TMPDF
TRADE MARKS, PATENTS & DESIGNS FEDERATION
Advancing Industry's View On Intellectual Property Since 1920

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Taking Forward the Gowers Review of Intellectual Property – Proposed Changes to Copyright Exceptions

TMPDF Response to the consultation by the UK Intellectual Property Office

INTRODUCTION

TMPDF welcomes the opportunity to respond to this consultation, concerning copyright exceptions. Although this reply will be in fairly general terms as regards several of the exceptions discussed in the consultation document, we stress that Federation members are interested in and concerned about all aspects of copyright law and its development. We confirm that we should be invited to respond to all consultations in the field of copyright and related rights.

In addition to commenting on the particular exceptions discussed in the consultation document, we draw attention to the important issue of on-line file inspection, in relation to which a clear exception to copyright needs to be established. We consider that this matter should be dealt with as soon as possible, even before any other changes in the Copyright, Designs and Patent Act 1988 (CDPA) to implement the Gowers recommendations are made

ON-LINE FILE INSPECTION

The UK-IPO is unwilling to make the electronic case files relating to the prosecution of patents and trade marks available on-line, as to do so would, so it is argued, be an infringement of the copyright in the various letters from applicants, attorneys and third parties contained therein. The case files can be physically inspected in the IPO, e.g., under section 118 Patents Act 1977, and extracts can be copied, since section 47 CDPA provides exceptions to copyright in relation to the copying or issuing of copies to the public of material open to public inspection pursuant to a statutory requirement. For inspection purposes, the provisions of section 17 (copying) and section 18 (issue of copies to the public) are overruled. However section 47, so it is argued, does not provide an exception in respect of section 20, which restricts to the copyright owner the right to communicate the material involved to the public.

Thus the UK-IPO currently does not provide what should be an important and valuable service for innovators and other users of the IP system and the general public. This shortcoming does not occur in the services provided by similar public bodies outside the United Kingdom (for example by the European Patent Office). We consider that it is vital and in the public interest that action should be taken as soon as possible to correct this severe defect in the UK inspection arrangements. The correction would be completely in accordance with the Government's stated

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policy of making patent information easily accessible, to the encouragement of innovation in the United Kingdom.

We consider that the problem has only arisen as a result of the changes made to the CDPA in 2003 by Statutory Instrument 2003/2498. This changed the narrow wording of the original section 20, which read 'to broadcast the work and include it in a cable programme service' to the far broader 'to communicate the work to the public' which (as defined) seems to include providing on-line access to what were formerly written records.

Under the original wording of section 20 the problem should not have arisen, so we believe it is entirely appropriate, indeed a necessity, that the exceptions provided by section 47 are extended to apply to communication to the public. This will fulfil the clear intention of section 47.

EDUCATIONAL EXCEPTIONS (Gowers recommendation 2)

Distance learning; On- demand communications

We agree that the educational exceptions should not be defined by 'media' but rather by intent, category of use and activity, so that e.g., extracts from films, sound recordings and broadcasts might be used. We agree also that there should be a distance learning exception.

We agree that distance learning access should be subject to security measures such as a requirement to enter a secure password, and that the educational establishment should take responsibility for these measures. We accept that the definition in section 34 of those who may have access in the virtual learning environment is probably as reasonable as can be expected.

We have reservations about extending the exception in section 35 to on-demand services. As the consultation document admits, not only will some works in on-demand services never have been broadcast in the traditional way but also, on-demand is a potentially valuable source of revenue.

Reprographic copying of passages from published works: classes of work

We agree that S 36 should be adjusted to allow for distance learning.

We agree that it should be required that the security measures associated with a VLE should be in place, that the expanded exception should be limited to communication inside a VLE and that access should be subject to security measures, such as a requirement to enter a secure password. The S34 definition of who may have access seems reasonable.

We agree that classes of work should not be restricted and that S 36 should be expanded to enable extracts from films, sound recordings and broadcasts to be used.

FORMAT SHIFTING *(Recommendation 8)*

We agree that there should be a new exception to copyright to allow consumers to make a copy (or copies – see below) of a work that they legally own, in order to make the work accessible in another format, for playback on a device in their lawful possession. The exception should apply only for personal or private use, in relation to all classes of works. Additional format shifts should be allowed to take account of changing technology. The exception should apply in relation to works copied after the law changes.

We consider that it should be possible to make a limited number of copies, rather than just one, for private use within the immediate family circle. We support the proposal from INTELLECT that the number of permissible copies should be determined by reference to the purpose for which they are made. The test should be that no loss of sale occurs as a result of the copying/format shifting.

We welcome the strong stand in the consultation document against a possible levy system and fully endorse the arguments against a levy system set out in the document. The prejudice is minimal, since a sale to the individual concerned has already been achieved. Consumers should not be required to pay more for items that may never be used to copy copyright works. We support the suggestion by INTELLECT that the legislation should include a statement that no compensation or levy would be due as a result of the exception.

However, the consultation document is silent on the possibility mentioned by Gowers that users might be required to take block licenses for the format shifting of back catalogues. We are opposed to this possibility – sales of the catalogue works have already been achieved. Catalogue items should not be treated differently from other works as regards format shifting.

RESEARCH AND PRIVATE STUDY (Recommendation 9)

We agree that all types of work should be covered, for both research and private study, on a fair dealing basis. A DRM workaround should be in line with EU law requirements and consistent for all types of work.

LIBRARIES AND ARCHIVES (Recommendation 10A and 10B)

We agree that appropriate libraries and archives should be able to copy all forms of works in their permanent collections, and to format shift the copies, for the purpose of preservation and replacement. More than a single copy should be permitted where necessary to preserve permanent collections in an accessible format. We have no view on the inclusion of museums and galleries.

PARODY (Recommendation 12)

We have no objection to the idea of a copyright exception for parody where it is used for humorous or satirical reasons. However, if such an exception is introduced, it is important that any rights under copyright that companies may presently have to take action against those who seek to compete unfairly with them, or who issue derogatory material damaging to their brands, are not taken

away. Already our members are subject to attack by persons setting up websites parodying our own, which mislead consumers and the public about us and our products. These can be very difficult and time consuming to counter. Whilst we in no way advocate the censorship of fair comment, we consider that any new legislation must adopt a balanced approach in this area.

A fair dealing exception, as proposed in the consultation document, may go some way to alleviating our concerns. While the consultation document also mentions the possible use of actions for passing off, injurious falsehood and defamation, these common law actions are notoriously difficult. Moreover, there is no unified law of unfair competition in the UK, as there is in many of the countries mentioned in the consultation document. There should therefore be no diminution in the availability of remedies under IP law to deal with the derogatory treatment of company logos and other publications.

TMPDF – March 2008

NOTE: TMPDF represents the views of UK industry in both IPR policy and practice matters within the EU, the UK and internationally. This paper represents the views of the innovative and influential companies which are members of this well-established trade association; see list of members below.

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