



The Office of the  
Committee for  
Economic Development

# CONSULTATION ON COPYRIGHT IN THE BAILIWICK

16 January 2017

## Purpose and Type of Consultation

This consultation paper is being issued to seek feedback from business, stakeholders, consumers, industry associations, practitioners and any other interested parties on the further development of intellectual property in the Bailiwick of Guernsey.

The intention is that responses will be considered by the Committee *for* Economic Development (the **Committee**), which will in turn produce recommendations in respect of the proposals.

Closing date: 27 February 2017.

The Committee:-

1. would like to invite comments from all interested stakeholders, intellectual property users of Guernsey's intellectual property environment, customers and consumers about the proposals; and
2. aims to work closely with stakeholders and industry to ensure the Bailiwick adopts the most appropriate changes to protect and enhance its economy and intellectual property environment.

This consultation paper is a working document and does not prejudice any final decision to be made by the Committee.

Please refer to section 4 "responding to this consultation" for full details of how to respond to this consultation paper.

# Consultees

This is a public consultation and responses are invited from all interested parties.

The consultation paper has been sent to:

Art dealers

Artists

Auction houses

Business magazines

Chamber of Commerce

Educational establishments (including GTA)

Galleries

Guernsey Press

Intellectual Property Commercial Group

Libraries

Registry User Group

States of Guernsey Champion for Disabled People (Deputy Sarah Hansmann Rouxel)

States of Guernsey Chief Information Officer (Colin Vaudin)

This consultation paper is also available on the [Registry website](#).

# Executive Summary

The Committee wishes to modernise the Bailiwick's Copyright legislation, in light of recent digital developments. It is also considered important that the Bailiwick's intellectual property environment keeps up to date with national and international developments, appropriate to the Islands.

The issues for consultation are discussed in detail below. Not all of the issues contained in this document may be relevant to your field of work or expertise. You are invited to respond to all or any of the questions as you consider appropriate.

A summary of the questions posed in this consultation is set out on page 24.

## Introduction

The Bailiwick's Copyright legislation is contained in *The Copyright (Bailiwick of Guernsey) Ordinance, 2005* (the "**Copyright Ordinance**") and *The Copyright (Prescribed Libraries and Archives and Copying of Material) Regulations 2011* (the "**Copyright Regulations**"). Pursuant to the Ordinance, the owner of a copyright work is entitled to control its use in various ways, including permitting or prohibiting copying the work, performing the work in public, issuing copies of the work, communicating the work to the public, and other acts.

Copyright provides a financial reward for the creators of work, and an incentive to create new works, which in turn will benefit the culture and economy of the Island.

There is however a balance to be struck between the increased incentives and rewards provided to creators and the impacts on users of copyright works who face restricted supply, increased transaction costs, and less economic justification for the trade-off.

The Copyright Ordinance seeks to balance the competing interests by permitting certain uses of copyright works without express permission from owners, through specific exceptions to copyright. For example, one existing exception allows an individual to record a television broadcast at home to watch at a more convenient time. Other existing exceptions allow copying for purposes such as research and private study, for criticism, review and news reporting, for educational use, for use by libraries and archives, for public administration, and for making accessible materials for those with visual impairment.

Directive 2001/29 of the European Parliament and the Council of 22 May 2001 deals with the harmonisation of certain aspects of copyright related rights in the information society (the "**Copyright Directive**"). The Copyright Directive, which does not have direct effect in the Bailiwick, was introduced to meet the challenge of the internet, e-commerce and digital technology. It introduced various exceptions to copyright infringement, the majority of which Member States could decide whether or not to adopt. It is considered that implementing some of these exceptions into

Bailiwick legislation could be beneficial, to harmonise the protection afforded by the Bailiwick copyright law with that of the EU and UK, and to enhance the Bailiwick's protection.

This consultation paper sets out proposals on several exceptions permitted by the Copyright Directive that have been identified to improve the existing copyright system, to make it fit for the digital age.

## 1 Issues for consultation

Fair dealing is a concept that has been part of copyright for over a century. When determining whether or not a specific use is "fair dealing" a court will usually consider how a fair-minded and honest person would deal with the work. This will always be a matter of fact, degree and impression in each case. The amount of work taken, the qualitative and quantitative proportion, and the impact of the dealing on commercial markets for the work will be important factors. The presence of the fair dealing qualification ensures compatibility with the requirements of the Berne Convention, which has been extended to Guernsey.

This consultation paper considers amendments to copyright legislation, including fair dealing exceptions in the following areas:

- a) research and private study (section 2.1);
- b) archiving and preservation in cultural institutions (section 2.2);
- c) text and data analysis for non-commercial research (section 2.3);
- d) education and teaching (section 2.4);
- e) accessible formats for disabled persons (section 2.5);
- f) public administration (section 2.6);
- g) quotation (section 2.7); and
- h) caricature, parody or pastiche (section 2.8).

