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Technical review of draft legislation on copyright exceptions – comments on the first four proposals deadline 17th July 2013

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 collecting societies which represent right holders and which enable access to works of creativity.

The BCC welcomes this opportunity to respond to the Technical Review and in this response addresses the first four proposals. A subsequent response will respond on the remaining three proposals.

In its response to both consultations the BCC includes the following general points and comments on contractual override provisions.

General

The BCC continues to have reservations about the assumptions behind Government's policy and its approach to implementation of that policy for the following reasons:-

- **Compliance with EU law.** We have concerns as to whether Government's proposals are in line with European law and whether it has taken full account of recent case law;
- **Potential consequences** of the proposals as announced which are likely to result from poor definitions, have not been fully foreseen and must be addressed;
- **Quality of economic evidence.** The BCC restates that the quality of economic evidence put forward by the Government in support of its proposals is unsatisfactory and takes little or no account of evidence put forward by rights holders. We note that a new Impact Assessment has been announced in the case of private copying but, once this is published, we would welcome an opportunity to comment on it; Regardless of our concerns about implementation, the BCC is concerned about the extent to which the proposed Statutory Instruments actually **implement the stated policy;**
- Given the application of **fair dealing** to most of the new exceptions, there is a real need for the law to include guidance on its interpretation as applied to the new exceptions. This should be explicit in the law with any appropriate application of fair dealing being linked to the three-step test. While explanatory notes and guidance from IPO will be helpful, it should not to enter into areas of legal uncertainty, which are more properly the remit of courts,

Contractual Override – impact and consequences of the contractual override provisions

Compliance with and implementation of Government Policy

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 licences which authorise access on agreed contractual terms. 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. US state contract law in a field where its service providers and other digital services are already dominant?

BCC recommendation

The wording of CDPA 1988 s.50A. and B. provides for a recognition of the way that conflict between the contract terms and narrowly defined permitted acts may be provided. The wording provides:-

*“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.

Private Copying

Compliance with Government Policy

The BCC recognises that the Government is seeking only to introduce a narrow exception for private copying falling within the scope of Article 5(2)(b) but it is our view that any exception for private copying must provide fair compensation for rights holders. The Government’s proposal does not.

Without prejudice to this, our first comment, the BCC is of the view that the wording of the exception, as currently proposed, is flawed and will confuse potential users as well as causing considerable harm to rights owners.

We also note that issues relating to the application of a private copying exception to particular categories of works will cause harm to some rights owners, which has certainly not been assessed for impact. For example, the impact on the value of limited editions of artistic works (photographs or prints), or impacts resulting from the creation of merchandising from such works have not been considered in the drafting of the exception.

Implementation of Government Policy

Many of the issues arising from the drafting of the exception were shared and noted by IPO at its Open Meeting on the 11th July.

The main concerns identified by the BCC are that:-

28B(1):

- wording of the exception must specifically state that it covers copying only by

- individuals;
- clarification of the meaning of “lawfully acquired” is provided;
- wording of the exception must specify that saved copies are for the “sole personal use” or “private personal use” of the person making the copy;
- clarification of the meaning of “permanent” is provided if reference to “permanent transfers” is retained;
- how the clause on technological protection measures will work in relation to the contractual override provisions to which this exception is subject.

28B(2):

- clarification of the meaning of “permanently transfers”.

28B(3):

- the wording should better reflect that the exception applies only to the reproduction right and not to the communication to the public or making available right for the purposes of compliance with the Copyright Directive.
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The BCC makes the following more detailed comments on these points:-

- ***wording of the exception must specifically state that it covers copying only by individuals***

That is, the copier must be an individual, not a body corporate. The copies should be made by the natural person who is the owner of a copy agreed to be relevant to the provisions and apply only to that natural person making copies for their own personal private use.

- ***wording of the exception must specify that saved copies are for the “sole personal use” or “private personal use” of the person making the copy***

The copy must be made for the individual’s private personal use, excluding family and friends as well as for non-commercial ends.

