Gowers Copyright Consultation
Copyright and IP Enforcement Directorate
Intellectual Property House
Cardiff Rd
Newport
South Wales
NP10 8QQ

30 March 2010

Dear Sirs

The Association for Learning Technology (ALT) is responding to the second consultation on the Gowers Report proposals. Please find attached our response.

We do not view any of this information as confidential.

Yours faithfully

John Slater

Professor J B Slater
Acting Director of Development

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This is the response of the Association for Learning Technology (ALT) to the 31 Mar 2010 consultation on proposals on copyright and educational exceptions.

We are pleased to have the opportunity to respond. We do not view any of this response as confidential.

ALT is the leading UK body bringing together practitioners, researchers, policy makers and funders of Learning Technology within and beyond UK FE and HE. ALT is a professional and scholarly organisation which brings together those with an interest in Learning Technology. There are over 200 organisations and 700 individual members including many who are leading academic and other creators of educational content. Accordingly we can speak for those whose rights are involved as well as those with interest in using exceptions.

Making the exceptions understandable, clear, technology and pedagogy independent, as future proof as possible, and reflecting the actual use of technology in education is arguably the single thing that the government can do to help the UK deliver better education without financial outlay.

This is an area where fairness and clarity are two essentials for the future. The principle that copies of material properly obtained should then be made available free of charge for the purpose of research, education and private study in the UK seem clear and fair to today's learning and research populations using today's technology. The role of the exceptions should be to make that a reality as simply and as clearly as possible and in line with usage and thinking about what is involved.

We have found that the rights creators who are members of ALT and others generally seem to agree strongly with this point of view. Their long term interests are best served by being quoted and used in learning experiences. They want this to be easy and straightforward for educational users. Resistance to simplicity and fairness seems to come not from creators but from third parties.

This is especially important at this time as educational establishments are being exhorted by government to embrace technology to increase efficiency. It would be unfortunate if the same government that is pushing hard in this direction were to simultaneously impose constraints that make it inherently difficult or impossible to proceed because of inconsistent or overcomplicated principles and definitions being embodied into law.

We believe that all aspects of Research, Learning and of Private Study by recognised members of recognised educational bodies need to be covered. Issues of the current location (e.g. at the site or at home), the type of learning (e.g. formal vs informal) and of the type of learner (e.g. site based vs remote) are irrelevant and should not be used to cloud a clear principle.

Format Shifting is an inevitable fact of modern technology. We have covered this in previous responses and believe that it is practice that is inevitable and that attempts to legislate against it will be essentially impossible to enforce[1].

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[1] ALT response to the Intellectual Property Office's "The Future" consultation paper - 4/2/2009
http://www.alt.ac.uk/docs/IPO_feb_2009_consultation_final.pdf
and
ALT response to the UK Intellectual Property Office's preliminary consultation on proposals to extend the educational exceptions on copyright - 8/4/2008

Thus the thrust of the educational exceptions should be that they should be essentially free of specifying or implying technologies (e.g. VLEs, versions of software products and hardware types, DRM products), educational paradigms (e.g. lectures, distance learners, assessment methodologies). Instead they should concentrate on the purpose being research, learning and private study as part of the activities of an appropriate educational body using product that is legitimately available before the copying takes place. This is understandable, technology free and above all fair. It also deals with the "who is doing the copying" issue that seems to trouble some as it is the institution that copies for its proper purposes and the actual identity of the person wielding the photocopier or whatever should not then be an issue.

We have few members in Libraries and archives that are not also attached to educational establishments and so we therefore do not wish to comment overmuch in this area beyond saying that Libraries, Museums etc. are often required to conduct educational activities as part of their charter or condition of award from for instance government. For those activities it would seem as if they could be considered as an educational body or be affiliated to one (perhaps a specific government one).

We are sceptical about the value of a lot of DRM. People who want to make money from stealing copyright content will break DRM. People who are not part of the "market" will be denied access to product and culture by overly fierce DRM. It is the responsibility of the educational institution and of the law enforcement bodies to ensure compliance with the law – DRM software if used has to be institutionally based - it would be excessively burdensome to have to include many different DRM products into an institutional context. A single "JISC" product could easily cover the whole of the JISC community (all of FE and HE and others).

