1988 that have, during more than 20 years, offered maximum flexibility in delivering long-term scholarly access and use of formerly broadcast content received in the UK.

Off-Air Recording Back-Up Service (see <http://bufvc.ac.uk/tvandrдио/offair>) delivering physical copies of formerly broadcast content to licensed educational establishments and recorded on their behalf;

Television and Radio Index for Learning and Teaching (TRILT - see <http://bufvc.ac.uk/tvandrдио/trilt/>) the UK's largest online database of television and radio receivable in the UK including annotation and links to sources of copies of programmes available under S35 and licence post-transmission. It is important to note that the TRILT is being developed as the core of a national shared service on behalf of universities and colleges in the UK operating under S35 of the CDPA 1988 and the embedded licences;

Box of Broadcasts (BoB - see <http://bufvc.ac.uk/tvandrдио/bob>) an online shared service for persistent post-transmission access to broadcast content operated in the UK for licensed bodies under S35 and ERA and ERA Plus licences - the service uses secure authentication and GeoIP controls in its delivery to bona fide students and staff in UK HE/FE;

News on Screen (see <http://bufvc.ac.uk/newsonscreen>) the most comprehensive online database describing the output of the British cinema newsreel companies and cinemagazines - including links to some 40,000 online newsreel stories and some 80,000 items of relevant documentation and ephemerae (scripts, dope sheets etc.).

**Question 1.** *Does the initial impact assessment capture the costs and benefits of creating a system enabling the use of individual orphan works alone, as distinct from the costs and benefits of introducing extended collective licensing? Please provide reasons and evidence about any under or over-estimates or any missing costs and benefits?*

*The Government is particularly interested in the scale of holdings you suspect to be orphaned in any collections you are responsible for. Would you expect your organisation to make use of this proposed system for the use of individual orphan works? How much of the archive is your organisation likely to undertake diligent searches for under this proposed system?*

*What would you like to do with orphan works under a scheme to authorise use of individual orphan works?*

The BUFVC does hold small collections of third party content, in particular film, in which rights ownership details have either been lost or transferred. In our case there is no imperative to copy or distribute these works unless or until there is demand that would justify the cost (technical processes and/or rights clearances) of copying or release.

The BUFVC would encourage the development of an equitable modus operandi that would encourage the copying and efficient release of content (that is either fully or partially orphaned), to support learning and research.

**2.** *Please provide any estimates for the cost of storing and preserving works that you may not be able to use because they are/could be orphan works. Please explain how you arrived at these estimates.*

The BUFVC holds a relatively small quantity of distribution prints and an even smaller quantity of master printing material. The estimated cost of storing this content off site in controlled conditions would amount to around £500 per annum.

**3.** *Please describe any experiences you have of using orphan works (perhaps abroad). What worked well and what could be improved? What was the end result? What lessons are there for the UK?*

We do not have any direct experience that would qualify us to answer these questions.

**4.** *What do you consider are the constraints on the UK authorising the use of UK orphan works outside the UK? How advantageous would it be for the UK to authorise the use of such works outside the UK?*

It would seem inappropriate to consider authorising use of orphan works outside the UK legislature unless the specific legal arrangements and exceptions pertaining in the UK were harmonised in the legislatures of all destination territories.

**5.** *What do you consider are the constraints on the UK authorising the use of orphan works in the possession of an organisation/individual in the UK but appearing to originate from outside the UK:*

*a) for use in the UK only*

*b) for use outside the UK?*

*How advantageous would it be for the UK to authorise the use of such works in the UK and elsewhere?*

Authorisation for use of orphan works in the UK would appear possible under the proposed arrangements for UK legislation, but it is hard to imagine how this could be achieved for use of the content outside the UK without full harmonisation under the legislatures of all destination territories. Foreign originated content would be difficult to justify drawing in for 'authorisation' to use.

It is important to note that many film or television titles are subject to exclusivity arrangements (under contract) to distribute in different territories - which presents a significant risk. If an authorisation agency broke one or more exclusivity arrangements (that subsequently came to light) the agency would need to be able to settle the resulting damages.

**6.** *If the UK scheme to authorise the use of orphan works does not include provision for circumstances when copyright status is unclear, what proportion of works in your sector (please specify) do you estimate would remain unusable? Would you prefer the UK scheme to cover these works? Please give reasons for your answer.*

We do not have sufficient direct experience that would qualify us to answer these questions.

**7.** *If the UK 's orphan works ' scheme only included published/broadcast work what proportion of orphan works do you estimate would remain unusable? If the scheme was limited to published/broadcast works how would you define these terms?*

We do not have sufficient direct experience that would qualify us to answer these questions.

**8.** *What would be the pros and cons of limiting the term of copyright in unpublished and in anonymous and in pseudonymous literary, dramatic and musical works to the life of the author plus 70 years or to 70 years from the date of creation, rather than to 2039 at the earliest?*

If a work were anonymous it would appear impossible to identify its exact copyright term (possibly life plus 70 years) because there is a contradiction here.

Many creators create works during their life, which they purposely do not wish to see the light of day, or to be used or published. There are also cases of films that are briefly published, but withdrawn with the intention of them not being seen again.

If a work were 'found', in future, it would seem inappropriate automatically to expose it to being published, especially during copyright term, simply because it was regarded as orphaned.

**9.** *In your view, what would be the effects of limiting an orphan works' provision to non-commercial uses? How would this affect the Government's agenda for economic growth?*

Limited non-commercial access to copying and use of orphan works would reduce the potential liability to reversion rights owners. It is not clear quite how large (or small) the effect of the release of orphan works would be on UK economic growth.

**10.** *Please provide any evidence you have about the potential effects of introducing an orphan works provision on competition in particular markets. Which works are substitutable and which are not (depending on circumstances of use)?*

We do not have any direct experience that would qualify us to answer these questions.

**11.** *Who should authorise use of orphan works and why? What costs would be involved and how should they be funded?*

We do not have any direct experience that would qualify us to answer these questions.

**12.** *In your view what should constitute a diligent search? Should there be mandatory elements and if so what and why?*

In the case of film, each search will require a different level of diligence depending upon the nature of the content and its originating organisation. It should therefore be, ultimately, for the courts or a tribunal to decide what was or was not 'diligent'.