- ***clarification of the meaning of “lawfully acquired” is provided***

For the provision to be effective in the way intended, it is essential that the term “lawfully acquired” be defined and to add to the examples provided. For example, to exclude from the exception, copies which have been acquired through another exception (for example for the purposes of timeshifting), or through an on-demand service.

“Excluded copies” linked to access via electronic communications on contractual terms must be clearly removed from the concept of what might be treated as “lawfully acquired” under the proposed provisions of section 28B.

“Timeshifting” is given as an example above, but further consideration should be given to the inter-action with other exceptions.

- ***wording of the exception must specify that saved copies are for the “sole personal use” or “private personal use” of the person making the copy***

The personal nature of the private use needs to be recognised when addressing “transfers” of copies to others.

- ***clarification of the meaning of “permanent” if reference to “permanent transfers” is retained***

In its present form and context this is not meaningful and further definition is required.

- ***how will the clause on technological protection measures work in relation to the contractual override provisions to which this exception is***

subject

The BCC supports the inclusion of Clause 28B(1)(c) but would suggest that it should more appropriately be included under s. 28B(2) (which deals with issues of infringement).

- ***Clarification of the meaning of “permanently transfers”***

The introduction of the new concept of “permanent transfer” of copies in a digital environment appears to require new legal tests which have not previously been recognised and which will be difficult to see applied against new digital technologies.

- ***the wording should better reflect that the exception applies only to the reproduction right and not to the communication to the public or making available right for the purposes of compliance with the Copyright Directive***

Subsection (4) aims to clarify that an individual who makes a copy under this exception is permitted to store that copy in any private place, including a private cloud or other remote electronic storage.

The BCC doubts whether this provision meet its objective.

The cross reference should presumably be to subsection (3)?

BCC recommendations on an exception for private copying

The BCC recommends that IPO carries out further work on improving the wording of this exception and that further consultation on the wording is carried out before it is taken to the next stage.

Parody

Compliance with Government policy

The BCC's view is that the exception as proposed does not meet Government's policy objective for the following reasons:-

- Government has focused on parody and no proper analysis of pastiche or caricature has been made during the “Modernising Copyright” process;
- There is little hard economic evidence available in support of the exception;
- Existing Impact Assessments take no account of the costs to rights holders and users of increased legal uncertainty or increased costs in pursuing legal cases resulting from changes to legislation.

Implementation of Government policy

Definitions and limitations

The current text omits some crucial definitions and limitations on the extent of the exception. This lack of clarity will increase legal uncertainty and costs for rights holders or users wishing to determine these points.

Caricature and pastiche - The BCC argues that their “common” meanings are not apparent and if they are to be included, they should be defined in the text. Without any clear definition they cannot be treated as “certain specific uses” and will conflict with the three-step test.

Parody – The BCC would welcome greater clarity on the meaning of this.

Rights granted - A clear reference is needed to the rights to which the exception applies. The exception should be expressly linked to the reproduction right and the communication to the public right as it appears in the Copyright Directive, so excluding unharmonised rights such as the right of public performance.

Scope and Subject Matter - The proposed text stating “for the purposes of” is very broad. The BCC supports the introduction of definitions, and the application of limitations to the scope and subject matter of the exception in the following ways:-

- the subject of the parody to be limited to the specific work being used;
- any parody to which the exception applies must involve modification of the work being used;
- only a small amount of a work may be used to the extent required for the purpose of the parody, that is, the use of an entire work should not be permitted;
- the text should include examples of what is not covered by the exception.

Fair Dealing

While it is helpful that the exception is restricted by the application of fair dealing, the text fails to define or clarify fair dealing in the context of parody, pastiche and caricature. The BCC would like to see this achieved by express exclusion of uses that would normally be licensed or otherwise exploited.

The BCC does not support the view that the application of “fair dealing” to this exception makes further definition and limitation on the exception unnecessary. Fair dealing is applied differently and according to pre-existing case law for each exception. As it is a new exception, none exists for parody. In addition, while fair dealing is a term that is understood by experienced user of copyright works, it will certainly not be apparent to the type of users at whom this exception is targeted. If the text is not sufficiently clear, then a great deal of time and expense will be spent testing it in the courts. The costs of pursuing such cases will particularly impact on the ability of creators and performers to pursue potential infringers and on small scale users who have misunderstood the intention of the exception.