Accordingly we need to get this right as a country and put law on copyright exceptions and related matters on a good footing for some time without the need to refresh due to technology and pedagogic changes (at least 15 years would be a good target). The alternative of an unclear or unfair piecemeal approach will not have the desired effect and will introduce inefficient frictions into education and cause resources to be wasted with an overall adverse impact on the quality of formal and informal learning and research to the detriment of the UK economy in the longer term.

To answer the specific questions of Annex B, included at the end of this document:

1a. There are no problems that cannot readily be overcome.

2a. As with other existing and proposed legislation, the problem here is that it will be very difficult to enforce. A good definition of "dealt with" is required to make this workable.

2b. It means that academics will have to think very hard indeed before undertaking operations that are currently routine and inoffensive such as distributing coursework, encouraging students to share commentary on a work etc.

3. It is a reasonable approach. While there are still problems associated with visiting academics normally based in other countries and self certifying "free" research workers, this appears a fair way forward.

This document may be accessed from the ALT Open Access repository from http://repository.alt.ac.uk/768

4. In this and a number of other places, distance learners is used as if it is a separate set of people from those present "on the premises". This is sometimes the case but is usually not true. The term "online usage" is more appropriate. Learners often wish to access and work remotely from the site where they are based, and also act as if they are remote when on site, using their own devices and the internet to access for instance course notes whilst listening to a lecture. Any legislation which tries to split learners and researchers in such a way is unclear and unfair and hence bad. Modern students do not make this kind of distinction and learners with some specific disabilities for instance may well have arranged to access in specific ways that have remote characteristics and should not be disadvantaged by the legislation.

5a. The approach needs to take into account technologies which permit distributed synchronous delivery (such as Elluminate). Other new technologies will further expand possibilities here. Again avoid naming and embedding into legislation the technology and the pedagogy as much as possible.

5b. There is a real danger that this part of the legislation will date badly and become restrictive as technology advances. It is also essentially counterintuitive to modern student thinking that distinctions of this kind are made.

6a. While we can see the logic behind this proposal, again we believe that it is confusing. "Audience participation" takes a variety of forms and these will expand. The concept of active teaching and passive learning by the "pupil" which is implied by the "receive" word is widely deprecated in the government's own literature. So, if used it should be noted that the word is being used in a technical sense and is not an attempt to turn the clock back in UK education.

6b. Both should be used. Self-directed and peer supported learning should be supported and enabled rather than seen as outside these provisions.

7a. It is reasonable to expect that institutions educate their members (researchers, learners etc.) about the need to follow the law (this includes help in understanding what the law is). They already do this in respect of photocopying through prominent notices (physical and electronic) and inclusion in induction programmes for staff and learners. Provided the law is clear, easy to understand and fair, this will be possible. If it becomes overcomplicated then the task becomes difficult and unreasonable.

7b. With some public education programmes, citizens who would benefit are the people who require access; this makes the concept of "authorisation" difficult to apply in practice in some cases.

8a. Here you have fallen foul of assuming things about technology and pedagogy. As an example, learners are increasingly asked to produce websites as part of the educational and assessment processes. The same will be true of other technologies. It is not website technology that is the problem. Any such website would need to make clear that some materials can only be accessed as part of the legitimate teaching, learning and research activities of the institution. The offence is not putting it on a website (especially but not only if it is internal!) it is the usage or downloading if not covered by the exclusion.

9a. The right thing has been done

9b. You have: see above

10 -16 (all). Beyond the comments made above we believe that the technical issues here are better dealt with by those working in the area. The principles should however remain exactly the same.

17. We anticipate that, as a result of this change, creators will be keener to see their work cited, widely used in learning and research, and fully recognised and acknowledged. It is important that this be facilitated in the interim period and subsequently. We live in an environment where openness and clarity are valued and where decisions are increasingly made on ethical grounds as well as financial ones. It is thus important that, in any transitional period, good information is made available to creators and the public as well as the educational establishments about the approaches being taken by organisations and individuals. In that way creators may be able to make more informed choices on channels to be used if they want to be seen to be acting fairly towards education, and others may also make decisions on the basis of the standing of bodies on this and related issues. It is possible that a “best practice” code for all concerned will emerge for the general benefit and this could be anticipated and facilitated.

