

11.09.2013

Technical review of draft legislation on copyright exceptions – comments on the proposed Disability exceptions

The British Copyright Council represents those who create, hold interests or manage rights in literary, dramatic, musical and artistic works, performances, films, sound recordings, broadcasts and other material in which there are rights of copyright and related rights.

Our members include professional associations, industry bodies and trade unions which together represent hundreds of thousands of authors, creators, performers, publishers and producers (see member list appended). These right holders include many individual freelancers, sole traders and SMEs as well as larger corporations within the creative and cultural industries. Our members also include collective management organisations which represent right holders and which enable access to works of creativity.

The BCC welcomes this opportunity to respond to the Technical Review of proposed Regulations concerning disability exceptions. The BCC has seen and supports the more detailed responses made by a range of its members including the Publishers Association, the Educational Recording Agency, British Equity Collecting Society, Professional Publishers Association and the Copyright Licensing Agency. We also note similar views expressed by our colleagues at the Creators Rights Alliance.

The UK has had an exception in its copyright laws in the absence of an authorised licensing scheme for visually impaired people since 2002, and as a result, some BCC members are already experienced and involved in the process of making published works available to print impaired people in the UK. In addition, an increasing percentage of print publications are now regularly available in accessible formats e.g. Braille or large print formats, such editions are increasingly easy to produce with the growing availability of e-books. In addition some online magazines are providing audio versions for access as part of new online business models.

At a time of rapid technological change, creators, publishers and other copyright owners in the UK look forward to continuing to making their works more and more available in accessible formats to people with print disabilities. The BCC believes, though, that while seeking to benefit legitimate users, this must not be at the risk of jeopardising the rights of those without whose creative efforts the works would not exist at all.

The BCC is not, in principle, opposed to an exception which goes wider than print disabilities and which covers all classes works. However, the way that the draft Regulations have been worded means that the different nature of a “broadcast” (and works included in it) and other works such as sound recordings, has not been properly provided for. We are also concerned by the omission of key definitions from the proposed wording. Our comments on both general points and on the proposed wording follow.

General Points

Contractual Override – impact and consequences of the contractual override provisions

In relation to this particular exception, the BCC is concerned that by deleting S31D CDPA, the draft Regulations omit recognition for licensing schemes and the basis on which appropriate licensing schemes should operate. Government has produced no evidence to show that such schemes linked to the current provisions do not work to the satisfaction of all parties involved and the BCC urges Government to re-introduce these

provisions.

The BCC also reiterates the views it has expressed previously on the introduction of contractual override provisions in the proposals on exceptions.

The move to digital use of creative content shifts the focus of use and rights away from the sale of product to the granting of a licence for agreed levels of use. Government must, therefore, take care that in introducing provisions on contractual override into its proposals, it does not tip the balance too far, limiting rights owners' control in ways which destroy existing licensing models, which disrupt the development of new models and which risk damaging economic growth.

The BCC asks:-

- How exceptions that apply only in the absence of a licence fit with wording which prevents contractual override?
- What the position will be if a work, licensed for a particular type of use, is then further used under the exception and outside the original contract terms?
- Whether, if UK law provides for a blanket prohibition on contractual override, UK content creators and other rights owners will be economically disadvantaged by comparison to the rest of the world as a result of a provision which can only incentivise the use of overseas e.g. American, contract law in a field where its service providers and other digital services are already dominant?

The wording of CDPA 1988 S.50A. and B. provides that:-

"Where an act is permitted under this section, it is irrelevant whether or not there exists any term or condition in an agreement which purports to prohibit or restrict the act".

The BCC finds this approach much less challenging to contract terms in general than that now being proposed for the text of the various proposals. The approach taken in S.50A and B. appears to deliver government policy, whilst not suggesting to users that terms and conditions, or parts of those terms and conditions, are unenforceable for any reason other than for the purpose of working around the application of recognised permitted acts.

We would, therefore, ask Government to reconsider its approach and enter into a further separate discussion on contract override in the context of its proposals.

