



**Consumer
Focus**
Campaigning for a fair deal

Consumer Focus response to Gowers 2nd stage consultation on copyright exceptions

March 2010

Introduction

Consumer Focus is the statutory independent watchdog for consumers across England, Wales and Scotland, and for postal consumers Northern Ireland. We operate across the whole of the UK economy, persuading Government, businesses and public services to put consumers at the heart of what they do. We have been working on copyright related issues for many years through our predecessor organisation, the National Consumer Council. We represent UK consumer interests in relation to copyright at European and international level as part of BEUC's digital team and as co-chair of the TACD Intellectual Property Working Group.

Copyright law exists to encourage creativity and innovation for the benefit of society as a whole. To do this it needs to balance the interests of creators, investors and consumers. We welcome the opportunity to respond to the **Taking forward the Gowers Review of Intellectual Property: 2nd Stage Consultation on Copyright Exceptions** (the consultation document thereafter). In our response we will focus mainly on the proposed amendments to the fair dealing provision for non-commercial research and private study, or recommendation 9 of the Gowers Review of Intellectual Property, which was published in 2006.

Summary

Consumer Focus opposes the proposed amendment which would see the right to fair dealing ‘with a sound recording, film or broadcast’ only extended to ‘a member of an educational establishment for the purposes of research for a non commercial purpose authorised by that establishment’. The Government has failed to come forward with convincing evidence that would justify not implementing Gowers’ recommendation that all private copying for research should be allowed in relation to all forms of content. The proposal also amounts to an unnecessary further complication of UK copyright law and is a failed opportunity to start defining the boundaries of non-commercial use of copyrighted works by consumers.

The Government needs to go back to the drawing board in relation to Gowers’ recommendations on exceptions. It is disappointing to see that few of Gowers’ recommendations on exceptions are actually being implemented. The Government has deferred the implementation of a much needed format-shifting exception and thus far has made little progress towards implementing a non-commercial use exception for consumers. The public’s fair use rights are expressed through fair dealing provisions, and they have a key role to play in achieving a balanced copyright framework. Without this balance copyright will not be perceived as legitimate by the public and copyright law itself will be brought into disrepute.

Recommendations

- Extend the existing fair dealing provision for non-commercial research and private study to all copyrighted content
- Acknowledge the value of the fair dealing provision for non-commercial research and private study to individual users and the public at large, and commit to expanding, rather than restricting this provision
- Undertake a proper economic impact assessment to assess the claims made by rights holders that allowing fair dealing with a sound recording, film or broadcast for the purpose of non-commercial research and private study by consumers would conflict with the normal exploitation of those works
- Clarify which educational establishments and their members are covered by the existing provisions in the Copyright, Designs and Patent Act 1988 by way of reviewing Copyright (Educational Establishments) (No2) Order 1989 (SI 1989 No1068) and Copyright (Application of Provisions relating to Educational Establishments to teachers) (No2) Order 1989 (SI 1989 No1067)

Our response

The existing fair dealing provision for the purpose of non-commercial research and private study exception is limited to literary, dramatic, musical or artistic works, and does not extend to, for example, films, sound recordings and broadcasts.¹ As with other exceptions, where a work that is copied legitimately under the private copy exception is subsequently dealt with, eg it is sold, let or hired or communicated to the public, it would become an infringing copy.²

Gowers' original recommendation in relation to the non-commercial research and private studies exception was 'Recommendation 9: Allow private copying for research to cover all forms of content. This relates to the copying, not the distribution, of media.'³ While the Gowers Review contains little detail as to the reasoning behind recommendation 9, it does state that: 'Fair dealing for the purposes of non-commercial research and private study, permitted by section 29 of the CDPA excludes copying sound recordings or film, which is inconsistent and adds to the cost of negotiating rights for sound recordings and films.'⁴ We, like other commentators, take this to mean that Gowers, in seeking to simplify UK copyright law, recommended the non-commercial research and private study exception be extended to all copyrighted works. It is therefore not clear how Gowers' simple recommendation, more than three years on, has morphed into what amounts to an unnecessary complication of the existing fair dealing provision, and the concept of non-commercial research and private study more generally.

The existing fair dealing provision for non-commercial research and private study, section 29 of the Copyright, Designs and Patent Act 1988 (the 1988 Act thereafter), has two central and simple provisions, which are:

- (1) Fair dealing with a literary, dramatic, musical or artistic work for the purposes of research for a non-commercial purpose does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement.
- (1C) Fair dealing with a literary, dramatic, musical or artistic work for the purposes of private study does not infringe any copyright in the work.