This consultation also considers amendments in relation to Droit de Suite (artist resale rights) (section 2.9).

You are invited to respond to questions on all or any of these sections.

### 2.1 RESEARCH AND PRIVATE STUDY

#### 2.1.1 Current position

Bailiwick copyright law provides exceptions for research and private use. Section 34 of the Copyright Ordinance permits fair dealing with a literary, dramatic, musical or artistic work, for the purposes of non-commercial research and private study. Users in such instances will not be required to obtain prior permission from the copyright holder. Researchers must give sufficient acknowledgement of source of material, unless it would be impossible for reasons of practicality or otherwise.

The Copyright Ordinance provides exceptions that permit libraries to make and supply copies of works for the purpose of non-commercial research or private study. The person to

whom copies are supplied must satisfy the librarian that they will only use such copies for the purpose of non-commercial research and private study.

The Copyright Ordinance does not currently provide an exception for sound recordings, films or broadcasts.

Those who wish to undertake non-commercial research and private study in relation to sound recordings, films or broadcasts (for example, in the fields of musicology, media studies, film, oral history, architecture, medicine, genealogy and science) must, currently, obtain permission from the copyright holder. This may be expensive and time-consuming, especially if the copyright holder is difficult to trace or does not respond to a request. Non-commercial researchers may lack the funding and mechanisms to undertake these transactions.

The Copyright Directive permits Member States to implement copyright exceptions for research,<sup>1</sup> providing the research is non-commercial, and copied extracts are accompanied by sufficient acknowledgement of their sources. These restrictions apply to the part of the current exception that relates to research. The other part of the exception relates to private study. This is a special case of private use, and is limited to acts of fair dealing so that it does not harm incentives to copyright owners.

The Copyright Directive also allows a further type of use of copyright works for the purpose of research or private study. EU States are able to provide exceptions that allow education institutions, libraries, archives and museums to communicate works from their collections to people on their premises by electronic means for the purpose of research and private study.<sup>2</sup> Such use must be limited to individual members of the public who are able to access these works. The Copyright Ordinance does not currently provide an exception of this type. Whilst the Copyright Directive does not apply in the Bailiwick, it may be beneficial, to harmonise the protection afforded by the Bailiwick copyright law with that of the EU and UK.

### 2.1.2 Proposed amendments

It is proposed that the legislation be amended to extend the scope of exceptions for research and private study to include all copyright works, including sound recordings, films and broadcasts, in addition to the types of works already permitted to copy. This will include copies provided to users by publicly assessable libraries.

It is also proposed that provision is made to permit electronic communications of works for research and private study within educational and cultural institutions (including libraries, museums and archives).

### 2.1.3 Policy issues

- i) The Bailiwick's current research and private study exception is inconsistent and benefits certain groups of researchers and students more than others. Audio and video content makes up a large proportion of modern research material. It seems unreasonable and inconsistent that people are able to make copies of material such as books and artistic

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<sup>1</sup> Copyright in the Information Society 2001/28/EC. Article 5(3)(a).

<sup>2</sup> Copyright in the Information Society 2001/29/EC. Article 5(3)(n).

works for research or study, but cannot do the same with audio and video content without permission.

- ii) The changes would enable institutions to provide enhanced access to cultural works that have been digitalised.
- iii) It is appreciated that a balance must be struck in not unduly infringing the rights of copyright holders in such material, and that copyright works should not be 'free for all'.
- iv) The amendments would reduce transaction costs, remove unnecessary rights clearance barriers for existing research and lead to improvements in media literacy skills.
- v) There is a possibility that the rights-holders may lose some future revenues, where licences would otherwise have been granted, but it is not clear if this is the case and seems unlikely that such loss would be anything other than de minimis given the limited scope of the proposed exception.
- vi) There is a risk of abuse by some users relying on the exception to copy works which they would like to see or hear for entertainment purposes, rather than for advancing their research or study in a particular field.
- vii) It is appreciated that care should be taken to avoid crafting a solution which enables abuse of the exception for purely entertainment purposes. Opportunities for this infringement already exist. The exception would not permit use for entertainment purposes. Accordingly it is considered that there would only be a net increase in the costs of piracy if the exception either discourages the practices or makes it harder to take action against an infringer.
- viii) If no amendments are made, there is a real risk that the impact of there being no exception will increase as the use and social importance of such media increases. This is likely to further increase incentives for infringing use of the media in research and private study, which the Committee views as undesirable.
- ix) In the absence of any amendments, there may be missed opportunities for research and improving knowledge and skills. It could also result in different/unfair treatment between users in the European territory.

***Question for consultation: Copyright - Research and Private Study***

1. Do you consider that the Copyright legislation should be amended to extend the scope of exceptions for research and private study to include all copyright works, including sound recordings, films and broadcasts? Please give your reasons for this.
2. Should provision be made to permit electronic communications of works for research and private study within educational and cultural institutions (including libraries, museums and archives)? Please give your reasons for this.