**13.** *Do you see merit in the authorising body offering a service to conduct diligent searches? Why/why not?*

There is merit in such a proposal, however, the question of costs would need to be resolved in advance of a search being commissioned.

**14.** *Are there circumstances in which you think that a diligent search could be dispensed with for the licensing of individual orphan works, such as by publishing an awaiting claim list on a central, public database?*

A diligent search should always be carried out before considering the implementation of an 'Await Claim' process. Publication of a list of Awaiting Claims online would be logical and transparent from the rights owner and user perspectives. Management of such a list would undoubtedly incur significant costs.

**15.** *Once a work is on an orphan works registry, following a diligent search, to what extent can that search be relied upon for further uses? Would this vary according to the type of work, the type of use etc? If so, why?*

An orphan works registry would be very helpful. We would suggest that such a registry should include identifying text and metadata, but also thumbnail pictures for artistic works and films. In all cases it would be wrong for the aspirant user to rely completely upon the veracity of a database and previous due diligence searches to underpin a decision to copy and use. Caveat emptor would have to be the order of the day - so there would need to be careful management of risk through all sorts of measures including PI insurance etc..

Risks would vary according to the type of content and the medium intended for inclusion of the new work. Copying and use of orphaned footage in an international feature film would attract greater attention and dispute than the use of the same content on a university website (for instance) and the stakes would be a great deal higher.

**16.** *Are there circumstances in which market rate remuneration would not be appropriate? If so, why?*

It is not clear what 'market rate' means exactly. The 'rate' applied in the sale of film footage (for instance) can vary enormously from case to case because the rate is normally negotiated against the uniqueness of the content, market projections for the new product, and the size and demographic spread of the intended audience. In some cases producers will strike a bulk deal and drive for deep discounts. Such negotiations would be a challenge for organisations that, on a day-to-day basis, operate outside the 'market' (such as publicly-funded institutions).

**17.** *How should the authorising body determine what a market rate is for any particular work and use (if the upfront payment system is introduced)?*

This would be an exceptionally difficult task that could only be accomplished by reference to 'the market'. This 'monopoly' body would be open to criticism both by owners of alternative content and by producers and users negotiating rights elsewhere.

**18.** *Do you favour an upfront payment system with an escrow account or a delayed payment system if and when a reventant copyright holder appears? Why?*

A delayed payment system would be likely to be preferable for content producers, although upfront payment into escrow would be more transparent and attract reventant rights holders earlier on in the process.

**19.** *What are your views about attribution in relation to use of orphan works?*

All copied works should be accompanied by a sufficient acknowledgement (for any known associated names and source of the original), including a statement that the content had been obtained as an Orphan Work.

Avoiding due acknowledgement would simply dilute the long-term value of content that is put before the public. On-screen credits and source details (for film content) offer provenance and referable data that gradually improve the standing and public value of content over time.

**20.** *What are your views about protecting the owners of moral rights in orphan works from derogatory treatment?*

As with 'paternity', the protection of a work from derogatory treatment as moral rights should be a sine qua non (whether or not a work is orphaned).

**21.** *What are your views about what a user of orphan works can do with that work in terms of duration of the authorisation?*

The answer to this question should refer back to the issue of 'market rate', for the 'market rate' is likely to be partly determined by how long a new work will continue to be used/exploited.

**22.** *What aspects of the current collective licensing system work well for users and rights holders and what are the areas for improvement? Please give reasons for your answers.*

Collective licensing is intended to benefit the market in offering simplicity. Where collective licensing is adaptive to the developing market, efficient in operation and capable of addressing the full spectrum of uses of content through scaled licensing rates, there is benefit to service providers/publishers and users. However, 'simplicity' can lead to the building of quasi monopolies for licences and fees and can also have the effect of stifling flexibility in available licence arrangements.

From the point-of-view of rights owners, there is a need for efficiency in the calculation of due payments, and settlement in a timely manner. Unfortunately, some collective licensing agencies have been less than fully transparent in the process of calculation and return of funds to owners. There are also significant issues around the long-term retention, by collecting agencies, of funds in escrow on behalf of rights holders without their knowledge.

**23.** *In the Impact Assessment which accompanies this consultation, it has been estimated that the efficiencies generated by ECL could reduce administrative costs within collecting societies by 2-5%. What level of cost savings do you think might be generated by the efficiency gains from ECL? What do you think the cost savings might be for businesses seeking to negotiate licences for content in comparison to the current system?*

We do not feel qualified to answer these questions.

**24.** *Should the savings be applied elsewhere e.g. to reduce the cost of a licence? Please provide reasons and evidence for your answers.*

We do not feel qualified to answer these questions.

**25.** *The Government assumes in the impact assessment for these proposals that the cost of a licence will remain the same if a collecting society operates in extended mode. Do you think that increased repertoire could or should lead to an increase in the price of the licence? Please provide reasons for your answers.*

It will undoubtedly be argued by collecting societies that the increased responsibilities in collection/administration from an extended repertoire, and the increased granularity of payments to be made to an extended group of owners, will result in increased costs that will have to be met through the licensing system.

In principle, prices should not rise because, as Charles Clark suggested "The answer to the machine is in the machine". In practice, the price will undoubtedly rise if efficient, transparent, equitable and trackable systems of charges and returns are not put in place.

**26.** *If you are a collecting society, can you say what proportion of rights holders you currently represent in your sector?*

N/A

**27.** *Would your collecting society consider operating in extended licensing mode, and in which circumstances? If so, what benefits do you think it would offer to your members and to your licensees?*

N/A

**28.** *If you do not intend to operate in extended licensing mode, can you say why?*

N/A

**29.** *Who else do you think might be affected by the introduction of extended collective licensing? What would the impact be on those parties? Please provide reasons and evidence to support your arguments.*

If extended collective licensing serves to undermine the current status quo of access charges from film and television archives in what is regarded as 'secondary' licensing - the secondary use of parts of works created with third party content sourced from archives - this would be likely to have a substantially deleterious effect on income to archives and thereby undermine the existing economy and business case which funds the long-term preservation and storage of archive content.

