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Technical review of draft legislation on copyright exceptions – comments on the second three proposals deadline 2nd August 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 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 copyright exceptions. The BCC has previously commented on the first four proposals. This response addresses the next three proposals.

In its response, the BCC makes brief comments on the implications of the proposals but leaves it to those members of the BCC, whose own members are directly impacted by the specific changes and additions included in the proposals to comment on technical detail.

For the exception for data analysis we support the submissions made by the Association of Learned and Professional Society Publishers, the Publishers Association and the Professional Publishers Association

On the widening of the exceptions for Research, Libraries and Archives we again refer government to the submissions by the Publishers Association and the Professional Publishers Association.

On educational exceptions we particularly note and support submissions made by the Copyright Licensing Agency (CLA) and the Educational Recording Agency (ERA) which operate existing licensing schemes for educational uses.

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 and 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 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 also concerned about the extent to which the proposed Statutory Instruments actually **implement the stated policy**

- Given the application of **fair dealing** to some of these 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 a definition of fair dealing which is 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 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?

BCC recommendation

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. The BCC's comments on contractual override provisions become particularly important in relation the new exceptions for data analysis for Non-commercial Research and within s. 32 concerning teaching for the purposes of illustration.

Data analysis for Non-commercial Research

The BCC supports the views on the proposed exception which have been expressed by our members, the Publishers Association and the Professional Publishers Association, in their responses to this consultation. Their members and their members' businesses are directly affected by this proposed exception

Compliance with Government Policy

This exception does not comply with Government's Policy aim because the managed access provisions accepted by Government and laid out in the policy document do not appear anywhere in the draft. Furthermore, the omission of the word “scientific” from the wording as drafted extends the impact of this exception outside Government's

stated policy.

Crucially the lack of a definition of “electronic analysis” means that, as currently worded, the exception fails to address the purpose for which the exception was intended. This point was picked up at IPO’s Open Meeting held on 31st July 2013.

Implementation of Government Policy

Once again new terminology and the definition of that terminology are crucial for the satisfactory implementation of Government policy. The terms “lawful access” and “electronic analysis” and the “non-commercial” purpose of academic research that is neither directly or indirectly commercial, require further definition and explanation, as is explained in the submissions made by our members.

In particular it should be made clear that “Lawful access” does not include copies that are acquired through reliance upon other permitted acts such as those for private study of for non-commercial educational use.

Education

The BCC’s view is that the proposed changes go wider than is needed to achieve Government’s aim of ensuring that educational establishments are in a position to use relevant works for educational purposes, while rights holders continue to benefit from licensing the use of their works for educational use.

The BCC is concerned by the extent to which new s.29, s.32 and s.43A may impact on existing licensing arrangements under s.35 and s.36 (see below).

Section 32

The BCC has seen the response of its member the Music Publishers Association (MPA) on changes to section 32 which will have a major impact on the sale of sheet music for educational purposes. The BCC supports in particular the statement at point 6. of the MPAs response which states that:

“It is vitally important that the specialist nature of the business of sheet music publishing for educational purposes continues to be recognised and protected in the drafting of the new Section 32 of the CDPA as any photocopying of sheet music for the purposes of instruction will substitute for sales.”

The remainder of our response on s.32 is directed at points of concern to all our members.

Compliance with Government Policy

Government’s proposals are to replace s.32 CDPA 1988 with a new fair dealing provision applicable to all copyright works for the “purpose of instruction” though its stated policy was to provide an exception “to the extent necessary by way of illustration”. The BCC takes the view that the proposed wording of Section 32 does not comply with Government Policy and falls outside Article 5(3)(a) of the Copyright Directive.

While rights holders recognise that teachers cannot teach without asking pupils to do things, the current s.32, which applies to students as well as teachers, is a manual non-reprographic exception, legitimising minimal acts of copying. Extending this to cover electronic delivery, for printed materials, is significantly more open to abuse and as it involves the communication to the public right it means that an excepted act be limited to an act of “illustration” and cannot legitimise whatever a student or pupil may do with what they receive. The wording of the proposed exception should recognise this.

Implementing Government Policy

Clarification is needed to ensure that the exception under s.32 does not apply to uses

covered by s.35 and s.36. Replacing the existing limited exception, which excludes reprographic copying, with an exception “for the purpose of instruction” will confuse users and potentially conflicts with s36 and licensing schemes already in place. If Government’s intention is to “complement and underpin educational licensing schemes” then the provision should state that the provisions are without prejudice to existing licensing schemes.