Association for Learning Technology (ALT), 30 March 2010

ANNEX B
LIST OF QUESTIONS RELATING TO THE DRAFT STATUTORY INSTRUMENTS

RESEARCH AND PRIVATE STUDY - SECTION 29
1. Section 29(3) will apply equally to the additional works (sound recordings, fi lm and broadcasts) as to the works originally covered by this exception.
a. Are there any consequences which make this impractical?

2. We propose that the law clarifies that legitimately copied extracts of sound recordings, fi lm or broadcasts, if subsequently dealt with, would be infringing copies. We believe that the same should also be made explicit with regard to extracts already covered by section 29.
a. Are there any practical consequences of this that make this change unduly restrictive? If so, please state what they are.
b. Would this interfere with the normal things done by academics with their research and by students in the course of their studies? If so, please outline.

3. 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.
a. Are there any practical consequences of this that make this an unreasonable approach? If so, please state what they are.

EDUCATIONAL EXCEPTIONS - SECTIONS 35 AND 36
Section 35
4. Section 35(1A) currently refers to “communication to the public” on the premises of the educational establishment, but does not contain any restriction on the identity of the persons who may receive the communication. In considering how to ensure that there is some degree of control over who should receive ‘communications to the public’ outside the premises, the proposed amendments include the requirement that it should be to “authorised persons”, which are defined as teachers and pupils. This restriction would apply to both communications which are received on the school premises and those which are received by distance learners off the premises, and so would restrict the scope of the current exception in this respect.

5. We believe that “communication to the public” would cover, for example, using a computer to show a recording of a broadcast to a group of people in a lecture hall which may engage Section 34 in addition to Section 35.

Section 34(2) provides an exception in relation to the playing or showing of a sound recording or fi lm which is already limited to an audience of teachers and pupils for the purposes of instruction.

We have therefore taken the view that there may already be circumstances in which the current exception in Section 35 is limited to teachers and pupils, and therefore believe this proposed wording is unlikely to have a significant impact on educational establishments which communicate recordings of broadcasts to persons situated within the school premises.
a. Do you feel this is an appropriate approach to take?
b. What are the practical implications of this proposal?

6. In relation to the ‘communication to the public’ right, we have used the term “receive” as opposed to the term “access”. We are aware that “receive” implies a passive act, for example a pupil watching a communication as part of a class on a screen, whereas “access” is a more active term that could imply the pupil taking an active role in obtaining the material to view on computer at a suitable time.
a. Do you believe that the term “receive” is sufficient for the needs of this exception?
b. Should the term “access” or should the terms “receive” and “access” both be used?

7. We have taken the view that educational establishments should be responsible for ensuring the communication of material is only to certain authorised recipients, but we accept that, provided they have taken appropriate precautions, they may have no control over the viewing of the material on a terminal once it has been accessed. To enable an appropriate degree of control, we believe the definition of “authorised person” only needs to cover teachers/pupils who will “access” the material. Whilst we believe this is sufficient to enable assistance to be given to authorised persons who have already accessed the material, we recognise that there may be circumstances in which a student, perhaps through disability, requires help in accessing material in the first place.
a. Is this a reasonable assumption? How do educational establishments currently deal with this situation?
b. What approach could be taken so that the law adequately reflects access by those assisting “authorised persons” whilst ensuring that this does not widen access to those who do not require it?

8. The proposed wording of Section 35(1B) allows a pupil to make a copy of a communication solely to assist in their study, for example by making a hard copy of the material. Whilst Section 35 is directed at what educational establishments may do, we consider that, as a consequence of the extension to Section 35, it is also appropriate for the provision to directly address the activities which a pupil may lawfully undertake.

Any copy which a pupil may make or communication to the public, such as by posting material on a website, which does not fall within this authorisation, will fall subject to the general provisions of the CDPA, and hence will be infringing activities.
a. Does this approach strike a reasonable balance between activities which a pupil should legitimately be able to do to carry out the relevant studies and ensuring material is adequately protected from further dissemination? If not, please indicate what your concerns are and how you believe they should be tackled.

Section 36

9. We have taken the view that the term “reprographic copy” (as defined in Section 178 CDPA) seems to be too narrow to accommodate the types of digital technology employed by educational establishments, which may include remote and on-site access via computers, and the use of whiteboards. We therefore propose to remove the reference to “reprographic” in section 36 which will therefore permit any type of copying of passages extracts of the named works. We are however aware that there are various references to “reprographic” copies throughout the CDPA which may need to be examined depending on the context in which the expression is used. We have not, therefore included in the attached draft SI any consequential provisions which may result from this amendment pending the outcome of this consultation.
a. What are the implications of replacing the specific term “reprographic copy” with “copy”?
b. How do we ensure that this section of the act is sufficient to permit reasonable acts of copying extracts which reflect available technologies whilst preventing inappropriate copying?