## 2.2 ARCHIVING AND PRESERVATION IN CULTURAL INSTITUTIONS

### 2.2.1 Current position

Archives and museums are responsible for preserving our cultural heritage for the benefit of current and future generations. Digital technology allows archives to copy creative works, such as books, sound recordings and films, to prevent the works from deteriorating and being lost to future generations.

Section 56 of the Copyright Ordinance provides an exception for libraries and archives to make a copy of certain creative works in order to preserve them, without infringing copies. The exception however only applies when a new copy is unavailable for purchase. The exception is intended to help minimise wear and tear on fragile items or to replace lost, destroyed or damaged items.

The current exception only applies to literary, dramatic or musical work. It does not apply to artistic works, sound recordings, films or broadcast – currently copying these types of work for preservation is an infringement of copyright, unless expressly permitted by copyright owners.

The wording permits a single copy to be made. Backup copies or the use of preservation technology (i.e. making multiple copies) are precluded.

In addition, only prescribed libraries and archives are able to benefit from the exception. It does not apply to other institutions with larger collections such as museums or galleries.

The costs of obtaining copyright permissions can be prohibitively high for prescribed libraries and archives wishing to copy works that are not included in the scope of the exception. The costs are even higher for institutions that are currently not covered by the existing exception at all, such as galleries and museums.

Separate exceptions allow designated bodies to record folk songs (section 81) and broadcasts (section 97) in order to archive and preserve them.

### 2.2.2 Proposed amendments

It is proposed to extend section 56 of the Copyright Ordinance to apply to all types of media (including audio-visual works, sound recordings, literary, dramatic or musical works), and so that multiple copies can be made. It is proposed that museums and galleries, as well as libraries and archives, would be able to benefit from the exception. The exception would only apply to works already in their collections and when it was not reasonably practicable to purchase a replacement copy.

### 2.2.3 Policy issues

- i) The current preservation exception unduly restricts the ability of cultural heritage institutions to preserve cultural works for future generations. It is considered that it could be widened without negative impact on copyright owners.
- ii) The limitation of the Bailiwick's archiving exceptions to literary, dramatic and musical works creates problems when attempting to preserve a range of unstable media that deteriorate with age, such as film, maps or videotape. A librarian or archivist that wants to preserve a sound recording, film or broadcast by copying it needs to establish who owns the copyright in the work, and whether permission needs to be obtained from them. The transaction costs associated with this are high. Expanding these exceptions to include sound recordings, artistic works, films and broadcasts will reduce these costs and help to ensure these media are preserved for future generations.
- iii) Making multiple copies is useful in itself (to create backups, for example) and certain modern preservation techniques rely on it. In order to do this under the current law, an archive must seek permission from copyright owners, with the associated transaction costs.
- iv) The primary aims of the proposal are to (1) reduce costs to cultural organisations by removing unnecessary regulation and (2) enable them to deliver greater benefit to society by making it easier to preserve our cultural heritage for future generations.
- v) It is necessary to ensure that the incentives of the copyright system are not undermined, in particular by ensuring the exception does not undermine commercial sales by copyright owners.
- vi) The proposed amendments would reduce transaction costs faced by archivists, making it easier and less costly for them to preserve their permanent collections.
- vii) Any impact on copyright owners is to be minimised by limiting the exception to certain uses by specific organisations. The exception will not permit copies of works to be put on the market, so is not expected to impact on sales of copyright works.

***Question for consultation: Copyright - Archiving and Preservation in Cultural Institutions***

3. Should the exception for libraries to make a copy of periodical articles, or part of a literary, dramatic or musical work from a published edition, be extended to apply to all types of published work? Please give your reasons.
4. Should provisions allowing the archiving of broadcasts and folksongs be updated? Please give your reasons.
5. Should the copyright legislation be updated to extend the exception for the preservation of works to apply to all types of media? Please give your reasons.
6. Should the exception for preservation of works apply to museums and galleries as well as libraries and archives? Please give your reasons.

## 2.3 TEXT AND DATA ANALYSIS FOR NON-COMMERCIAL RESEARCH

### 2.3.1 Current position

New automated analytical techniques (such as text and data mining – turning raw data into useful information) work by bulk copying electronic information, which is analysed for patterns, trends and other useful information. In this way businesses can learn more about the customers and develop more effective marketing strategies, as well as potentially increase sales and decrease costs. Data mining is used in pharmaceutical companies for example to predict how a patient's genetic make up determines the patient's response to a drug therapy, or to identify links between symptoms and conditions.

The Copyright Ordinance does not expressly allow the automated copying of whole works for text and data mining. Copying in this way, without the permission of the rights holder, currently risks infringing copyright.

Copying for automated text and data analysis is not listed as a permitted type of copyright exception in EU law. The Directive does however allow EU States to provide exceptions for non-commercial research, so the introduction of an exception for text and data mining is possible under current EU law, as long as it is used only for non-commercial research purposes. Harmonising the protection afforded here by the Bailiwick copyright law with that of the EU could be beneficial.

