

## Response by the National Union of Journalists to the consultation on proposed exceptions to copyright following the Gowers report



The NUJ represents 38,000 journalists, from reporters to photographers to crossword compilers, most working for employers and clients in the UK and Ireland.

Of that membership, 8000 are freelance – meaning that they by default own copyright in their work and in many cases depend for a significant proportion of their income on equitable remuneration for re-uses of that work. Their work may be “syndicated” by the original publisher or broadcaster to other publishers or broadcasters and they are entitled to payment in respect of reprography of their work wherever published. About one in ten have also written books.

The NUJ believes that not only is independent, impartial journalism necessary to the functioning of any democracy – how else will rational voters make their choices but on its basis? – but also that it is essential to the health of journalism that there is a vibrant sector of completely independent professional journalists: freelances. And for that to be possible, it must be possible to make a living as a dedicated full-time professional – not, as a commissioning editor on a national newspaper recently said explicitly to an NUJ member, to see “proper journalism” as a side-line promoting paying work in the corporate sector – “so no, I won’t pay you more than £135 for 500 words”. That rate is equivalent to three days’ work at minimum wage – hardly enough for an in-depth investigation at a legal rate of pay – and few local newspapers would pay as much as £50 for a story of the same size.

We do not, therefore, apologise for not putting our argument in the form “the effect on the turnover of UK plc would be...” Even if it were possible to gather statistics from 8000 freelances with an aversion to form-filling and better things to do, the issues at stake as they affect the NUJ’s members are issues of principle: even the low rewards mentioned above are a matter of public policy concern since they mean that it is difficult to sustain high-quality independent journalism.

The NUJ is deeply disappointed that neither the Gowers Review, nor the the consultation document on legal changes arising from it, pays attention to the public interest, that of democracy, or that of the culture. For example the consultation document makes no mention of the moral rights to be identified as author and to defend the integrity of a work in what purports to be an introduction to the copyright framework.

The common practice of referring to “rightsholders” as if they were an homogeneous single interest group obscures both the ethical and the economic argument. Some “rightsholders”, such as News International with its practice of demanding that authors effectively hand over all rights in their work, are doing rather well. Some, such as the majority of those individual authors, are not. The median income of a freelance member of the NUJ in 2002 was between £25,000 and £29,999: at this level every pound counts. Income levels from books, which involve extensive and time-consuming research, are considerably lower than these. Providing sustainable income from such work is essential to the contribution these make to the culture and, we emphasise, to the educational system and thus to the knowledge base of future generations.

## The legitimacy of copyright is at stake

As we said in our submission to the Gowers Review, the legitimacy of copyright in the public eye – and therefore the very survival of the concept of copyright and authors’ rights – will depend on the clear perception and understanding that it is a matter of rewarding the individuals who actually produce the works. Hostility to copyright is widespread, and based on a perception that it is entirely a matter of protecting the interests of extremely powerful corporations: and to members of the public who express this view, our members respond “yes, we know, these are the corporations that are extorting copyright from us.”

### ***Extension to educational exceptions to include distance learning***

We are sceptical of the need for an exception. Virtual Learning Environments are radically different from classroom use, since any sane designer will have built in mechanisms to record which student views what resource, and to whom rights of exploitation in each resource belong.

UK-based educators may think that “rightsholders” refers only to publishers, and not be aware that many publishers are for these purposes merely warehouses of individual creators’ work in which they retain rights. VLE designers, however, must produce products that are also compatible with, for example, German law – under which authors’ rights may not be transferred and indeed authors are entitled to re-negotiate a share of “windfall” income – a category into which a requirement that 1000 students access a local newspaper article would fall.

The mechanisms for a licence scheme with income tracking and allocation of a share of tuition fees therefore exist – assuming sane systems designers. The “stick” of an exception to copyright in the absence of a licensing scheme is not therefore required. Educational institutions should therefore simply sit down to negotiate one with a body such as the Copyright Licensing Agency and representatives of authors’ and performers’ organisations.

### ***‘Format-shifting’ exception***

Whatever euphemism is used, what is proposed is a *private copying* exception. Member states of the European Union that have private copying exceptions operate mechanisms for the equitable remuneration of authors to compensate for loss of income arising from this. The suggestion that the equitable remuneration required by EU law may be set at zero is bizarre, to say the least.