The BCC recommends the removal of the caveat around sufficient acknowledgement (“where this is possible”). At the very least the burden should be reversed, in line with Directive Article 5(3)(c).

The inter-action between s32 and ss. 35 and 36 is unclear. The existing arrangements offered through ERA and CLA are based on contractual agreements which create certainty and are supported by rights holders and users alike.

Section 35

The Educational Recording Agency is a member of the BCC and we support its submission on s.35 as well as on other matters relating to educational uses. ERA has played a major role in ensuring that it offers a licensing arrangement to educational establishments which is simple and flexible. It has done this through the development of ERA Plus and by the recent admission of the Open University to ERA membership, with the result that a single scheme is now available for licensing educational use under s.35.

Implementing Government Policy

The BCC supports ERA’s recommendation for an amendment to the wording of s35(2) as follows:-

“Acts which would otherwise be authorised by this section are not authorised if, or to the extent that, licences are available authorising the **use** in question and the person **or educational establishment responsible for the use** knew or ought to have been aware of this fact.”

Section 36

The Copyright Licensing Agency is a member of the BCC and we support its more detailed submission on s.36 as well as on other matters relating to educational uses. We also note ERA’s submission on aspects of the proposals on s.36 relating to sound recordings and films and support these.

Implementing Government Policy

The BCC encourages Government to increase clarity in the proposed wording, for those who wish to use the exception by adding the word “teaching” to “staff” where this word appears. The BCC also recommends that further definition or guidance is provided on the wording of the exception to ensure clarity of meaning for the term “secure electronic network”.

The BCC also recommends that Government give further consideration to the policing of use of 5% of a sound recording or film, which will also be difficult to reconcile with the licensing options under s.35(5) or control in relation the build up of substantial parts of works which are copied, stored, accessed and used over a period of time.

Research, Libraries and Archives

Research and Private Study – Section 29

In terms of use, that is, use for non-commercial research and private study, it remains unclear what the amendments to Section 29 will achieve from the addition of sound recordings, film and broadcast, as such use of these works is already provided for by other provisions.

With regard to contractual override provisions, the BCC repeats its concerns

expressed above and questions how the clause on technological protection measures will work in relation to the contractual override provisions to which this exception is subject.

The text does not take account of the need to distinguish between “personal private use” and “private study”. Wording is needed which will provide greater clarity on this.

It is also important to distinguish between non-commercial research and private study and non-commercial educational purposes of educational establishments (to which the provisions of s.35 and s.36 apply) if the new provisions are to allow for clarity over distinct application of the different permitted acts to which the Regulations apply.

Provision of copies by librarians and archivists – Section 37 to 40 and 43

We support the submissions made by our members the Publishers Association and the Professional Publishers Association and note their recommendations that Section 37 should be limited to “certain libraries”, such as those already holding a mandate to do this and with security provisions in place under the new 2013 Legal Deposit Regulations, rather than libraries which operate as part of commercial businesses.

The wording proposed by Government for this exception includes a range of undefined, or insufficiently defined, terms, or are terms that are being applied in a context different to the one in which it is used elsewhere in legislation. “Article”, “reasonable proportion” and “making and supply” all need additional elaboration and safeguards to prevent wider use than is intended.

To reduce confusion and the risk of undermining existing licensing schemes, the BCC supports the removal of “an education establishment” at (b) in the list of institutions in new s.43A, as they are already covered by the provisions set out in Sections 32, 35 and 36.

The draft wording should also include measures to safeguard against the creation of digital files, particularly where hard copies have not been published in digital form by the author or publisher, which increases the risk of competition with the commercial marketplace.

As far as the copying of unpublished works by librarians or archivists, clarification is needed on how this subsection will sit alongside the provisions on unpublished works in the Enterprise and Reform Act 2013.

On making works available through dedicated terminals (Section 43A), the BCCs view is that the “cultural institutions” entitled under this exception, should be further limited to those which are “not conducted for profit” and which are clear legal entities.

Archiving and preservation - Section 42

Any extension of this exception to include museums and galleries should be limited to those institutions which are “not conducted for profit” and which are clear legal entities.

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 McCall President
PPL	CMO with 65,000 record company and musician members	Fran Nevrla 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