### 2.3.2 Proposed amendments

Amendments are proposed to allow computer-based analysis (data mining) of copyright material for non-commercial research, without having to obtain specific permission from the rights holder.

### 2.3.3 Policy issues

- i) Data mining techniques can help researchers analyse the huge amount of data and information that is being produced. The European Bioinformatics Institute has estimated that the volume of biological data is doubling every nine minutes. The introduction of this exception would mean that where a person had lawful access to read any copyright material (whether under a license or otherwise), they would not have to obtain additional permission from rights holders in order to copy the work for text and data mining for non-commercial research. Use would need to be accompanied by sufficient acknowledgement.
- ii) The direct beneficiaries of a specific exception for text and data mining are likely to be to scientific researchers, but the public will also gain to the extent that important research is made more efficient, delivering social and economic benefits. Helping to make data analysis less laborious and allowing researchers to analyse a wider range of sources using these techniques should help to improve the quality of research.
- iii) Publishers of information, particularly publishers of scientific material, are likely to be the main group experiencing costs from such an exception. They would lose the right to restrict data analytics on the copyright works where that was undertaken by users who had legitimately obtained access to the works.
- iv) The exception would not provide a “right to data mine” works which the researcher did not already have a right to access. Researchers or their institutions would still have to buy access to content if that was the rights holder’s model. Publishers would be able to impose reasonable measures to maintain stability and security of their computer networks as long as researchers were able to benefit from the exception to carry out non-commercial research.

***Question for consultation: Copyright - Text and Data Analysis for Non-Commercial Research***

7. Should the legislation be amended to allow an exception for computer-based analysis (data mining) of copyright material for non-commercial research? Please give your reasons for this.
8. If you are of the view that an exception should be permitted for computer-based analysis, what copyright material should be included within the exception for? For example should analysis of databases and video clips be permitted?

## 2.4 EDUCATION AND TEACHING

### 2.4.1 Current position

Bailiwick copyright law includes exceptions for education. Copying is often a necessary part of teaching, as people learn through analysing, imitating and reproducing the works of others. The exceptions exist in recognition of education as a public good that provides both economic and social benefits.

The Copyright Ordinance contains the following provisions, which are relevant to this consultation:

- i) Section 44 of the Copyright Ordinance permits fair dealing for the purpose of instruction or examination in literary, dramatic, musical or artistic works. The exception does not apply to sound recordings, films or broadcasts.

This provision allows, for example, a teacher to reproduce a work – such as a few lines of poetry or bars of musical notation – on a blackboard, in order to explain to a class how they were put together. It allows a student to copy down the example using paper and pen. It does not allow copies to be made by a “reprographic process”, including photocopying, printing, or use with technology such as interactive whiteboards or PowerPoint. If teachers or pupils wish to copy material using “reprographic process” permission must be sought from the copyright owner.

- ii) Section 47 of the Copyright Ordinance permits educational establishments, such as schools, colleges and universities, to record broadcasts for education purposes, and to play those recordings before an audience within the school premises.

This exception does not apply to the extent that a licensing scheme (certified by the Committee) covers the activity, in which case the establishment must hold a license to be able to carry out the activity.

- iii) Section 48 of the Copyright Ordinance permits educational establishments to make reprographic copies of passages from published literary, dramatic or musical works (i.e. to make multiple copies using a photocopier or computer), for the purposes of instruction. The copies must be accompanied by an acknowledgement and the instruction must be for a non-commercial purpose. This enables teachers, for example, to make photocopies of pages of course books for inclusion in handouts to their class.

The exception does not apply for artistic works, sound recordings, films or broadcasts.

As with the exception for recording broadcasts, where a relevant licence for the activity is available the school must hold it to be able to carry out the activity.

No more than one percent of any work may be copied in any quarterly period.

In addition, all of these exceptions only apply when students are physically located at an education establishment and do not cover distance learning environments. The Guernsey Training Agency often uses Les Cotils, for example, for training and education purposes.

The Copyright Directive permits EU States to have exceptions for the purpose of illustration for teaching as well as other copying by education establishments as long as it is non-commercial.<sup>3</sup>

## 2.4.2 Proposed amendments

Amendments are proposed to:-

- i) Replace section 44 with a new exception to permit fair dealing for the purpose of illustration for instruction in any medium.
- ii) Amend the legislation to permit activities using modern technology. The exception would apply only so far as the work is used to illustrate a teaching point, the use is fair, not for a commercial purpose, and is accompanied by a sufficient acknowledgement where possible.
- iii) Widen the definition of an educational establishment, to include for example public museums, and galleries.
- iv) Remove the requirement, under sections 47 and 48 of the Ordinance, for the licensing schemes.
- v) Amend section 48 to:
  - a. extend the exception for reprographic copies to all types of work;
  - b. increase the copying limit from 1% to 5% of a work, per school annum (not per quarter); and
  - c. permit teachers to distribute copies via secure Virtual Learning Environments.