That equitable remuneration is, of course, funded by levies on recording media. We appreciate that HMG has set its heart against levies, though we note that the *Nederlandse Vereniging van Journalisten* reports a survey showing that consumers prefer levies to Technical Protection Measures (TPMs) that would restrict their physical access to works. Computer club HCC surveyed its members in October 2006 and only 16 per cent wanted to scrap the levy and strengthen the security features on media like DVDs (see [www.nu.nl/news.jsp?n=845275&c=54](http://www.nu.nl/news.jsp?n=845275&c=54) – in Dutch).

The NUJ notes that other bodies are proposing a licensing scheme to provide for equitable remuneration and we await details of those proposals with interest. Were they not to prove practicable or appropriate to journalists’ needs, we would propose a system analogous to Public Lending Right. This may, indeed, prove the most cost-efficient means of complying with EU law.

- An annual sum would be set aside from central funds.

- A suitable independent body would commission an annual, voluntary, anonymised survey of the public: what do you recall copying?
- Note, to forestall objections, that we do not propose building records of who is reading, listening to or viewing what – whereas the effect of TPMs as deployed or proposed by some publishers and broadcasters is to do precisely that.
- The survey could prompt respondents with a variety of more- and less-well-known authors and performers – the goal must be to gain a statistically useful estimate of the extent of copying of works of the less-well-known, collectively if not individually.
- The sum set aside would be distributed to authors and performers according to a formula with similar goals to those governing PLR. The NUJ is agnostic on whether distribution should be carried out by PLR.co.uk or by collecting societies such as ALCS and DACS, but notes that more of its members are already registered with the latter.

The NUJ is keen to meet with the Intellectual Property Office and other interested parties to develop this proposal further.

### ***Extending the exception for copying for research and private study***

Journalists, journalism and the unhindered operation of Article 10 of the European Convention on Human Rights depend on a fair regime of exceptions for research and private study, subject to the Berne “three-step test”. The NUJ is broadly in favour of extension.

### ***Caricature, parody or pastiche exception***

We see no need for an exception.

Were one to be introduced, immensely complicated issues would be raised. The moral right of the author to defend the integrity of their work exists for a reason. That this right is currently denied authors of news reports in the UK merely highlights the importance for journalists of being able to report the truth as they have managed to discover it, and then to have those reports distributed without distortion.

It’s one thing to put together from news footage a montage of Messrs Bush and Blair in a duet of *I will always love you*.

It is quite another to re-edit news reports to give the lying impression that the Duke of Edinburgh was, in fact, recorded ordering the killing of Diana Windsor or that a Parliamentary Under-Secretary at the Department for Innovation, Universities and Skills was filmed accepting a bribe from a pharmaceutical company.

We defy anyone to come up with wording of an exception that can distinguish these cases. Let parodists continue to take their chances.

## ***Access to justice***

The NUJ noted in its submission to the Gowers Review that “A very serious flaw in the UK legal system is the lack of access to justice for individual authors.” We proposed new Small Copyright Claims Courts to address this.

The content of UK statute on authors’ rights is unhelpful while authors have such poor access to justice. Journalists face a particular problem in that they are typically authors of very many works and receive relatively low income from each.

Since we made that submission, the Civil Procedure Rules in England and Wales have been amended so that all claims including copyright matters are now allocated to the “multi-track process”. This means they have to be started in a County Court where there is a Chancery District Registry; in a Patents County Court; or in the Chancery Division of the High Court. Intellectual property matters are no longer assigned to the Small Claims track.

This means a claimant with little means risks being ordered to pay substantial costs, win or lose. In a case heard recently in the Patents County Court, an NUJ member who brought a claim against a well-known publisher, representing herself in the County Court “multi track”, succeeded in her claim on liability and was awarded £400 damages. She was, however, also ordered to pay the Defendant’s costs of £2000 on the basis that the action she had taken was disproportionate to her claim.

The NUJ proposed the introduction of Small Copyright Claims Courts specifically to adjudicate on copyright claims with a value of less than £5000. Like the Patents County Court, the judge will have specialist background in copyright law and will have peripatetic jurisdiction to sit in civil litigation centres elsewhere in England and Wales.