It is important to recognise that, in the absence of a process of legal deposit in the UK, a very large proportion of the UK's national heritage in moving image and sound archive content is in private hands, without state support. These collections rely on access fees, and a part of trading in primary and secondary licensing to obtain the necessary funds to sustain their collections.

**30.** *What criteria do you think should be used to demonstrate that a collecting society is "representative"? Please provide reasons for your answer.*

We do not feel qualified to answer this section.

**31.** *Do you think that it is necessary for a collecting society to obtain the consent of its members to apply for an ECL authorisation? What should qualify as consent- for example, would the collecting society need to show that a simple majority of its members have agreed to the application being made?*

We do not feel qualified to answer this section.

**32.** *Apart from securing the consent of its members and showing that it is representative, are there other criteria that you think a collecting society should meet before it can approach the Government for an ECL authorisation? Please give reasons for your answer.*

We do not feel qualified to answer this section.

**33.** *When, if ever, would a collecting society have reasonable grounds to treat members and non-member rights holders differently? Please give reasons and provide evidence to support your response.*

We do not feel qualified to answer this section.

**34.** *Do you have any specific concerns about any additional powers that could accrue to a collecting society under an ECL scheme? If so, please say what these are and what checks and balances you think are necessary to counter them? Please also give reasons and evidence for your concerns.*

We do not feel qualified to answer this section.

**35.** *Are there any other conditions you think a collecting society should commit to adhering to or other factors which the Government should be required to consider, before an ECL authorisation could be granted? Please say what these additional conditions would help achieve?*

We do not feel qualified to answer this section.

**36.** *What are the best ways of ensuring that non-member rights holders are made aware of the introduction of an ECL scheme and that as many as possible have the opportunity to opt out, should they wish to?*

We do not feel qualified to answer this section.

**37.** *What type of collecting society should be required to advertise in national media? For example, should it need to be a certain size, have a certain number of members, or collect a certain amount of money?*

We do not feel qualified to answer this section.

**38.** *What would you suggest are the least onerous ways for a rights holder to opt out of a proposed extended licensing scheme?*

We do not feel qualified to answer this section.

**39.** *Should a collecting society be required to show that it has taken account of all opt out notifications? If so, how should it do so? Please provide reasons for your answers.*

We do not feel qualified to answer this section.

**40.** *Are there any groups of rights-holders who are at a higher risk of not receiving information about the introduction of an ECL scheme, or for whom the opt-out process may be more difficult? What steps could be taken to alleviate these risks?*

We do not feel qualified to answer this section.

**41.** *What measures should a collecting society take to find a non-member or missing rights owner after the distribution notice fails to bring them forward?*

We do not feel qualified to answer this section.



**42.** *How long should a collecting society allow for a non-member rights holder to come forward?*

We do not feel qualified to answer this section.

**43.** *Aside from retention by the collecting society or redistribution to other rights holders in the sector, in what other ways might unclaimed funds be used? Please state why you think so?*

We do not feel qualified to answer this section.

**44.** *What do collecting societies do well under the current system? Who benefits from the way they operate? Please explain your response and provide evidence for it.*

We do not feel qualified to answer this section.

**45.** *What are the areas for improvement in the way that collecting societies operate at present? Who would benefit from these improvements, and what current costs (if any) could be avoided? Please give reasons and provide evidence for your response.*

We do not feel qualified to answer this section.

**46.** *Do you agree with the analysis contained in the impact assessment of the costs and benefits for collecting societies and their users? Are there additional costs and benefits which have not been included, or which you are able to quantify? Please provide reasons and evidence for your response.*

We do not feel qualified to answer this section.

**47.** *Who else do you think would be affected by a requirement for collecting societies to adhere to codes of conduct? What would the impact be on them? Please provide reasons and evidence for your response.*

We do not feel qualified to answer this section.

**48.** *Is one year a sufficient period of time for collecting societies to put in place a code of conduct? Please provide reasons for why you agree or disagree? Please also provide evidence to show what a workable timeline would be?*

We do not feel qualified to answer this section.

**49.** *What other benefits or rewards could accrue to a collecting society for putting in place a voluntary code? Please provide evidence for your answer.*

We do not feel qualified to answer this section.

**50.** *In your view, does it make a difference whether there is a single code, one joint code, or several joint codes? Please give reasons for your answer.*

We do not feel qualified to answer this section.

**51.** *Are there any other areas that you think should be covered in the minimum standards, or areas which you think should be excluded? Please give reasons for your response, including evidence of alternative means of securing protection in relation to any areas you propose should be excluded from the minimum standard.*

We do not feel qualified to answer this section.

**52.** *Are there any additional undertakings that a collecting society should give with regard to its members and the manner in which it represents them? Should any of the proposed minimum standards about members be excluded? Please provide reasons and evidence to support your response*

We do not feel qualified to answer this section.

**53.** *Are there any additional undertakings that a collecting society should give with regard to its licensees, or should any of the proposed minimum standards be excluded? Please give reasons and evidence for your response, included why you consider any standards which you propose should be excluded to be unnecessary.*

We do not feel qualified to answer this section.

**54.** *Are there any additional expectations for licensees that should be set out by a collecting society in its code, or should any of those listed be excluded? Please give reasons why.*

We do not feel qualified to answer this section.

**55.** *Are there any additional measures that a collecting society should put in place to ensure proper control of the conduct of its employees, agents, and representatives? Should any of the proposed standards be excluded? Please say what these are and provide evidence to support your response.*

We do not feel qualified to answer this section.

**56.** *Are there any additional provisions that you believe would enhance the transparency of collecting societies? Should any of the proposed provisions be excluded? Please give reasons and evidence to support your response.*

We do not feel qualified to answer this section.

**57.** *Are there any other criteria that a collecting society should report against? Should any of the proposed criteria be excluded? Please give full reasons and evidence for your answer, describing what impact it would have and on whom*

We do not feel qualified to answer this section.

**58.** *Are these criteria sufficient for the creation of a complaints procedure that is regarded as fair and reasonable by the members and users of collecting societies? Should any proposed criteria be excluded? Please provide reasons and evidence to support your response.*

We do not feel qualified to answer this section.