## 2.4.3 Policy issues

- i) The proposed amendments would bring copyright exceptions for educational purposes up to date, reflecting advances in digital technology. There is a strong case for permitting the copying of more types of work, including films, sound recordings, and artistic works, and for widening these exceptions so that copyright is no impediment to teaching using digital technology such as interactive whiteboards in the classroom. These changes are likely to support the teaching of arts and humanities subjects in particular.

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<sup>3</sup> Copyright in the Information Society 2001/29/EC. Article 5(2)(c) and Article 5(3)(a).

- ii) Education increasingly takes place outside of the classroom or lecture theatre, using Virtual Learning Environments. Distance learning is increasingly popular and may include for those who are unable to access education in other ways, such as students with disabilities. The proposed amendments would enable the exceptions be applied to virtual classrooms, making it easier for teachers to use distance learning technology.
- iii) Teachers and lecturers would be able to use copyright works with modern teaching equipment without the risk of copyright infringement, and would remove administrative burdens from schools and universities.
- iv) Current education exceptions permit educational establishments to copy no more than 1% of a work per quarter. This limit is very low, and likely to be meaningless when applied to small works. Being able to copy 1% of a poem or a newspaper headline, for example, is of little practical use. Other countries, such as the US, permit the copying of larger extracts of copyright works.
- v) The benefits to educational institutions of the current exceptions are reduced where collective licensing schemes can over-ride them. Collective licensing schemes are much more efficient than individual licensing. It is considered that implementing the changes proposed above, without removing the ability to license-out the exceptions, will still deliver benefits to educational establishments.

***Question for consultation: Copyright - Education and Teaching***

- 9. Should the Copyright legislation be amended to create a new exception to permit fair dealing for the purpose of illustration for instruction in any medium?
- 10. Should the Copyright legislation be amended to permit teaching activities using modern technology?
- 11. Should the definition of an educational establishment for Copyright be widened, to include for example public museums, and galleries?
- 12. Should the requirement for the licensing scheme to be certified by the Committee be removed?
- 13. Should the Copyright exception for reprographic copies in education and teaching be extended to include all types of work?
- 14. Should the copying limit for education and teaching be increased from 1% to 5% of a work, per school annum?
- 15. Should the Copyright exception permit teachers to distribute copies via secure Virtual Learning Environments?

## 2.5 ACCESSIBLE FORMATS FOR DISABLED PERSONS

### 2.5.1 Current position

Sections 38 and 39 of the Copyright Ordinance create exceptions for individuals, educational establishment and non-profit organisations, to make published literary, dramatic, musical or artistic works accessible formats for blind and visually-impaired people.

The exceptions enable accessible copies to be made and provided to a visually-impaired person without infringing copyright where a book is unavailable in an accessible format such as braille, audio or large print.

The exceptions apply only to literary, dramatic, musical or artistic works or published editions. In addition, they only apply to the extent that equivalent accessible copies are not commercially available. This is because these exceptions exist only to address a specific market failure – the lack of supply of accessible copies. If the market is able to supply these goods then the exception no longer applies.

If a license scheme for the activity is available, the section 38 and 39 exceptions will not apply and the establishment must hold a license to be able to carry out the activity.

Section 96 of the Copyright Ordinance permits a designated body to sub-title (or otherwise modify for special needs) and issue copies of broadcasts to people who are deaf or hard of hearing, or physically or mentally handicapped, without infringing copyright. The section does not apply if or to the extent that a licensing scheme exists.

### 2.5.2 Proposed amendments

It is proposed to extend the scope of the exception for copying work for blind and visually-impaired people, to permit copying of any type of copyright work for the benefit of people with any impairment.

It is also proposed to extend the scope of the exception for copying work for deaf or hard of hearing or physically or mentally handicapped persons, to make copies of any copyright material.

These exceptions would continue to apply only to the extent that commercial accessible copies were not available.

### 2.5.3 Policy issues

- i) It is important that people with disabilities are treated fairly. Making it easier for all individuals to enjoy copyright works enhances the value of those works to society.

Exceptions to copyright in this area should help copyright owners and service providers ensure that they comply with equalities legislation.

- ii) The definition of a visually impaired person is restrictive and does not extend, for example, to those with cognitive or perceptual disabilities such as dyslexia. Many print disabled persons are unable to benefit from the exceptions. International discussion on the need to reform copyright for visually impaired and disabled persons indicate that the current definition within the Bailiwick's copyright legislation is not sufficiently wide enough.
- iii) The current exceptions cover limited types of works. The exception for visually impaired persons applies in respect of literary, dramatic, musical or artistic works but works such as films are not included. Expanding the type of works covered would allow disabled persons or those acting on their behalf to make accessible copies of a much broader range of copyright material.
- iv) The amendments would allow disabled people to make a copy of a work for their own personal use, and allow charities and educational establishments to make accessible-format copies and issue them to disabled people more widely.
- v) Amending these exceptions could help meet national and international commitments towards people with disabilities. The UN Convention on the Rights of Persons with Disabilities states that its parties shall take all appropriate steps to ensure that people with disabilities enjoy access to cultural materials, television programs, films, theatre and other cultural activities, in accessible formats, and to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by people with disabilities to cultural materials.
- vi) The Copyright Directive states that *"It is ... important for the Member States to adopt all necessary measures to facilitate access to works by persons suffering from a disability which constitute an obstacle to the use of the works themselves, and to pay particular attention to accessible formats"*.