This proposal requires only sufficient training for a small pool of judges to hear these cases. Initially, quarterly hearings on fixed dates when required in each of the court Circuits in England and Wales would probably suffice, leading to a minimum of difficulty with court scheduling.

We note the alternative proposal that a simplified Copyright Tribunal procedure could instead handle such cases. We are not opposed to this in principle. We suggest, however, that the proposals in the recent consultation on reform of the Copyright Tribunal fall far short of what would be required to offer access to justice equivalent to that provided in Small Claims; and indeed they leave open the risk of *larger* costs being awarded against claimants *pro se* seeking to recover small amounts than would be the case in the multi-track procedure.

The NUJ also observes that it is a deterrent to accessing justice that the sum recoverable for an unauthorised use of a work is frequently no more than would have been paid for legal use. As photographer and NUJ member David Hoffman says of his negotiations with infringers: “The sentence *I cannot accept that copyright infringement can ever be a cheaper route to publication than licensed use* is now hard-wired into my brain.”

We observe that Gowers, challenged on BBC Radio 4 by NUJ Freelance Organiser John Toner after publication of his report, conceded that he had been wrong to ignore these concerns and our constructive proposals.

## The detailed questions:

### ***EXTENSION TO EDUCATIONAL EXCEPTIONS TO INCLUDE DISTANCE LEARNING***

#### **RECOMMENDATION 2**

1. What impact would the expansion of the educational exceptions have? What costs or benefits would accrue to right holders and users of copyright?

- Clearly, rightsholders would lose income. The Authors' Licensing and Collecting Society (ALCS) estimates that losses could reach several million pounds of income to creators of audiovisual works and a similar amount in respect of printed works distributed through online learning environments.

#### **SECTION 35 (RECORDING BY EDUCATIONAL ESTABLISHMENTS OF BROADCASTS)**

2. Should section 35 be extended to allow educational establishments to record on-demand communications in addition to traditional broadcasts?

- If it is to be extended, this must be on condition that there is equitable remuneration for authors: and, as noted above, many NUJ members are book authors as well as periodical or broadcast journalists.

3. If so, should the recording of an on-demand service be permitted only where the work in question was subject to an original broadcast? Would this restriction be practical?

- No, it would not be practicable.

#### **SECURE ENVIRONMENTS**

4. Do you agree that access should be subject to security measures, such as the requirement to enter a secure password in order to access a recording? What other security measures might be appropriate?

- We would not support the idea that Technical Protection Measures (TPMs) could replace the operation of the law. We would not in any case expect any TPM to remain secure for more than a matter of weeks.

5. Who should be able to view recordings made by an educational establishment in a VLE? Is the reference to "teacher and pupils at an educational establishment and other persons directly connected with the activities of the establishment" in section 34 sufficient or too widely cast?

- Yes, it is too widely cast: if there were an exception, it should be for teachers and students and clearly defined categories of support staff involved in delivery and course assessment.

6. What level of responsibility should an educational establishment have for maintaining the security of a password-protected VLE?

- As noted, our faith in TPMs is bounded: were there to be an exception, establishments should bear full responsibility including, but not limited to, consequential damages.

7. How should onward communication beyond a secure environment be prevented?

- We do not believe it can be prevented by technical measures. The only workable framework for such uses is equitable remuneration for authors, plus education of students about authors' rights – including their own rights as authors.

### **SECTION 36 (REPROGRAPHIC COPYING BY EDUCATIONAL ESTABLISHMENTS OF PASSAGES FROM PUBLISHED WORKS)**

8. Should limits be placed on the form of communication used by educational establishments to communicate extracts to distance learners?

- Yes, otherwise such an exception would convert all educational establishments into a loophole in copyright law. The difficulty of defining such a limit is a clear argument for negotiation of a licensing scheme being a better solution than any exception.

9. Should the expanded exception be limited to communication inside a VLE?

- If there must be an exception, then yes, it should be limited.

10. Should communication by email outside a VLE be permitted?

- No. Obviously not.

### **SECURE ENVIRONMENTS**

11. Do you agree that access should be subject to security measures, such as a requirement to enter a secure password in order to access the recording? What other security measures might be appropriate?