**59.** *Please indicate whether you think a joint ombudsman or individual ombudsmen would work better. Please say why you would prefer one over the other?*

We do not feel qualified to answer this section.

**60.** *Is the ombudsman the right person to review the codes of conduct? Please give reasons for your answer, and propose alternatives if think the ombudsman is not best placed to be the code reviewer.*

We do not feel qualified to answer this section.

**61.** *What do you think about the intervals for review? Are they too frequent or too far apart? Please provide reasons for your answers.*

We do not feel qualified to answer this section.

**62.** *What initiatives should the Government bring forward to provide recognition of high performance against voluntary codes of conduct? Please give reasons and evidence for your response.*

We do not feel qualified to answer this section.

**63.** *What do you consider the process and threshold for non-compliance should be? For example, should Government test compliance on a regular basis (say by following Ombudsman' s reports) or on an ad-hoc basis ? What evidence would be appropriate to demonstrate non-compliance? Please give reasons for your response.*

We do not feel qualified to answer this section.

**64.** *What, in your view, are suitable penalties for non-compliance with a statutory code of practice? For example, are financial penalties appropriate, and, if so, what order of magnitude would be suitable? Please give reasons and provide evidence for your answer.*

**65.** *Do you agree that the imposition of a statutory code should be subject to review? How long should such a code be in place before it is reviewed? Please give reasons for your response.*

N/A

**66.** *If you are a collecting society which may qualify as a micro-business, would you be likely to introduce a voluntary code? If you are a user of collecting societies, what do you believe the Government should do to encourage good practice in any collecting societies which are exempt from the power to introduce a statutory code? Please give reasons for your response.*

We do not feel qualified to answer this section.

**67.** *Do you agree that a private copying exception should not permit copying of content that the copier does not own?*

Yes, we agree, for without the pre-condition of 'owning' a copy of the content, the way would be clear for a single audio CD or DVD, for instance, to be copied virally to hundreds, if not thousands, of end users. Such a copying exception would then breach a key part of the Berne Convention three-step test in that it would undoubtedly undermine the commercial viability of certain works.

**68.** *Should the private copying exception allow copying of legally-owned content for use within a domestic circle, such as a family or household? What would be the costs and benefits of such an exception?*

Private copying, if permitted, should primarily be for private and/or personal use while accepting that others, within a domestic setting, could share in having access to, or the benefit of using, a copy (but not the benefit of an exception to copy it).

**69.** *Should a private copying exception be limited so that it only allows copying of legally-owned content for personal use? Would an exception limited in this way cause minimal harm to copyright owners, or would further restrictions be required? What would be the costs and benefits of such an exception?*

The restriction of private copying to legally-owned content would limit the potential harm an 'open' exception might otherwise cause. This is an example of UK legislation having to catch up with existing practice in a pragmatic manner (much in the same way that the Section 70 exception was installed in the CDPA in 1988 to accommodate the already pervasive use of video recorders in the home).

**70.** *Should a private copying exception be explicitly limited so that it only applies when harm caused by copying is minimal? Is this sufficient limitation by itself, or should it be applied in combination with other measures? What are the costs and benefits of this option?*

It is our understanding that any copyright exception, that is to operate correctly under the Berne Convention three-step test, can only be implemented if harm caused by copying is 'minimal'.

**71.** *Should the current mechanism allowing beneficiaries of exceptions to access works protected by technological measures be extended to cover a private copying exception? What would be the costs and benefits of doing this?*

We do not believe that content, that would be subject to DRM or TPMs, should be available under a private copying exception unless there are exceptional circumstances to permit access for copying (for instance format shifting for disability access).

**72.** *Should the preservation exception be extended:*

- *to include more types of work?*

-*to allow multiple copies to be made?*

- *to apply to more types of cultural organisations, such as museums?*

*How might this be done, and what would be the costs and benefits of doing it?*

In our view, creative works held on all carrier media in archives, museums and galleries should be subject to an exception that would permit the copying of those works for the purposes of preservation (without prior permission from owners/rights holders). If necessary, for the purposes of good preservation and security, there may have to be more than one copy created/held.

The types of archives, museums and galleries or collections that would be permitted to operate under such an extended exception should be defined in such a way as to preclude potential abuse by commercial interests.

**73.** *Is there a case for simplifying the designation process which is part of Section 75? How might this be done and what would be the costs and benefits of doing it?*

We believe it is essential to make more efficient the process of 'designation' of archives under Section 75, for the holding of formerly broadcast content. The process has to be improved, partly to respond to changes in the archive sector (at least one specialist 'designated' archive on the existing list has not made active use of its status for more than 15 years) and the expanding ecology of broadcasting that now arrives and affects the UK public.

Six significant and established UK organisations, with substantial interest in this issue, have been waiting more than six years for the process of designation to start. Meanwhile, the Government department responsible for the process, when the co-ordinated application for designation was originally lodged, - the Copyright Office - has changed its name, changed location and changed its staff. The more than six-year wait for action has been an unacceptable delay. The UK is likely, during this time, to have lost a very large quantity of the record of broadcast output that has been delivered to the UK public and will never be seen again. This includes (for instance) 24 hour television news services in English from China, Russia, Iran, France, USA and Qatar, multiple radio stations plus low and medium power transmissions that would, over time, have been an important part of the scholarly corpus had they been captured, stored and properly catalogued.

To achieve greater efficiency the process of designation should be:

(i) subject to a service-level agreement that would ensure a limit of time in the turn around of decision-making,

(ii) subject to a mechanism of feedback for applicants, and

(iii) subject to quinquennial review (with survey assessment of existing designated archives and their holdings/activity)

We suggest it would be unlikely for the process of designation to be needed to be run more frequently than every five years.

In the absence of legal deposit for television and radio content, the benefits of Section 75 designation are:

- (a) that curatorial staff may legitimately collect and store relevant broadcast content that may be co-located with specialist text, artistic works, artefacts and ephemera for the benefit of research and scholarship,
- (b) that an 'open' system (with qualifying criteria) for designation will encourage the filling of 'gaps' and the association of broadcast works in innovative collections - so strengthening the UK's scholarly corpus,
- (c) that broadcast media will be moved closer to being considered on a par with text for the purposes of research.