**Question for consultation: Copyright - Disability**

- 16. Should the copyright legislation be amended to extend the scope of the exception for copies for blind and visually-impaired people, to permit copying of any type of copyright work for the benefit of people with any impairment? Please give your reasons.
- 17. Should the copyright legislation be amended to extend the scope of the exception for copying work for deaf or hard of hearing or physically or mentally handicapped persons, to permit copies of any copyright material? Please give your reasons.

## 2.6 PUBLIC ADMINISTRATION

### 2.6.1 Current position

The Copyright Ordinance contains exceptions for public administration (sections 60 to 68). Some material held by public bodies will have been submitted by businesses or members of the public. Existing copyright law permits third party material that is open to public inspection pursuant to a statutory requirement (for example planning applications) (section 62), and previously unpublished material which has been communicated to the Crown in the course of public business (section 63), to be issued to the public in paper format or to be viewed on the premises of public bodies.

Some of the exceptions permit the issuing of individual copies to the public, for example paper copies. It does not permit copies to be shared on the internet. The copyright in most of the information held by a public body will be owned by that body or the Crown, so will not be an issue. Where a public body wishes to make available letters or other materials sent to them by third parties, however, they may be prevented from doing so by the owners of the copyright in those materials.

The Copyright Directive allows exceptions permitting the use of copyright works for the purposes of public security or to ensure the proper performance of reporting of administrative, parliamentary or judicial proceedings. It allows these exceptions to cover the making available of such copies on the internet, as well as the issuing of physical copies.

### 2.6.2 Proposed amendments

Amendments are proposed to amend the Bailiwick exceptions for public administration and reporting, to permit the publication of relevant documents online.

### 2.6.3 Policy issues

- i) Making third party material available online reduces administrative costs for public bodies, saving public money and time. It will also improve transparency and public confidence in Government and other public bodies.
- ii) Most people expect to be able to access public services and information online.
- iii) The amendment would only apply to material that is already available for public inspection through some statutory mechanism or material that is unpublished. It would not apply to material which the copyright owner had made available on a commercial basis (for example publications which carry a cover charge).
- iv) The change would only give new powers to the public body/registrar. Anyone accessing information shared by the public body would remain bound by the usual copyright rules, ensuring material is properly protected. The exception would not, therefore, substantially affect the ability of rights holders to control copies of their work, nor would it pose any risk to their revenue.

**Question for consultation: Copyright - Public Administration**

18. Should legislation be amended to enable public bodies to make relevant copyright material that they hold available to the public online? Please give your reasons for this.

## 2.7 QUOTATION

### 2.7.1 Current position

Many people wish to use quotes or extracts from other people's copyright works in their own works.

Section 35 of the Copyright Ordinance currently permits fair quotation of extracts from copyright works that have been made lawfully available to the public, for the purposes of criticism or review, as long as there is sufficient acknowledgement of the source of the quotation. This exception does not cover other uses of extracts, for example quotations for illustration or analysis may require copyright clearance and incur associated costs.

Fair dealing with a work (except a photograph) for reporting current events does not infringe copyright as long as it is accompanied by a sufficient acknowledgement and has been made available to the public. Similar exceptions relate to rights in performances.

It is noted that the Copyright Directive allows EU States to provide an exception covering "*quotations for purposes such as criticism and review...*", which is broader than the Bailiwick definition which limits use *only* to criticism and review. Other countries also have wider quotation exceptions than the Bailiwick. Some, such as Denmark and Sweden, have an exception that covers any quotation of a published work, as long as it is in accordance with proper usage and to the extent necessary for the purpose. Others permit quotations for additional categories to criticism and review, such as for comment or information.

Article 5(3)(c) of the Copyright Directive covers the reporting of current events, but allows EU States to have exceptions for the communication or making available of published works on current economic, political or religious topics.

The Berne Convention states that "*it shall be permissible to make quotation from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries*".

It may be beneficial to widen the Bailiwick copyright exception, to better align with the EU and other jurisdictions.

## 2.7.2 Proposed amendments

It is proposed to amend the Copyright Ordinance to widen the existing “criticism and review” exception to permit quotation from a work, not only for the purposes of criticism or review, but for any purpose, providing it is “fair dealing”.