The current proposal would insert the following provision into the existing exception:

- (1A) Fair dealing with a sound recording, film or broadcast by a member of an educational establishment for the purposes of research for a non-commercial purpose authorised by that establishment does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement.⁵

The effect of this amendment to the 1988 Act would be to prevent private copying for the purpose of non-commercial research and private study of sound recording, film and

¹ Hector L. MacQueen, Charlotte Waelde and Graeme T. Laurie, **Contemporary Intellectual Property: law and policy**, Oxford University Press, 2007, pg.244

² **Gowers Review of Intellectual Property**, HM Treasury, November 2006, pg.63

³ **Gowers Review of Intellectual Property**, HM Treasury, November 2006, pg.6

⁴ **Gowers Review of Intellectual Property**, HM Treasury, November 2006, pg.63

⁵ **Taking forward the Gowers Review of Intellectual Property: 2nd Stage Consultation on Copyright Exceptions**, Intellectual Property Office, December 2009, pg.47

broadcast by consumers. Exactly the opposite of what Gowers has recommended. Therefore Consumer Focus opposes the suggested amendment to the 1988 Act.

Reasoning for exclusion of users:

The consultation document summarises its decision to limit the fair dealing with sound recording, film or broadcast to members of an educational establishment as follows:

‘9. To better reflect technological developments in the way content is accessed and to reflect modern methods of studying and research, the first stage of the consultation considered the Gowers recommendation to extend the existing exception for research and private study to cover all forms of content. This would enable the use of sound recordings, films and broadcasts, which were not covered by the existing exception, but would not permit further distribution.

10. The overall majority of respondents were in favour of extending the exception to cover all types of work and areas of study. Most users thought there should be no distinction between research and private study and the exception should apply to both. Users were also keen for a DRM workaround.

11. Rights holders were not in favour of extending this exception and had concerns about the inclusion of private study and a DRM workaround. They were keen to link this exception to an educational course or establishment to assist in preventing the possible misuse of works.

12. While recognising the concerns of rights holders, we nevertheless intend to extend this exception to cover the additional forms of content, for both research and private study. Mindful of the potential for misuse, however, we intend to apply this extension only to genuine students or researchers that are linked to an accredited educational establishment, and are undertaking a course of study or research at that establishment. We do not intend to make any changes to the current procedures regarding DRMs (see paragraphs 22-24 and 239-240).⁶

Consumer Focus categorically objects to the reasoning demonstrated here. Due to ‘potential misuses’ which have neither been defined nor assessed, the Government has decided to not follow Gowers’ recommendation.

In doing so the Government has decided to deny the general public and society the right to fair dealing with sound recording, film or broadcast for the purpose of non-commercial research and private study. The consultation document simply states that ‘we are mindful of the fact that it may be appealing to copy such works purely for ‘entertainment’ purposes’ and goes on to state that, ‘This should minimise the potential risks of unauthorised use and give some assurance to rights holders.’⁷

Ignoring the public interest

The existing fair dealing provision of the purpose of non-commercial research and private study was first enshrined in the Copyright Act 1911 (the 1911 Act thereafter), which considerably extended the scope of copyright protection awarded to works. In order to safeguard the public interest and the interests of individual users the 1911 Act also attempted to codify the various incidents of fair use which had developed through case law in the 18th and 19th Century. As a result Section 2(1)(i) of the 1911 Act provided that ‘any fair dealing with any work for the purpose of private study, research, criticism, review

⁶ **Taking forward the Gowers Review of Intellectual Property: 2nd Stage Consultation on Copyright Exceptions**, Intellectual Property Office, December 2009, pg.3

⁷ **Taking forward the Gowers Review of Intellectual Property: 2nd Stage Consultation on Copyright Exceptions**, Intellectual Property Office, December 2009, pg.28

or newspaper summary' would not constitute copyright infringement in the original work.⁸ At the time the private study and research provision extended to all copyrighted works. But by the time of the 1988 Act the fair dealing provision was limited to only literary, dramatic, musical and artistic works.⁹

The fair dealing provision for the purpose of research and private study is one of the original fair use rights in UK copyright law and illustrates how in the 20th century copyright has been over extended to the detriment of individual users and society at large. Limiting the fair dealing for the purpose of non-commercial research and private study to literary, dramatic, musical and artistic work ignores the importance of non-authorial works for both study and research. It also leads to absurdities; under current law an individual copying a substantial part of a sound recording for the purpose of private study would infringe the copyright in the recording itself, but not in any underlying musical work.¹⁰ It is difficult to accept that the rights of the owner of copyright in the sound recording ought to be exempt from the a fair dealing provision that is in the public interest and does not impact on the normal exploitation of the work.