The costs of the process of designation should be marginal (it is an established responsibility of the IPO). The cost of acting as a designated archive would be borne by each of the applicants and would not necessarily have a direct impact on government spending.

**74.** *Should any other changes be made to the current exceptions relating to libraries and archives, and what would be their costs and benefits?*

**75.** *Would extending the copyright exception for research and private study to include sound recordings, film and broadcasts achieve the aims described above? Can you provide evidence of its costs and benefits?*

Yes. The proposed changes, that would serve to bring film, sound recordings and broadcasts further into the scholarly corpus, appear to achieve what is required while providing a level of protection from abuse by commercial interests. The benefits of such a move will be to foreground a wider range of media as primary and secondary sources for research and study. It may also serve to ensure greater emphasis on the active preservation of a broader spread of content.

We cannot easily quantify the costs of implementation.

**76.** *Should the copyright exception for research and private study permit educational establishments, libraries, archives or museums to make works available for research or private study on their premises by electronic means? What would be the costs and benefits of doing this?*

Yes. There are many good reasons for libraries, archives and museums to make content available electronically, on site, for research and private study access. These include:

- (i) making delicate objects and media available to be viewed without jeopardising the originals through wear,
- (ii) electronic linking with metadata and related assets to improve research efficiency,
- (iii) the support of deeper levels of research through the implementation of electronic techniques such as OCR text analysis, pictorial analysis and sound to text transformations.

We cannot easily quantify the costs of implementation.

**77.** *Would an exception for text and data mining that is limited to non-commercial research be capable of delivering the intended benefits? Can you provide evidence of the costs and benefits of this measure? Are there any alternative solutions that could support the growth of text and data mining technologies and access to them?*

Yes. We believe that such an exception would deliver the intended benefits. We would also add that, from our point-of-view, 'text and data analytics', as described in the consultation, should include data mining in still pictures or illustrations and time-based media (such as moving images and recorded sound) as well as metadata.

The benefit of such a measure would be to promote research and analysis for public benefit - although the precise outcomes of such research and analysis could not be predicted.

**78.** *Do you agree that a parody exception could create new opportunities for economic growth?*

We do not feel qualified to answer this section.

**79.** *What is the value of the market for parody works in the UK and globally?*

We do not feel qualified to answer this section.

**80.** *How might a parody exception impact on creators of original works and creators of parodies?*

We do not feel qualified to answer this section.

**81.** *What would be the costs and benefits of such an exception?*

We do not feel qualified to answer this section.

**82.** *When introducing an exception for parody, caricature and pastiche, will it be necessary to define these terms? If so, how should this be done?*

We do not feel qualified to answer this section.

**83.** *How should an exception for parody, caricature and pastiche be framed in order to mitigate some of the potential costs described above?*

We do not feel qualified to answer this section.

**84.** *Would making this a "fair dealing" exception sufficiently minimise negative impacts to copyright owners, or would more specific measures need to be taken?*

We do not feel qualified to answer this section.

**85.** *How should the Government extend the education exceptions to cover more types of work? Can you provide evidence of the costs and benefits of doing this?*

The intention to extend educational exceptions to cover the copying of extracts from more types of work, including recorded sound and films, is logical and to be welcomed. This would be especially beneficial for those wishing to teach with extracts from rare moving image and sound content that has not previously been broadcast and would allow for insubstantial copying to be included in VLE deliveries without fear. It should be noted that, in accessing commercial film publications (as DVD or BluRay), DRM and TPMs may be an impediment to copying. We would suggest that permitted copying should be 'insubstantial' and not capable of, or be exposed to, being used commercially.

The intention to support distance learning and display on interactive whiteboards is also to be welcomed. The support of distance learning using exceptions should, we suggest, be for non-commercial education, with due acknowledgement and under authenticated access within the UK.

Delivery for distance learning to overseas territories and foreign legislatures is a laudable aim (see our reply to Q. 87), but an exception that would support this would (we believe) need to be subject to an international agreement to operate without risk of challenge.

The costs of using such extended exceptions would be marginal if educational establishments already have VLE systems and whiteboards in place. The benefit will be to expand the repertoire of content that may be included for study.

It is important to note that the existing arrangement (for educational establishments) of an embedded licence in Section 35 (allowing the copying of broadcasts - in full length and extract) and an additional licence to permit 'communication' of copies 'off the premises' to support distance learning has been beneficial in the long-term access to and use of moving image and sound content in education. This beneficial exception and licensing arrangement should therefore be permitted to continue.

**86.** *Would provision of "fair dealing" exceptions for reprographic copying by educational establishments provide the greater flexibility that is intended? Can you provide evidence of the costs and benefits of such an exception?*

We believe the provision of 'fair dealing' for reprographic copying will provide greater flexibility. We cannot provide evidence of costs and benefits.

**87.** *What is the best way to allow the transmission of copyright works used in teaching to distance learners? What types of work should be covered under such an exception? Should on-demand as well as traditional broadcasts be covered? What would be the costs and benefits of such an exception?*

We would suggest that the precedent set by the terms of the established ERA+ licence, which permits the delivery online of formerly broadcast content to bona fide staff and students within UK territory, is a suitable model for a distance learning exception that might be applied across broadcasts and other works. This would provide that educational establishments, delivering third party works online for the purposes of instruction and use 'off the premises' by bona fide staff and students in non-commercial education\*, would be required to implement secure authentication systems (using Open ATHENS, Shibboleth or equivalent) which are password protected and employing GeoIP so that content licensed for use in the UK, or delivered under the terms of UK copyright legislation, would only be received within UK territory. The form of delivery should not allow the retention of copies of works that might



be onwardly delivered. By way of example, GeoIP is implemented by the BBC for its iPlayer service that is intended only to deliver to users within UK territory.

UK institutions of further and higher education increasingly aspire to deliver distance learning courses beyond UK territories to students residing in destinations abroad. While this is a laudable and logical aspiration, we do not see how content ingested under UK-only licensing and copyright exceptions could be delivered currently into foreign territories (or legislatures) without an international concordat. Such an agreement, which would be necessary to move forward on this matter, may already be on the agenda of the IPO and equivalent agencies worldwide.