Moral Rights

The “right to be identified” must apply to the parody exception as it does to other fair dealing exceptions, that is, the author should receive sufficient acknowledgement.

A parody exception presents an even greater risk to the “right to object to derogatory treatment” and this must be addressed in assessing the impact of the proposed new provisions. There are three issues to be noted:

- By the time the author is alerted to the parody any damage to their “honour or reputation” is done and cannot be withdrawn;
- The Impact Assessments take no account of the cost of moral rights cases, which are likely to be high and difficult to resolve;
- The target users for this exception are unlikely to be aware of the existence of moral rights or their application, unless there is a specific reference. The Government cannot just ignore those rights or expect users to be aware.

BCC Recommendations on an exception for Caricature, Parody and Pastiche

The Impact Assessment in relation to parody, pastiche and caricature should be revisited before an exception is introduced. The absence of assessment of what is meant by “pastiche” is particularly significant here.

Uses that would normally be licensed or otherwise exploited should be expressly excluded from the exception.

A clear reference should be added to clarify the rights to which the exception applies.

Definitions and limitations should be included in the wording wherever possible to increase legal certainty. Without proper definitions being agreed (and evidence to support the proposal), pastiche and caricature would be better left out of the exception.

While the BCC welcomes the possibility of IPO guidance notes on parody and on the application of fair dealing to this exception, IPO should not become involved in publishing notices on areas of legal uncertainty. The BCC supports greater clarity in the wording of the legislation over the publication of extensive notices.

To clarify the position and educate users, it is essential that IPO incorporates an express reference to moral rights in the text of the proposal.

Quotation

Compliance with government policy

Government's intention is to permit the use of quotations for "fair purposes" which go wider than criticism and review. However, as drafted, the text encourages much more general use than is intended and the wording lacks clarity and will increase uncertainty for rights holders and will confuse users.

Implementation of government policy

The exception as drafted falls outside Article 5(5) of the Copyright Directive and the three-step test, which make it clear that any exception for quotation must be for a specific purpose, that is, a "certain special case". The exception must be clearly defined and have a narrow scope.

The term "Purposes such as criticism and review" is vague and capable of widely divergent interpretations, ranging from purposes that are critical to any purpose whatsoever, including those where any other permitted act might apply.

The BCC is also concerned that:-

- In the case of photography this exception would permit "quotation" of photographs in circumstances very similar to those that are excluded from the exception for news reporting;
- In the case of musical and audio visual works it encourages the use of "snippets" of music and film which would otherwise be licensed;
- For educational use there needs to be a clear distinction between the exception for quotation and the (licensable) activities under s.35 and s.36.

The BCC is of the view that the term "fair dealing" should be clarified and specifically linked to the three-step test. With changes to exceptions and the addition of new fair dealing exceptions, the BCC believes this is an ideal opportunity for Government to incorporate such a reference.

The vagueness of the current wording and the lack of any reference to the three-step test will increase litigation costs and will place a burden on rights holders, particularly creators and performers who will have to fund court cases to determine the extent of the exception.

BCC recommendations on an exception for quotation

The BCC recommends that "purposes such as criticism and review" be replaced with wording which makes the purpose of the exception more specific.

The BCC proposed wording along the lines of "This section does not apply to any use by or on behalf of an educational establishment to the extent that Licences are available authorising use of the work in question under the provisions of either s 35 or s 36 and the person making use of the quotation for the non-commercial educational purposes of the establishment ought to have been aware of this fact".

The BCC also recommends that further consideration be given to how the exception as proposed will apply for specific categories of work or types of use.

Public Administration

The BCC has no comment to make on this exception other than the views it has previously expressed.

The British Copyright Council represents:-

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 Nevrla President
Professional Publishers Association (PPA)	250 publishers	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