The proposed amendment to the fair dealings provision on non-commercial research and private study is not in the public interest. Many citizens who are not members of an educational establishment engage in non-commercial research and private study, for example by researching local history, their family tree, or subjects of personal interest, such as technology and environmental issues. The consultation document even states that:

'Many respondents believed that researchers, the general public (eg local historians) and society as a whole would benefit from a wider exception (eg museums, galleries and heritage sites would be permitted to research their collections). This would improve the UK's research base, encourage creativity and support Government's 'lifelong learning' campaign.'¹¹

The Government has failed to outline why it believes that copying for 'purely entertainment purpose' poses such a high risk to the normal exploitation of the works covered by the fair dealing provision, that Gowers recommendation will not be implemented. Consumers and the general public have the right to fair dealing with a literary, dramatic, musical or artistic work for the purposes of non-commercial research and private research since 1911. It is not apparent why the Government believes that sound recording, film or broadcast would be more at risk of copying for 'purely entertainment purposes' than literary, dramatic, musical or artistic works. After all the 'normal exploitation' of literary, dramatic, musical or artistic works has not been substantially affected in the past 99 years by allowing the general public fair dealing.

In *The Way Ahead* the Government acknowledges the key role of the existing fair dealing provisions and permitted acts in establishing a fair and balanced copyright system, and that this balance is important for the public perception of copyright.

'One key element of fairness in the system is the existence of exceptions, by which certain uses of copyright material can be defended without a licence, for example fair dealing for research and private study. It is important that these

⁸ Ronan Deazley, **Rethinking copyright**, Edward Elgar Publishing, 2006, pg.145-146

⁹ Ronan Deazley, **Rethinking copyright**, Edward Elgar Publishing, 2006, pg.148

¹⁰ Robert Burrell, Allison Coleman, **Copyright exceptions: the digital impact**, Cambridge University Press, 2005, pg.116

¹¹ **Taking forward the Gowers Review of Intellectual Property: 2nd Stage Consultation on Copyright Exceptions**, Intellectual Property Office, December 2009, pg.28

exceptions do not conflict with the normal exploitation of the work but that they continue to provide access to knowledge for society as a whole.¹²

The Way Ahead summarises the purpose of copyright as follows:

‘Copyright is important because it impacts on the UK’s economy, culture, education and research, and on everyone who enjoys or creates copyright material such as computer games, TV shows or modern art. This encompasses almost the entire population. Copyright is the legal vehicle through which creativity, and interaction with it by authors, rights holders, business and users, is managed by society. Creativity is what entertains, educates and informs us. It brings many benefits, economic, cultural and social.’¹³

The Government should bear these principles in mind when amending existing exceptions to copyright for the benefit of consumers and the public at large.

Potential misuse by consumers

The consultation document suggests that consumers would potentially misuse the fair dealings provision for non-commercial research and private study by copying ‘works purely for ‘entertainment’ purposes’. It is also apparent that the Government has failed to assess the actual risk from such copying, but nevertheless seeks to minimise ‘the potential risks of unauthorised use’ in an attempt to reassure rights holders.¹⁴

Private study will always have an ‘entertainment’ value, the question is whether fair dealing for non-commercial research and private study impacts in any significant way on the normal exploitation of the work. For example, a member of the public who takes great interest in, say Chinese or Italian opera, may approach the British Library, museum or archive for a copy of a sound recording made of a little known performance. That sound recording may then be played at home for private study purposes, as well as entertainment purposes. And the ‘researcher’ may also play it to family members or friends who are equally enthused about Chinese or Italian opera. This use would be within the spirit of a fair dealing provision, and does not impact on the normal exploitation of the work. Many of the works that will be accessed under a fair dealing provision on non-commercial research and private study will be works that are not readily available through commercial distributors, and in many cases simply sit on the shelves of a library or museum. No economic value is derived from works sitting on shelves, and fair dealing by members of the public will not deprive anybody of economic value otherwise obtained from the works.