The need to move towards a process for permitting distance learning content to be delivered beyond UK territory is amplified by the following statement from the BUFVC Trustees, which reflects a common view from UK universities and colleges:

"It is highly desirable that delivery to bona fide distance learning students via secure authenticated systems be extended to those students who are based outside of the UK. Drawing a distinction between students based in the UK and those based overseas seriously hampers the use of any type of resources (including formerly broadcast content). Students taking a distance learning module could equally be based in either the UK or overseas. A lecturer will not develop separate content and course materials for student based in the UK and those students based overseas; all students have to have the same learning experience. Consequently lecturers will not include content which cannot be made available to all students, so in the example of formerly broadcast content, it will be excluded. This is disadvantageous to all of the students; a rich source of material is left untapped."

Regarding 'on-demand' services, it would be appropriate to propose that content that was part of a broadcast service and is then delivered as an on-demand service (such as BBC iPlayer and 4oD) should automatically fall under the educational exceptions and licensing arrangements to permit copying, playing and delivery both 'on the premises' and online for distance learning. Where video-on-demand services are not related to broadcasts, the business model for the delivery of such services may be pay-per-view and imply the use of technical protection measures. Therefore any exception which might be extended to cover 'on-demand' services would need to take account of this.

Some video on-demand services, such as YouTube and Vimeo, are so open to user upload (without any real control on the source of the hosted content and whether rights have been cleared) that a broad brush exception to allow educational copying of these deliveries would need to carry a caveat that a defence of copying for education would not stand if the content had been received as an infringing delivery in the first place.

The institutional costs of delivering content 'off the premises' for distance learning would be in establishing a streaming server and VLE, administering an authentication system (with underlying student and staff agreements), and monitoring GeoIP as well as payment of any relevant licences. For educational establishments already having an infrastructure serving students and staff 'on the premises', the incremental costs of implementation of systems for distance learning would not be substantial. Additionally, where non-commercial services are established by third party agencies to deliver distance learning components 'on behalf of' educational establishments, there are opportunities to manage content, licensing and delivery cost-effectively. The 'on behalf of' component in the S35 exception should be carefully preserved to encourage third party and shared services to continue to offer efficiency savings.

The benefits of such an exception would be:

- (i) to offer an elegant solution through blanket coverage of forms of content and terms of delivery - so reducing risk for those constructing curricula and learning materials,
- (ii) to permit educational establishments properly to engage with distance learners who may not be able to travel - for reasons of disability or poverty,
- (iii) to enable educational establishments to deliver to students at a distance in the work place, for instance in apprenticeship mode, and thereby widen participation.

\* Clarification of an answer to the question "what is non-commercial education?" may soon be needed in an era when institutions of higher education in the UK are increasingly market orientated, charging substantial fees and creating full-cost recovery structures within their charters. To avoid misunderstandings, a definition of non-commercial education may now be needed in revised legislation.

**88.** *Should these exceptions be amended so that more types of educational body can benefit from them? How should an "educational establishment" be defined? Can you provide evidence of the costs and benefits of doing this?*

Educational establishments are, at present, closely defined by Statutory Instrument, and this close definition can be helpful in that it gives comfort to rights holders having concerns about the scope of educational exceptions and their likely effect on the commercial viability of their properties. The current definition, and the related exceptions, relies upon the notion of educational establishments having pupils (or students) and teachers – those 'giving or receiving instruction'. There are also references (through SI 2498) to delivery 'on the premises'. The definition has specific impact on the operation of Sections 33, 34, 35, and 36 of the CDPA 1988 (S32 does not cite 'educational establishment') and Sections 137 – 141 relating to reprographic copying.

Certain organisations, that have teachers/instructors and students/pupils, were not covered by the original SI definition at the time of the implementation of the CDPA 1988. These included prisons, certain film schools and teaching hospitals. We understand that subsequent adjustment of the SI brought these bodies in to qualify to benefit from exceptions under the definition of 'educational establishment'.

Museums, archives, galleries and libraries, that are established for public benefit, clearly have an educational remit. If the definition of 'educational establishment' were extended to these bodies, the impact of their using existing copyright exceptions to serve their primary audience (the wider public) in the absence of registered pupils/students, could be deleterious to commercial interests. This move might therefore risk de-stabilising the effective operation of existing exceptions (bearing in mind these are defences and not rights).

Rather than risk a potential de-stabilisation of established interpretations relating to 'educational establishment', we believe there may be merit in extending exceptions that would apply specifically to the on site public access needs of museums, libraries, galleries and archives established for public benefit. This would mean a closer examination of the operation of exceptions such as Section 75, and the potential showing of content to the public.

There would be benefit, for instance, in establishing an exception that would permit the showing to the public on site of film and television performances, alongside collections of related costumes, artefacts and ephemera (e.g. in the V&A) without the need for specific licensing. The same might apply to the

screening of documentary footage of an artist at work as part of a show of his or her work (e.g. at the Tate).

We do not have evidence of the costs of doing this.

**89.** *Is there a case for removing or restricting the licensing schemes that currently apply to the educational exceptions for recording broadcasts and reprographic copying? Can you provide evidence of the costs and benefits of doing this, in particular financial implications and impacts on educational provision and incentives to creators?*

The licensing schemes established to operate in conjunction with Section 35 (for off-air recording) and Sections 137 to 141 (for reprographic copying) are very different in their respective effects and costs. We wish to focus our comments on Section 35 (and 34) and the attendant licence arrangements that, in our view, should be protected.

The ERA licence scheme, operating with Section 35, has delivered to the UK education community a most flexible, wide-ranging and cost-effective solution to the needs of educational establishments requiring long term post-transmission access to formerly broadcast content. We believe the UK's exception and embedded licence is World leading and without parallel in the rest of Europe in supporting the needs of education while delivering equitable payments to broadcasters. The exception and licence rely on drawing together the acts of recording, copying and retaining formerly broadcast content. A further elegance is that S35 covers all broadcasts receivable in the UK - and these are many and various beyond the repertoire of content described in standard UK listings publications. Low and medium power broadcast transmissions are also covered by the exception (alongside the standard high power transmissions that are familiar to the general public).