- See (7): We do not believe onward copying can be prevented by technical measures. The only workable framework for such uses is equitable remuneration for authors, plus education of students about authors' rights – including their own rights as authors.

12. Who should be able to access extracts made available by an educational establishment in a VLE? Is the reference to "teachers and pupils at an educational establishment and other persons directly connected with the activities of the establishment" in section 34 sufficient or too widely cast?

- See (5): if there were an exception, it should be for teachers and students and clearly defined categories of support staff involved in delivery and course assessment.

13. What level of responsibility should an educational establishment have for maintaining the security of a password protected VLE?

- See (6): were there to be an exception, establishments should bear full responsibility including, but not limited to, consequential damages.

14. How should onward communication beyond a secure environment be prevented?

- It can't. Application of the law is the answer, not technical measures. We are tempted to recommend that the law on theft of the Kingdom of Saudi Arabia apply. See our note on access to justice, above.

### **CLASSES OF WORK**

15. Should section 36 be expanded to include classes of work other than short extracts from published literary, dramatic and musical works? If so, what classes of work should be included?

- No.

16. What consequences would such an amendment have on rights holders?

- Loss of almost all income from educational publications? Loss of secondary rights (reprographic) income from other material used in education. (See estimates of losses in the millions by ALCS, above.)

17. What benefits would there be for educators?

- They would gain a few minutes a week from not having to think – not having to understand authors' rights, nor to educate their students about authors' rights.

18. If the exception is expanded to other works, what limits should be placed on the size of extracts? Would the application of existing limits to other works be desirable or practical?

- It shouldn't be, so we're not answering.

## **FORMAT SHIFTING EXCEPTION**

### **RECOMMENDATION 8**

19. What impact would the introduction of a format shifting exception have? What costs or benefits would accrue to right holders and users of copyright?

- This is becoming increasingly relevant to journalists as print journalists are expected to produce blogs, podcasts and even videos; and as broadcast journalism moves toward "independent" production and away from salaried staff. A private copying exception, whatever it is called, would deprive authors and performers, including journalists, of income.

### **SCOPE OF THE EXCEPTION**

20. Do you agree with the conditions proposed above?

- As the consultation document confesses, the requirement that a member of the public destroy all copies once they dispose of the legitimately acquired original is likely to be seen by the public as nonsensical. Has no-one involved in its drafting ever tried to remove a song from the Apple Corporation's iTunes program, only to see it magically reappear when the machine is restarted? Conversely, does everyone involved have a card index of their collection of 45rpm singles? Should someone who copies a newspaper journalist's podcast onto their mobile phone have to track it down and delete it the moment they wrap fish in the paper that pointed them to it? For these reasons and others we propose a *proper* private copying exception with equitable remuneration.

21. Would a requirement to keep an original copy, or dispose of a format shifted copy if the original was given away or sold or otherwise disposed of, be practical or enforceable? What alternatives can you suggest to address the problem of original copies going back into circulation after copies have been made?

- Of course it wouldn't be enforceable. See above.

22. Should further conditions be imposed? If so, what are these?

- E-qui-ta-ble re-mu-ner-a-tion.

23. Should the non-infringing acts differ depending on the class of work concerned?

- Media convergence would make a nonsense of such distinctions in short order...

#### **CLASSES OF WORK**

24. Should the proposed format shifting exception be limited to recorded music and film or should it also apply to other works? If so, which ones?

- ...but given the assumptions in the consultation our answer must be, yes, it should be strictly limited.

25. What impact would the introduction of a format shifting exception have on particular sectors of the creative industries?

- The impact on journalism is that of brand-new forms of journalism: it is only in the last two years that print journalists have been expected to make audio podcasts and in the last year that vodcasts – as distinct from short proper films made by a few newspaper companies – have started to spread. There are no industry norms for rights in these – most journalists not being members of Equity. It is therefore not possible to assess the financial impact of private copying in the narrow sense proposed. Only a survey along the lines we propose to determine the distribution of equitable remuneration will reveal the extent of “format-shifting” such as the private scanning of newspaper articles to send to distant relatives.