Missing definitions

The BCC is concerned by the omission of essential definitions such as that for "disabled people" and of "accessible copy" within the new provisions. Government's intention is to provide greater clarity and certainty to those who benefit from this exception as well as for right holders. Leaving these definitions out of the proposed wording of the Regulation does not assist with these aims.

Section 31A: Disabled persons – making copies of copyright works for personal use

Compliance with Government Policy

Specific Comments

Subsections (1)(a), (b)and (c) set out the conditions required for the exception to apply. To benefit from this exception, a person with a disability must have lawful possession or use of a copy of a work, and copies of that work in a format accessible to that person must not be commercially available on reasonable terms.

Q1. Does the drafting of this subsection achieve the intended policy aim?

No. As mentioned above, "disabled person" must be defined at the outset. This is particularly important as the existing definition is being swept away and Government now intends to include physical and mental impairment as a pre-condition for use of the exception.

We also have concerns about the inclusion of the wording "on reasonable terms" alongside "commercially available" which suggests potential interference with the market and introduces new uncertainty to the application of the exception.

Implementation of Government Policy

Subsection (2) provides that copyright is not infringed by the making of an accessible copy of a work using the copy described by subsection (1), if the accessible copy is made for the personal use of the disabled person.

Q2. Is the wording of this subsection effective?

The definition of "accessible copy" should be clearly defined, in particular, that it applies to *one* accessible copy. All three of the pre-conditions at 31A (a), (b) and (c) should apply and not just that at 31A (a).

Subsection (3) provides examples of acts permitted by this exception. This list is non-exhaustive.

Q3. Are such examples helpful?

Such examples are not helpful.

Subsection (4) retains the condition in the existing Section 31A which ensures the exception cannot be used for commercial gain.

Subsection (5) sets out that any copy made pursuant to this Section must not be dealt with or transferred to a person who is not entitled to benefit from the exception.

Q4. Is the wording of this subsection effective?

No comment.

Subsection (6) aims to ensure that the exception does not allow any dealing with the work beyond that expressly permitted by this Section.

Q5. Is the wording of this subsection effective?

While the prohibition against dealing is helpful, greater clarity is needed to ensure that "communication to the public" is covered, providing consistency with other updated provisions in CDPA 1988. The reference to "cable programme service" should fall within the wider definition of "communication to the public" linked to S20 CDPA 1988.

Subsection (7) is intended to clarify that the exception cannot be overridden by contractual terms.

Q6. Does the wording of this subsection achieve this?

See our comments under the heading of "**Contractual Override – impact and consequences of the contractual override provisions**" above.

Section 31B: Making copyright works for disabled persons generally

Subsections (1) (a), (b) and (c) set out the conditions required for the exception to apply. To benefit from this exception, an educational establishment or body not conducted for profit must have lawful access to a work and accessible copies of the work must not be commercially available on reasonable terms.

Q7. Does the drafting of this subsection achieve this?

We have already commented definitions of "Disabled person" and "Accessible copies" and these apply here.

We support the proposal by the Publishers Association that "a body not conducted for profit" should be replaced by "authorised entity" and the definition of an "authorised entity".

Subsection (2) mirrors subsection (1), but applies to broadcasts. This enables the deletion of current Section 74, and allows recordings of broadcast works to be dealt with in the same way as copies of other works under this Section.

Q8. Does the drafting of this subsection achieve this?

No. The BCC supports the point made by its members BECS and ERA, here and in relation to subsection 1.

Subsection (3) is intended to provide that an educational establishment or body not conducted for profit may make and supply accessible copies of qualifying works for people with disabilities without infringing copyright.

Q9. Is the wording of this subsection effective?

Yes, though note our comment on definitions above.

Subsection (4) provides examples of acts permitted by this exception. This list is non-exhaustive.

Q10. *Are such examples helpful?*

Such examples are not helpful though we support the retention of subsection (c).

Subsection (5) retains the conditions in the current legislation requiring that the accessible copies must be accompanied by a statement that it is made under this exception and a sufficient acknowledgement.