Much of the copying undertaken for non-commercial research and private study will be for the purpose of time-shifting, ie being able to watch, listen or read the works at the users convenience. This is because many of the works are held in a distant library or archive, and because the user does not have enough time to study all relevant material on site. Users may also want to review a particular works several times in the course of the non-commercial research or private studies.¹⁵ Of course there is a ‘risk’, if it should be described as such, that the user copies or collects copies for their entertainment value, rather than purely for ‘the application of the mind to the acquisition of knowledge, as by

¹² **The way ahead – A Strategy for Copyright in the Digital Age**, Intellectual Property Office, October 2009, pg.28

¹³ **The way ahead – A Strategy for Copyright in the Digital Age**, Intellectual Property Office, October 2009, pg.8

¹⁴ **Taking forward the Gowers Review of Intellectual Property: 2nd Stage Consultation on Copyright Exceptions**, Intellectual Property Office, December 2009, pg.28

¹⁵ Robert Burrell, Allison Coleman, **Copyright exceptions: the digital impact**, Cambridge University Press, 2005, pg.117

reading, investigation or reflection'¹⁶ – the dictionary definition of 'private study'. But so long as this does not impact on the normal exploitation of the works, such 'misuses' should not be used as an excuse to deny all users and consumers the right to fair dealing with copyrighted works of the purpose of non-commercial research and private study.

Consumer Focus would like to suggest that the risk of consumers copying popular music, film or broadcast under the guise of a fair dealings provision on non-commercial research and private study is already minimised through the time-shifting exception. Broadcasts are covered by the time-shifting exception (Section 70 of the 1988 Act), which allows consumers to copy TV and radio broadcasts for the purpose of watching or listening to them at a more convenient time, ie for their own entertainment. The time-shifting exception, which exists since 1988 has not noticeably impacted on the 'normal exploitation' of popular music and film that is broadcast. Despite it being almost impossible to police whether consumers time-shift a broadcast for the purpose of watching or listening to it at a more convenient time, or to establish a permanent movie or music collection. Similar to the generation of home tapers who spent entire Sundays meticulously taping the top 40 off the radio, some dedicated individuals will misuse the fair dealings provision on non-commercial research and private study. But it is hard to see how such potential misuse would impact on the normal exploitation of the work.

In reality the fair dealing provision for non-commercial research and private study will primarily be used to provide the public with access to non-popular culture, in libraries, museums and archives. The Government needs to openly assess whether a minority of consumers potentially abusing the fair dealing provision is reason enough to deny British society the right to fair dealing with sound recording, film or broadcast for the purpose of non-commercial research and private study. Consumer Focus does not believe that it does, and at the very least the Government should undertake a full economic impact assessment, which it would have to do anyway if it wanted to make the suggested amendment to primary legislation.

Ignoring the user and consumer as a stakeholder

The Way Forward recognises consumers as vital stakeholders to copyright law, but this is not apparent from the consultation document. Consumers and users of digital technologies are now able to infringe copyright on an unprecedented scale, it is therefore all the more important that they understand copyright law, and in particular fair dealing provisions that apply to their use of copyrighted works. The Government can not continue to write copyright law as if copyright lawyers are the only ones who need to understand it.

It is relatively straightforward to explain to users and consumers what they can and can not do under the existing fair dealing provision for non-commercial research and private study. A short explanation might look like this:

'You can copy a literary, dramatic, musical or artistic work for non-commercial research or private studies. If you do so you need to include an acknowledgement and you are not permitted to sell, let, hire or distribute the copy you have made to the public.'

But, with the amendment proposed in the consultation document the short explanation would have to look more like this:

'You can copy a literary, dramatic, musical or artistic work for non-commercial research or private studies. If you do so you need to include an acknowledgement and you are not permitted to sell, let, hire or distribute the copy you have made to the public.'

¹⁶ Robert Burrell, Allison Coleman, **Copyright exceptions: the digital impact**, Cambridge University Press, 2005, pg.116-117

‘You may also copy a sound recording, film or broadcast for non-commercial research or private study, but only if you are a member of an educational establishment, and if the non-commercial research is authorised by that establishment. If you do you need to include an acknowledgement and you are not permitted to sell, let, hire or distribute the copy you have made to the public.

‘So if you make a copy of a sound recording for non-commercial research and private studies, you will not be infringing the copyright in the underlying musical work, but if you are not a member of an educational establishment which has authorised your research you are infringing the copyright in the recording itself.’

It is not apparent how the Government has taken on board SABIP’s work in relation to the simplification of copyright law. It is now widely accepted that UK copyright law suffers from too much complexity and in places is completely incomprehensible to a normal member of the public. The SABIP workshop on simplification of copyright law presented the following quote as a summary of the problems with UK copyright law:

‘Our IP laws are not complex merely because their subject is inherently complex. They are complex partly because they have been enacted in needlessly complex ways, and because they are not written to be understood by those who are mainly affected by them.’¹⁷

The Government needs to assess whether its proposals to amend copyright law, and particularly a fair dealing provisions, introduce unnecessary complexities and whether they can be understood by the general public. Consumer Focus does not believe that the proposed amendment is a positive step towards simple and clear copyright law that can be understood by consumers and would be perceived as fair.