PRESERVATION BY LIBRARIES, ARCHIVES, ETC - SECTION 42

10. In contrast to the approach of some Member States, the amendments to Section 42 are not intended to place numerical limits on the number of copies of an item which may be made for preservation purposes. Instead, the focus is on specifying the scenarios under which preservation copies can be made, which are given in subsection 2 of section 42. This will not permit institutions to make copies for administrative convenience for example, but will give them a certain degree of latitude in identifying the particular circumstances under which copying for preservation purposes is appropriate. Is this the right approach?

11. There are 4 ways in which the term “library” might be understood:

- i. An institution (i.e. a body running a library)
- ii. A place (i.e. a building containing a library)
- iii. The library itself (i.e. a collection of the things that a library can contain).
- iv. The library being an undertaking of some kind (see e.g. references in section 3 of the 1989 Regulations 35 relating to ‘conducted for profit)

There may be difficulties if a library is treated as an institution: if the institution does anything other than running a library should it be treated for the purposes of the exception as a library in relation to everything which it has? If a library is treated as a collection of things which a library can contain, and the same applies to archives, museums and galleries, then it would be possible to treat libraries, archives, museums and galleries as not being mutually exclusive: a library could, for example, include documents which could also be included in an archive or it might include illuminated manuscripts which could also be included in a museum.
a. Should libraries, archives, museums and galleries be treated as mutually exclusive for the purposes of the amended section 42 exception?
b. If libraries, archives, museums and galleries are not treated as being mutually exclusive, what is the impact of this approach on the prescribing of conditions36 for the purpose of section 42? Does this approach only work if the prescribed conditions are the same for libraries, archives, museums and galleries?

12. What is a 'permanent collection'? A permanent collection could be regarded as the items included for whatever purposes the collection was formed, whereas other items, such as records about the institution or its staff, may merely be ancillary to it. Over time it is possible that an ancillary item may become part of the permanent collection. For example, the personnel records of current staff would presumably not count as a 'library' or 'archive', but old records from the time an institution was founded might do.
a. Is this kind of test appropriate? If such a test is adopted, should it be objective i.e. for what purposes was the collection in fact formed and what is in fact ancillary to the collection? Or should it be subjective i.e. what does the body running the library/archive, etc consider the purpose of the collection to be and what is considered to be ancillary to that purpose?
b. Does ability to preserve by electronic means have any bearing on the answers to the questions about permanent collections? If so, how?
c. Does the word "deposit" in the revised draft encompass all of the ways in which an item may enter a permanent collection? If not, please elaborate.

13. Should there be restrictions on subsequent use of copies lawfully made under section 42? For example, should a lawfully made copy become an infringing copy if dealt with improperly?

14. The language of section 42 distinguishes between the objects or items to be preserved and the copyright work that may be included within such an item or object. Whilst this may not be an issue in many contexts, it could have practical implications in relation to electronic items. For example, it is often likely to be the case that the original format of an electronic item itself is of little interest, and that therefore the focus of preservation activities is actually the content which that electronic item records.
a. In such a case, what are the practical implications of the distinction in section 42 between items and the work which the item records?
b. Are there any other exceptions in the CDPA which make a similar distinction, where the language may unintentionally limit the possible use of the exception, particularly as regards works recorded in electronic items?

15. The wording of the proposed amendments to section 42 are intended to cover content which may be lost because e.g. the medium in which it is recorded has or will become obsolete. Do the proposed amendments achieve this objective?

16. We have amended the definition of "publication" in section 175 to add some further definition in relation to films and sound recordings for the purposes of new sections 39A and 43A of the Act. Does the proposed amendment of the definition have any undesirable consequences, when read in conjunction with other provisions of the Act which rely on it?

GENERAL

17. Are there any specific transitional arrangements which need to be considered?

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35. The Copyright (Librarians and Archivists) (Copying of Copyright Material) Regulations 1989
36. The responses to this stage of the consultation will help us to assess how to add to and/or amend the 'prescribed conditions' whichare set out in the Regulations referred to in footnote 35.