As a direct result of these elegant blanket arrangements, UK higher and further education has had the benefit of accruing what has become, de facto, a distributed national collection of formerly broadcast content that, in some respects, is more comprehensive than the established national archive collections. In a recent survey it was established that some 40% of UK Higher Education Institutions (HEIs) hold between 1,000 and 10,000 television recordings, with 4% holding more than 20,000 television recordings\*.

Off-air recording, copying, storage and long-term use of formerly broadcast content is now part of the fabric of the operation of educational establishments, alongside libraries and information services that feed teacher and student expectations. Educational copying of broadcasts in the UK is not primarily about 'time-shifting' (see evidence above) - it is about developing long-term access to formerly broadcast content and for these works to be embedded in the scholarly corpus. The majority of UK HEIs (77%\*) regularly copy from one format to another, frequently making multiple copies for internal use. Therefore any licence for retention will also need to accommodate copying of content, so it would be logical also to cover off-air recording (as currently).

The proposal to separate 'time-shifting' from licensing the retention of broadcast content is, in our view, a backward step that would be likely to de-stabilise the current blanket licensing arrangements and result in some unintended consequences that will be deleterious.

The accumulated collection of many thousands of hours of content stored and currently made available for educational access in UK universities\* could very easily be eroded and reduced by those personnel managing collections under a new 'content retention' licence. Some institutions would attempt to avoid

such a licence altogether and would try to rely on the 'time-shifting' exception. In those cases, such institutions would have to regulate staff and students to ensure that formerly broadcast content would not be retained beyond time-shifted use. There would then be an inevitable drive towards a transactional licence. In other words, licensed bodies (wishing always to cut recurrent expenditure) would wish to pay an annual licence only for what they retained. This would inevitably arrive at something similar to the existing Open University licence (operating within S35) that is much-criticised, costly to manage and somewhat self-defeating. It is important to note that, despite the ethos of The OU towards 'Open Learning' and free access, broadcast OU content is often avoided from being recorded by institutions that do not wish to have the management overhead of their transactional licence.

If a copy 'retention' licence is developed, it is almost inevitable that annual revenues to rights holders would be reduced (when compared to the current arrangements) - and the costs of gathering/administration will inevitably rise.

The current blanket licensing arrangement covering recording, copying, storing and sharing of formerly broadcast content between licensed institutions is exceptionally successful in its outcome, cost-effective and worthy of protection. Under existing arrangements the cost per FTE university student for the ERA licence fee is £1.68 per annum and this licence opens the door to a vast repertoire of recorded content (including sharing with other licensed bodies) and active off-air recording systems ingesting different regional and national variations. The addition of the cost of the ERA+ licence (for off campus access) and use of the national online shared BoB service lifts the total cost per student to no more than £3.00 per annum (actual costs for an average university with 12,000 students). This covers the cost of system administration, storage of content, live capture of content and sharing between institutions.

The BUFVC has recently surveyed the holdings of off-air recordings within the UK higher education sector, with support from the Higher Education Funding Council for England, to develop a UK-wide shared service that is building efficiency savings upon the benefits of the current licensing scheme (that covers all HEIs in the UK). Current estimates of savings amount to £2.3 million per year\*. It is estimated that this shared service avoids a further expenditure of some £1.7 million per year across the sector\*.

It is worth noting that the 'recording on behalf of' an educational establishment should be retained in the legislation because it encourages efficient access to copies and exchange of content along with the sharing of service through nominated third parties. Please see the paper\* appended. The proposed changes in the current consultation on copyright would certainly undermine, if not destroy, some of the plans coming out of the BUFVC's recent work for HEFCE.

We believe the current legislation, and elegant ERA licensing arrangements, should be left un-touched, because the perceived savings (in removing the blanket recording licence fee to be replaced by a 'retention licence') will be marginal and there is otherwise nothing beneficial for UK education to be gained out of the proposed changes. Indeed, much that has been developed, during the last five years, for greater access and efficiency would be likely to be destroyed.

\* Please see the appended document "BUFVC Shared Services Report 22 April 2010" that includes summaries of substantial data collected by survey of UK Universities and Colleges. The underlying raw data may be consulted by the IPO by arrangement with the BUFVC.

**90.** *How should the current disability exceptions be amended so that more people are able to benefit from them? Can you provide evidence of the costs and benefits of doing this?*

There is little doubt that the current disability exceptions should be amended to enable more people to benefit from them because the various pieces of relevant legislation in the UK that affect educational disability access, including SENDA (Special Educational Needs Disability Act), need to be harmonised across the sector.

**91.** *How should the disability exceptions be expanded so that they apply to more types of work? Is there a case for treating certain works differently to others? What would be the costs and benefits of amending the exceptions in this way?*

The exceptions should be expanded to include all media. It is important to note that some existing exceptions in UK law, for instance the appointment under Section 74 of a Designated Body to undertake sub-titling of films, has not, as far as we know, been properly addressed even though the IPO, some four years ago, encouraged the BUFVC to apply for this status. The process of 'designation' (as with Section 75) should be streamlined and transparent. It is important that the UK takes advantages of existing exceptions while also building new access arrangements.

**92.** *What are the costs and benefits of the current licensing arrangements for the disability exceptions, and is there a case for amending or removing them?*

We do not have direct knowledge of the costs and benefits of the current licensing arrangements

**93.** *How should this exception be modified in order to simplify its operation?*

We cannot offer an authoritative response here.

**94.** *Should the current exception for criticism and review be amended so that it covers more uses of quotations? If so, should it be extended to cover any quotation, or only cover specific categories of use? Can you provide evidence of the costs or benefits of amending this exception?*

We would support the notion of widening the exception for criticism and review to cover the use of quotations for other purposes. The notion of permitting any quotation "as long as it is fair" while giving comfort to rights owners, that the exception is not intended to permit extensive and unjustified copying of works, is an appropriate move.

**95.** *Is there a need to amend or clarify the exception for reporting current events? Could this be done as part of a quotation exception, or would a separate measure be needed? What would be the costs and benefits of doing this?*

We believe this could be done as part of a quotation exception.