Subsection (6) retains the condition in the existing Section 31B ensuring the exception cannot be used for commercial gain.

Subsection (7) provides that an educational establishment can only use the exception for educational purposes.

Subsection (8) requires that a body making and supplying copies under this exception maintain records and allow copyright owners, or their representatives, to inspect these records.

Subsection (9) requires that a body making and supplying copies under this Section must notify the copyright owner or their representative within a reasonable time of making an accessible copy.

Subsections (10) and (11) are intended to prevent copies made under this exception being transferred to a person who is not entitled to receive it or to a body that is not entitled to make copies under this exception. Subsection (11) aims to ensure that the exception does not allow any dealing with the work beyond that expressly permitted by this Section.

Q11. *Are these safeguards acceptable?*

No comment.

Subsection (12) is intended to clarify that the exception cannot be overridden by contractual terms.

Q12. *Does the wording of this subsection achieve this?*

See our comments on contractual override above.

BCC Members	Membership numbers	President/Chairman
Artists Collecting Society (ACS)	800 artists and estates	Harriet Bridgeman Chairman
Association of Authors' Agents	99 agencies representing authors and other rights holders	Peter Straus Rogers, Coleridge & White Ltd Chairman
Association of Illustrators (AOI)	1,450 illustrators and artists	Andrew Coningsby Chairman
Association of Learned and Professional Society Publishers (ALPSP)	210 publishers	Simon Ross Cambridge University Press Chairman
Association of Photographers (AOP)	950 professional photographers	-
Authors' Licensing & Collecting Society	85,000 authors	Maureen Duffy, FRSL President
BPI (British Recorded Music Industry) Ltd	300 independent music companies and the 3 UK major record companies	Tony Wadsworth, CBE Chairman
British Academy of Songwriters & Composers	2,000 composers and songwriters	Simon Darlow Chairman
British Association of Picture Libraries & Agencies	300 agencies and libraries	David Redfern President
British Equity Collecting Society (BECS)	CMO with 27,000 performer members	Jean Rogers Chairman
British Institute of Professional Photography (BIPP)	3,200 professional photographers	Roy Meiklejon, FBIPP President
Broadcasting, Entertainment, Cinematograph & Theatre Union (BECTU)	25,000 including staff, contract and freelance workers in the audiovisual sector	Christine Bond President
Chartered Institute of Journalists (CIOJ)	2000 members	Charlie Harris President
Copyright Licensing Agency (CLA)	CMO with 2 members and 1 agency agreement	Tom Bradley Independent Chairman
Design and Artists Copyright Society (DACS)	CMO representing 60,000 visual artists & artists estates worldwide	Mark Stephens CBE Chairman
Directors UK	CMO and professional body with 4500 director members	Paul Greengrass President
Educational Recording Agency Ltd (ERA)	CMO with 20 members including broadcasters	Deborah Annetts Chairman
Equity	36,000 performers	Malcolm Sinclair President
Incorporated Society of Musicians (ISM)	6500 musicians	Richard Hallam MBE President
Music Publishers Association (MPA)	259 companies	Chris Butler Chairman
Musicians' Union	30,500 musicians and performers	Kathy Dyson Chairman
National Union of Journalists (NUJ)	32,000 staff, contract and freelance journalists	Barry McGall President
PPL	CMO with 65,000 record company and musician members	Fran Nevkla President
Professional Publishers Association (PPA)	250 publisher members	Kevin Hands Chairman
PRS for Music (MCPS & PRS)	CMO with 100,000 composer, author and publisher members	Guy Fletcher President
Publishers Licensing Society (PLS)	CMO with 2,325 publisher members	Mark Bide Chairman
The Publishers Association	200 publishing companies	Nick Fowler Elsevier President
The Royal Photographic Society	11,000 photographers	Roy Robertson Hon FRPS President
The Society of Authors	9,000 authors	Philip Pullman President
The Writers' Guild of Great Britain	2,100 authors	Olivia Hetreed President