## 2.7.3 Policy issues

- i) The proposed amendment would allow other minor uses of quotation, such as academic citation and use in examination papers, which do not undermine the commercial exploitation of copyright works.
- ii) The objective of the amendment would be to provide greater opportunities for the freedom of expression, and reduce or remove the administrative and licensing costs associated with using extracts of existing copyright works in the new works.

### ***Question for consultation: Copyright - Quotation***

19. Should the Copyright legislation be amended to permit quotation from a work for any purpose? What are the practical benefits and commercial implications of doing so? Please give reasons for your answer.
20. Should the exception for criticism and review be restricted to non-commercial use only?

## 2.8 CARICATURE, PARODY OR PASTICHE

### 2.8.1 Current position

Comedy and satire often involve imitation and use of the works of others, through parody, caricature and pastiche. This is especially so in the current age of digital creation and re-mixing.

Some countries, such as the US and France, have long allowed people to copy other people’s works for the purpose of parody. Others, such as the Netherlands and Australia, have introduced exceptions for parody more recently. No such exceptions exist in the Bailiwick. While technology now provides more opportunities for people to express themselves in new ways, the Bailiwick’s copyright law may therefore limit freedom of expression and creativity.

Creators are liable for copyright infringement if even a small amount of copying takes place when making a caricature, parody or pastiche work. The requirement to obtain copyright permission may be a time-consuming process. Additionally, rights holders may grant

permission in some cases, but it may be refused or involve significant costs. Failure to secure relevant permission runs the risk of legal action and potential damages. These risks and transaction costs may stifle the ability of creators to make new material.

## 2.8.2 Proposed amendments

It is proposed to amend the Copyright Ordinance to introduce an exception to permit fair dealing for the purposes of caricature, parody or pastiche.

## 2.8.3 Policy issues

- i) Copyright should only limit the use of creative works to the extent necessary for it to fulfil its central objective – the provision of incentives to creators, balanced against the interests of society as a whole. The law should not unduly regulate businesses and consumers where their activity has little harm on commercial sales by copyright owners.
- ii) Other countries, such as the UK, US and many EU countries permit parody works.
- iii) The amendment would encourage creativity and foster innovation in new works.
- iv) Those who would benefit from the amendment may include broadcasters, entertainers and the wider public.
- v) “Fair dealing” provisions will ensure that use is reasonable and proportionate – the use of a few lines of a song for a parody sketch is likely to be considered fair, whereas use of a whole song is not and would therefore require a license. The fair dealing requirements also ensure that this exception is compatible with the Berne Convention.
- vi) Permitting copying for these areas would reduce barriers to the creation. It would enhance freedom of expression by the general public and would also be in tune with the expectations of users of online media. These exceptions also provide educational benefits, enhancing future creativity and growth.

### ***Question for consultation: Copyright - Caricature, Parody and Pastiche***

- 21.** Should an exception be introduced to permit fair dealing for the purposes of caricature, parody or pastiche? Please give you reasons for this.

## 2.9 DROIT DE SUITE

### 2.9.1 Current position

Droit de suite is a right granted to artists or their heirs, in some jurisdictions, to receive a percentage of the sale price, net of tax, whenever original works of art in which copyright subsist are resold in transactions involving art market professionals.

At an international level, droit de suite is viewed as an important right. It has existed for some time in a number of EU Member States. The Berne Convention provides that countries may choose to permit a “Droit de suite” in works of art and manuscripts.<sup>4</sup> The procedure for collection and the amounts shall be matters for determination by national legislation. The right was introduced in the UK in 2006 in response to Directive 2001/84EC (the “**Resale Directive**”).

There is currently no resale right in the Bailiwick’s copyright legislation. The question posed in this consultation is whether it should be introduced.

## 2.9.2 Proposed amendments

It is proposed that a right of resale for artists and their heirs be introduced into Bailiwick legislation, in accordance with provisions of the Resale Directive. The Committee wishes to explore whether it would be beneficial to introduce this right.

## 2.9.3 Policy issues

- i) Droit de suite is a controversial right. On the one hand it can be seen to address the disparity between the initial sales price in the primary market and the price for which a work is later sold, and on the other the additional ‘tax’ on sales can be seen to stifle the art market.
- ii) The right has faced opposition in the United States and China, due to concerns over stifling the art market.
- iii) In the absence of a resale right, artist will receive nothing for resale at auction, whereas the auction houses will receive commission from each sale.
- iv) The right can be seen as equalising the incentive for visual artists with authors and musicians, who already receive royalties from copies of their works.
- v) Sales may be redirected to countries which do not recognise droit de suite.
- vi) In the UK, the right is operated through a system of compulsory collective management. Resale royalties must be claimed through a collecting society, such as DACS, which charge a cost for the service.
- vii) The Committee is keen to understand all the implications of introducing an artist resale right in the Bailiwick.