**96.** *Is there a need to amend the existing provisions relating to speeches and lectures, and what would be the costs and benefits of doing so? Should these provisions be combined within a quotations exception?*

The provisions relating to speeches and lectures should be combined with a quotations exception.

**97.** *Would there be additional benefits if all three types of exception examined by this section were combined?*

It would seem appropriate that the benefits of all three types of exception should be combined.

**98.** *How should the current exceptions for use by public bodies be amended to support greater transparency? How could such exceptions be limited to ensure that incentives to copyright owners are not undermined? Can you provide evidence of costs or benefits of doing this?*

The proposal to permit the publication of relevant documents online is a logical development that we would support. However, all correspondents communicating with public bodies would need to understand that their correspondence may be published.

**99.** *Should a new exception for time-shifting of broadcasts by social institutions be introduced? What would be the costs and benefits of doing this?*

Our understanding is that, under the current arrangements (Section 70 and/or Section 35 and accompanying licences), most social institutions are believed to qualify to record off-air. If there is any question of their not being permitted to record off-air for the benefit of patients, residents or inmates, there should be an extension of the existing exceptions to include such bodies.

**100.** *Should a new exception for use during religious celebrations or official celebrations organised by public authorities be introduced? What would be the costs and benefits of doing this?*

We have no comment to make on this issue

**101.** *Should our current exceptions be expanded to cover use for public exhibition or sale of artistic works on the internet? What would be the costs and benefits of doing this?*

The exceptions should be expanded provided the associated risks can be mitigated.

**102.** *Should our current exceptions for the demonstration and repair of equipment be expanded? What would be the costs and benefits of doing this?*

We do not see a need for change here.

**103.** *What are the advantages and disadvantages of allowing copyright exceptions to be overridden by contracts? Can you provide evidence of the costs or benefits of introducing a contract-override clause of the type described above?*

By and large, most exceptions to copyright operating in the UK, that affect the educational copying and re-use of film, sound recordings and broadcasts, are rarely over-ridden by contract. This is not to say that such a development will not soon take place.

There are, however, certain database licences and other subscription-based content suppliers whose terms of contract play against the established exceptions.

It seems clear that a blanket clause insisting that exceptions take precedence over contract terms would be unlikely to work. The preferred option would be to take a considered approach to strengthening (where necessary) each exception in turn against overwrite by contract.

**104.** *Are there specific and or general areas of practical uncertainty in relation to copyright which you think would benefit from clarification from the IPO? What has been the consequence to you or your organisation of this lack of clarity?*

In our experience, many of the clarifications that are regularly required concern the interpretation of the limitations of exceptions, and the interplay with terms of contract and their interpretations. Sometimes 'lack of clarity' can prove beneficial. On the other hand, there are generic issues that the IPO could offer authoritative advice on and the IPO might further extend its online Q&A to the benefit of both rights holders and users.

**105.** *Who do you think would benefit from this sort of clarification? Should it be reserved for SMEs as the group likely to produce the greatest benefit in economic growth terms?*

Undoubtedly, SMEs would benefit from authoritative advice and clarification.

It is also worth considering that education is an important driver for economic growth. Teaching staff and, in particular, the student population (both undergraduate and post-graduate) require knowledge of the subtleties of IP and copyright as they develop their own ideas that might be capable, one day, of commercial exploitation. They also need fully to understand the standing of the work of others. The IPO could further assist the education sector to inculcate this knowledge in the student body (regardless of subject discipline) through online information and personal advice.

**106.** *Have you experienced a copyright dispute over the last 5 years? If so, did you consult lawyers and how much did this cost?*

No.

**107.** Do you think that it would be helpful for the IPO to publish its own interpretation of problem areas which may have general interest and relevance? What sources should it rely on in doing so?

The IPO's own interpretation of general problems/issues would be worth having access to. However, in 'grey' areas this type of interpretation might be held as one 'authoritative point of view' rather than a definitive answer. In other words, in controversial issues IPO interpretations should be offered 'without prejudice'.

**108.** Do you agree that it would be helpful to formalise the arrangements for these Notices through legislation? Please explain your reasons.

It may be less risky for Notices to be formalised through legislation because they could then be protected through legislative caveats - because, despite authoritative interpretation from the IPO, it will be the judicial process that will independently make a final decision in difficult cases.

**109.** How do you think that the IPO should prioritise which areas to cover in these Notices?

If the IPO is to be genuinely user-focussed, it would seem appropriate to prioritise issues that have attracted significant traffic from the public while also taking care of the high net worth issues that might affect UK enterprise at home and abroad.

**110.** Does there need to be a legal obligation on the Courts to have regard to these Notices? Please explain your answer.

The courts should pay regard to IPO notices, but it would be inappropriate for such Notices to be the 'final word' because it must be possible to retain the opportunity to appeal to higher courts for another opinion.

**111.** Are there other ways in which you think that the IPO can help clarify areas where the law is misunderstood? How would these work?

The IPO logically tends to focus its work and services on UK law and its interpretations. A larger issue, from the point-of-view of UK-based enterprises, is the question of how copyright and exceptions are likely to be interpreted abroad, within and beyond the EU States. It would be a valuable service to offer rights holders and users detailed summaries of the copyright protection and exceptions that pertain in foreign legislatures.

**112.** Do you think it would be helpful for the IPO to provide (for a fee) a non-binding dispute resolution service for specific disputes relating to copyright? Who would benefit and how? Are there any disadvantages of IPO operating such a service?

'Non-binding' dispute resolution sounds a bit like an oxymoron. If the IPO were to act as a small claims court, whose decisions would be binding unless a process of appeal to a higher court were entered, this would be helpful.



**113.** *What would you be prepared to pay for a dispute resolution service provided by the IPO? Please explain your answer, for example by comparison with the time and financial cost of other means of redress.*

This would depend entirely upon the size and value of the particular issue that was subject to the dispute resolution.

**114.** *Which would you find more useful: general Notices on the interpretation of the law (free) or advice on your specific dispute (for which there would be a charge) ? Please explain your answer.*

Both of these would be useful, but it would be true to say, from our point of view, that 'general notices on the interpretation of the law' would be most used and advice on specific disputes would be less frequently required.