#### **FORMAT**

26. How many format shifts should be allowed?

- We see no reason to believe that a limit would be enforceable.

27. Should the exception allow additional format shifts to take account of changing technology?

- N/A

28. Should more than one copy be allowed to address the technological process of transferring content?

- Eh? If by this is meant a copy on computer hard drive on the way from C90 cassette to iPod: see (26).

#### **TIMING**

29. Should the exception apply to works:

- a. published after the date the law changes;
- b. purchased after the date the law changes; or
- c. copied after the date the law changes?
- d. What would be the practical implications of the above options?
- e. Can you think of any alternatives?

- Only (C) makes sense.

## **EXTENDING THE EXCEPTION FOR COPYING FOR RESEARCH AND PRIVATE STUDY**

### **RECOMMENDATION 9**

#### **GENERAL QUESTIONS:**

30. What impact would the expansion of the exception for research and private study have?

- We expect little financial impact from the proper use of the exception. We would be surprised, however, if there were not some attempt at a scam whereby works are distributed “for private study”.

31. What benefits can the expanded exception be expected to deliver?

- Legal clarity for those researching any works covered by the exception.

32. What might be the impact of the expanded exception on rights holders and other affected parties?

- As we said, journalists are heavy users too.

33. Should the expanded exception cover both research and private study?

- Yes.

34. Should all types of work be covered?

- We can't speak for other authors and performers.

35. Should the expanded exception cover all fields of study or just specific areas?

- All fields.

36. What action, if any, should be taken to address possible concerns about misuse of the expanded exception?

- Enforcement. Funds to Trading Standards to enforce claims by authors, not just handbag trademark holders. See our note on access to justice, above.

#### **THE BENEFITS OF AN EXPANDED EXCEPTION**

37. Do researchers and students experience difficulties getting permission to make copies today?

- Mostly, they probably just do it illegally.

38. Are areas of research and study not being pursued as a result of issues regarding permissions for film, sound recordings and broadcasts?

- Don't know.

39. What benefits might an expanded exception deliver for researchers and students, for educational establishments and research institutions and for society overall?

- Greater access to information.

### **SCOPE OF THE EXPANDED EXCEPTION: RESEARCH AND PRIVATE STUDY**

40. Are there reasons why the expanded exception should be limited to 'research' rather than covering both research and private study?

- No. There are, in fact, reasons for it not being limited to a defined category of "research" – and it should be independent of affiliation of the private student to any institution.

41. If the expanded exception is limited to 'research' is it necessary to set a clear boundary between research and private study in order to avoid confusion?

- N/A.

### **SCOPE OF THE EXPANDED EXCEPTION: CLASSES OF WORKS TO BE COVERED**

42. Are there reasons why the expanded exception should not apply to all works i.e. including films sound recordings and broadcasts?

- Not that we can think of – but ask the actors and musicians

### **SCOPE OF THE EXPANDED EXCEPTION: FIELDS OF STUDY**

43. Is there a pressing need for action in particular areas of research or fields of study where current progress is being constrained by the current exception?

- Probably not.

44. Should the expanded exception apply to all areas of research and study?

- Yes

### **THE SCOPE FOR MISUSE OF THE EXPANDED EXCEPTION**

45. Is it necessary to limit the scope of the expanded exception to prevent intentional misuse? If so how should it be limited? For example, would guidance on fair dealing be useful? Should there be a formal link to a course of study or research establishment?

- Prevent intentional misuse by enforcement, as above. Oh, and by giving individual authors access to justice – see our note above.

46. Are steps needed to make the boundaries of the expanded exception clear to researchers and students so as to prevent misunderstanding? If so, what steps should be taken?

- Education.

### **DIGITAL RIGHTS MANAGEMENT**

47. Should a DRM workaround be provided for all copying under the expanded exception or should the workaround just be limited to scientific research in line with EU law requirements?

- The workaround needs to apply to all legitimate exceptions to copyright. In the case of the exceptions for reporting news and for review and criticism, reform is needed to ensure that these exceptions may be used in a timely manner. As the European Federation of Journalists noted in its submission to the EU "Online Content" consultation: "If a TPM is over-zealous by, accident or design, users may be denied access under the exceptions (or 'fair dealing') to which they are entitled by law. Journalists are users too and have a particularly strong interest

in such exceptions as quotation for review and criticism.”