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<sup>4</sup> Article 14ter

***Question for consultation: Copyright – Droit de Suite***

- 22.** Should droit de suite be introduced in the Bailiwick? Please give reasons for your answer.
- 23.** Do you consider that implementing Droit de Suite in the Bailiwick could stifle the art market? Please give reasons for your answer.
- 24.** If implemented, please provide your suggestions for collection methods. Would you favour a compulsory collective management system similar to that in the UK?

### 3 CONCLUSION

If you have any further comments about these proposals, or about the development of Copyright law within the Bailiwick, the Committee would be very pleased to hear from you.

***Question for consultation: Copyright***

- 25.** Please provide any further comments that you may have on general proposals for the development of Copyright legislation in the Bailiwick.

## 4 Responding to the Consultation

Please provide your comments by 27 February 2017, in writing and preferably in a format that can be read by Microsoft Word. The Committee prefers responses to be made by email to the following address:

Email: [liz.decarteret@gov.gg](mailto:liz.decarteret@gov.gg)

### **Consultation on Copyright protection in the Bailiwick**

**Attention:** Liz de Carteret

Guernsey Registry, PO Box 451, Fountain Street, St Peter Port, GY1 3GX

The consultation closes on 27 February 2017.

1. When submitting your views please indicate whether you are responding on behalf of an organisation.
2. The Committee is also interested in receiving general comments and feedback on the Proposals. Please feel free to respond to all, or some, of the questions.
3. Additional copies of the consultation document can be obtained from the Committee C/o (address as above).
4. Unless **specifically requested otherwise**, any responses received may be published either in part or in their entirety. Please mark your response clearly if you wish your response and name to be kept confidential. Confidential responses will be included in any statistical summary and numbers of comments received.
5. The purpose of the consultation is to gather information, views and evidence which will allow an informed decision to be made regarding the Proposals. As in any consultation exercise the responses received do not guarantee changes will be made to what has been proposed and any views indicative of an approach the Committee may take, are not its final policy position nor do they constitute any formal proposal.

## Summary of consultation questions

Respondents are invited to comment on the specific questions which appeared in the main text and are repeated below.

1. Do you consider that the Copyright legislation should be amended to extend the scope of exceptions for research and private study to include all copyright works, including sound recordings, films and broadcasts? Please give your reasons for this.
2. Should provision be made to permit electronic communications of works for research and private study within educational and cultural institutions (including libraries, museums and archives)? Please give your reasons for this.
3. Should the exception for libraries to make a copy of periodical articles, or part of a literary, dramatic or musical work from a published edition, be extended to apply to all types of published work? Please give your reasons.
4. Should provisions allowing the archiving of broadcasts and folksongs be updated? Please give your reasons.
5. Should the copyright legislation be updated to extend the exception for the preservation of works to apply to all types of media? Please give your reasons.
6. Should the exception for preservation of works apply to museums and galleries as well as libraries and archives? Please give your reasons.
7. Should the legislation be amended to allow an exception for computer-based analysis (data mining) of copyright material for non-commercial research? Please give your reasons for this.
8. If you are of the view that an exception should be permitted for computer-based analysis, what copyright material should be included within the exception for? For example should analysis of databases and video clips be permitted?
9. Should the Copyright legislation be amended to create a new exception to permit fair dealing for the purpose of illustration for instruction in any medium?
10. Should the Copyright legislation be amended to permit teaching activities using modern technology?
11. Should the definition of an educational establishment for Copyright be widened, to include for example public museums, and galleries?
12. Should the requirement for the licensing scheme to be certified by the Committee be removed?
13. Should the Copyright exception for reprographic copies in education and teaching be extended to include all types of work?
14. Should the copying limit for education and teaching be increased from 1% to 5% of a work, per school annum?
15. Should the Copyright exception permit teachers to distribute copies via secure Virtual Learning Environments?
16. Should the copyright legislation be amended to extend the scope of the exception for copies for blind and visually-impaired people, to permit copying of any type of copyright work for the benefit of people with any impairment? Please give your reasons.
17. Should the copyright legislation be amended to extend the scope of the exception for copying work for deaf or hard of hearing or physically or mentally handicapped persons, to permit copies of any copyright material? Please give your reasons.

- 18.** Should legislation be amended to enable public bodies to make relevant copyright material that they hold available to the public online? Please give your reasons for this.
- 19.** Should the Copyright legislation be amended to permit quotation from a work for any purpose? What are the practical benefits and commercial implications of doing so? Please give reasons for your answer.
- 20.** Should the exception for criticism and review be restricted to non-commercial use only?
- 21.** Should an exception be introduced to permit fair dealing for the purposes of caricature, parody or pastiche? Please give you reasons for this.
- 22.** Should droit de suite be introduced in the Bailiwick? Please give reasons for your answer.
- 23.** Do you consider that implementing Droit de Suite in the Bailiwick could stifle the art market? Please give reasons for your answer.
- 24.** If implemented, please provide your suggestions for collection methods. Would you favour a compulsory collective management system similar to that in the UK?
- 25.** Please provide any further comments that you may have on general proposals for the development of Copyright legislation in the Bailiwick.