Defining the boundaries of non-commercial use by consumers and users

Consumer Focus is disappointed that the consultation document, and indeed the entire approach taken to Gowers’ recommendation on copyright exceptions, does little to advance developments towards a non-commercial use exception for consumers.

Following Gowers’ recommendation to allow fair dealing with all copyrighted works for the purpose of non-commercial research and private study would go some way to start defining the boundaries of non-commercial use by consumers. As acknowledged by the consultation document, and scholarly research on the subject, there is little practical or legal distinction between non-commercial research and private study for users. Hence from a consumer perspective the fair dealing provision, if extended to all copyrighted works, would be an ideal starting point for having conversation with consumers about what they can and can not do under a fair dealing provision for non-commercial research and private studies.

Fair dealing provisions already establish certain boundaries on the use of copyrighted works by users, namely that a work that is copied legitimately under the private copy exception can not be subsequently sold, let or hired or communicated to the public. Given that any distribution to the public has a significant potential to impact on the normal exploitation of the works these boundaries are the ideal starting point for a discussion on what consumer can and can not do with copyrighted works under a non-commercial use

¹⁷ David Vaver, ‘Reforming Intellectual Property Law: An Obvious and Not-so-Obvious agenda: The Stephen Steward Lecture for 2008’, *Intellectual Property Quarterly* (2009), p. 147, quoted in: **Exploring the case for simplification of the copyright framework: Report for proceedings**, Strategic Advisory Board for Intellectual Property Policy, February 2010, pg.6

exception. These boundaries would also make it clear that a non-commercial use exception does not cover the peer-to-peer filesharing of copyrighted works.

Educational establishments and fair dealing for the purpose of non-commercial research and private study

According to Gowers 'many users in the Call for Evidence outlined problems in using material for genuine academic purposes.'¹⁸ This problem is universally acknowledged and has arisen with the introduction of non-commercial into the existing fair dealing provision on research and private study in 2003. As a consequence organisational users, such as educational establishments, are no longer covered by the fair dealing provision if their research is commercial, for example a professor undertaking research for consultancy work. Unfortunately the proposed amendment to the 1988 Act does not help to clarify any of the existing questions.

Educational establishments are defined in section 174 of the 1988 Act as 'any school' and 'any other description of educational establishment specified for the purposes of this Part', which by order has been defined as universities, university colleges, institutions providing further education, colleges of education or theological colleges. Home teachers employed by a local authority are also recognised as working for an 'educational establishment' for the purpose of the fair dealings provision on non-commercial research and private study.¹⁹

In relation to the scope of educational establishments and their members the consultation document proposes to only allow fair dealing with sound recording, film or broadcast for 'members of an educational establishment for the purpose of research for non-commercial purpose authorised by that establishment'. The consultation document indicates that 'authorised by that establishment' may allow for non teaching staff to be covered by stating that 'Section 29(1) specifically includes members of educational establishments who may not necessarily be on the teaching staff, but who are nevertheless carrying out research authorised by that establishment.'²⁰ But because the consultation document remains ambiguous with regards to who these 'authorised' individuals should be, which would help in evaluating whether the proposal is appropriate.

The legislative proposals made in the consultation document would introduce an entirely new and undefined concept into the 1988 Copyright Act, and Consumer Focus is not convinced that this is the best way to achieve an adequate coverage in relation to educational establishments. Consumer Focus recommends that if the Government wants to see non-teaching staff of educational establishments to be explicitly covered by the fair dealing provision on non-commercial research and private study it should seek to do so by order, rather than by changing primary legislation. The last order in relation to the scope of educational establishments and their members were made in 1989. The past 20 years have seen significant developments in the provision of education, especially further education and adult education, as well as distant learning. It would therefore appear reasonable to review whether under the existing orders all members of educational establishments that should be covered by the non-commercial research and private studies provision, are actually covered.

¹⁸ **Gowers Review of Intellectual Property**, HM Treasury, November 2006, pg.63

¹⁹ The Copyright (Educational Establishments) (No2) Order 1989 (SI 1989 No1068) and the Copyright (Application of Provisions relating to Educational Establishments to teachers) (No2) Order 1989 (SI 1989 No1067)

Robert Burrell, Allison Coleman, **Copyright exceptions: the digital impact**, Cambridge University Press, 2005, pg.120

²⁰ **Taking forward the Gowers Review of Intellectual Property: 2nd Stage Consultation on Copyright Exceptions**, Intellectual Property Office, December 2009, pg.54

Consumer Focus response to ‘Taking forward the Gowers Review of Intellectual Property: 2nd Stage Consultation on Copyright Exceptions’

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