- If it takes six months to exercise these exceptions to allow quoting from a document released with such over-zealous TPMs, another tool is added to the armoury of those who wish to restrict free and democratic reporting and freedom of information.

48. What impact might a broad DRM workaround have on rights holders?

- We would expect the impact of *legitimate* application of such an exception to be very small: the problem would come in the case that it were exploited in the course of a scam, the answer to which is application of the law, not technological.

49. If a narrower approach is adopted, is it necessary to adjust the current arrangements for literary and other works to ensure consistency in this area?

- The current workaround is inadequate to safeguard news reporting – so, yes.

## **AMENDMENT OF LIBRARY PRIVILEGE EXCEPTIONS TO EXTEND PERMITTED ACTS FOR THE PURPOSES OF PRESERVATION**

These questions are not (currently) of huge concern to NUJ members. We note, however, that the distinction between a library and a commercial online archive is increasingly blurred – see the operation of BL Direct (<http://direct.bl.uk/bld/>).

### **RECOMMENDATIONS 10A AND 10B**

50. What impact would the expansion of the exception for libraries and archives have? What costs or benefits would accrue to right holders and users of copyright?

#### **CLASSES OF WORK**

51. What are the consequences, for rights holders and beneficiaries, of extending section 42 to cover all classes of works?

#### **NUMBER OF COPIES**

52. Is it necessary to restrict the number of copies made for preservation purposes?

53. If so, why, and how many copies should be permitted?

#### **SCOPE OF ORGANISATION COVERED**

54. What would be the impact on rights holders if section 42 was extended to cover museums and galleries?

55. What types of museums and galleries should be included? What criteria should they meet to qualify?

## **CARICATURE, PARODY OR PASTICHE EXCEPTION**

### **RECOMMENDATION 12**

56. What impact would the introduction of an exception for parody have? What costs or benefits would accrue to right holders and users of copyright?

- We see no need to introduce an exception. We answer the following just in case one is

introduced.

#### **FAIR DEALING**

57. Could an unlimited exception undermine the interests of owners of copyright in the underlying work by allowing advertising or the endorsement of products which are contrary to their commercial interests?

- Yes, it would. And for journalists being seen to endorse a product is a serious matter, contrary to the NUJ's Code of Conduct.

58. If so, would framing the exception as a 'fair dealing' exception address the problem adequately?

- No: the urine would still be extracted, so to speak.

#### **ACKNOWLEDGEMENT**

59. Should the exemption for parody include a requirement to acknowledge the underlying work and its author?

- Yes.

#### **DEFINITIONS**

60. Is the ordinary meaning of the terms caricature, parody and pastiche sufficient?

- No. See our introduction above: no exception is permissible which allows the abuse of an author's work, name and reputation to propagate a lie contrary to their name, honour and reputation, and "it was only parody" must not be enshrined in law as a defence.

#### **CLASSES OF WORK**

61. Is there any reason for excluding particular classes of work from the exception?

- Yes: news reporting. So the most interesting parodies will continue to be extra-legal. So be it.

#### **THE RIGHTS AFFECTED**

62. Should the exception only apply to certain exclusive rights of a copyright owner or to all such rights? If the exemption is to be limited, how should it be limited and why?

- *If any such exception were to cover news reporting, then the right of the author of the original to object to derogatory treatment should be preserved (and of course must be universal and inalienable).*

#### **WORK PUBLICLY AVAILABLE?**

63. Should the exception explicitly state that it only applies where the underlying work has been made available to the public?

- Yes.

#### **PARODY ONLY OF THE UNDERLYING WORK?**

64. Should the exception only apply where the parody relates specifically to the underlying work?

- We have very little idea what this question means and suggest that its obscurity highlights the inherent difficulty of drafting such an exception so that it makes any sense at all, let alone protects the legitimate interests of authors and of the news-using public.

## **MORAL RIGHTS**

65. Is there any reason why section 79(4) should not be extended to exempt parodies from the right of attribution?

- Yes: see news reporting.

66. Is there any reason why section 84 should be amended to exempt parodies from the right of false attribution?

- This question is itself parody, yes?

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