HM Government

Technical Review of Draft Legislation on Copyright Exceptions:

Government Response

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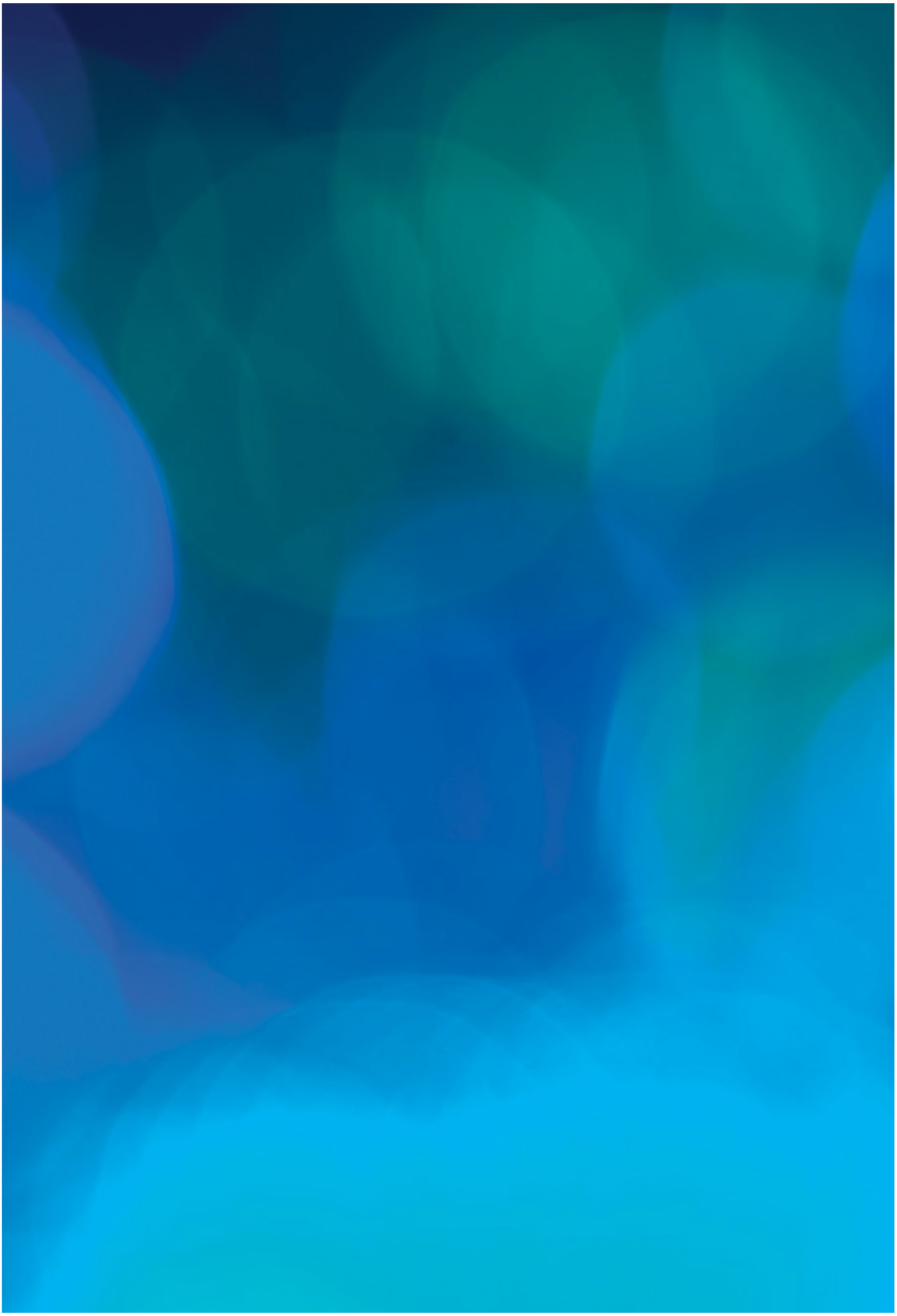
Contents



Introduction

In December 2012, the Government published proposals for reform of the copyright system. The document, "*Modernising Copyright: a modern, robust and flexible framework*", sets out the Government's policy on changes to the framework for copyright exceptions. The Government's aim is to achieve a flexible, modern and robust copyright system, including copyright exceptions that balance the interests of rights holders, creators, consumers and users.

In June 2013, the Government published draft legislation on changes to UK copyright exceptions for technical review. The purpose of the technical review was to enable interested parties to review the draft legislation at an early stage and to provide comments as to whether it achieved the Government's stated policy objectives. The technical review provided people an opportunity to make representations through written submissions over an 8-week period for each exception, or by attending public round-table meetings held in London.

Over 140 organisations and individuals made submissions to the technical review, and the Government is grateful to all who contributed.

This document summarises the key technical points raised by respondents to the technical review and notes where amendments have been made to the draft regulations. Cross-cutting points are discussed in the section on general themes and exception-specific points in the appropriate section. Minor changes or alterations to the ordering of provisions to increase clarity are not covered. This document does not include points made by respondents about the Government's policy, as this was out of scope of the technical review.

The draft legislation submitted to Parliament has been the result of extensive public consultation. As is standard practice for secondary legislation, the Office of Parliamentary Counsel has been involved in drafting the version of the legislation laid before Parliament. Legal advisers at the Joint Committee on Statutory Instruments were also consulted before the regulations were laid.

Next Steps

Alongside publication of this document, the revised draft regulations amending the Copyright, Designs and Patents Act 1998 (CDPA) have been laid before Parliament for debate and approval of both Houses. The legislation is accompanied by an Explanatory Memorandum. Guidance accompanying the legislation has also been published.

General Themes

Licensing and contract terms

The draft legislation contains clauses providing that to the extent that any contractual terms purport to prevent or restrict the doing of a permitted act allowed by a copyright exception, those terms are unenforceable. This language does not void the term of any contract.

Many respondents were positive about the language used in the contract override provisions. However, some suggested that the draft language could do more to achieve the policy goal of protecting the legitimate interests of rights holders and creators. The Government has taken great care to ensure that the draft regulations protect rights holders' ability to control how their works are used and accessed, to an appropriate degree. The extent to which the use of works can be controlled is determined by the scope of the exception. The contract override provision will only apply to contract terms in so far as they purport to restrict or prevent the act that is permitted by the exception. Other contract clauses will be unaffected. The Government therefore believes the draft legislation is consistent with its overall aims, including protection of rights holders.

A number of respondents questioned the legality of using legislation to ensure that exceptions are not undermined by contracts, in particular in the context of the legal obligations the UK has under international copyright treaties and the European Union Directive 2001/29/EC "on the harmonisation of certain aspects of copyright and related rights in the information society" (hereafter referred to as the Copyright Directive). The Government is of the view that the contract override provisions are compliant with the Copyright Directive, which does not restrict EU member states' freedom to implement domestic provisions affecting contract law. The Government is also of the view that the contract override provisions are compatible with other international obligations, in particular the "three-step test", which is a feature of several copyright treaties and with which all copyright exceptions must comply.

Fair dealing

A number of respondents suggested that the term 'fair dealing' should be defined within legislation for reasons of clarity.

The concept of fair dealing is well established in UK law, and has been expressed by the Court of Appeal as the objective standard of whether a fair minded person would have dealt with the copyright work in the manner in which the defendant did, for the relevant purpose. This test for fair dealing has been established in case law over time, and allows the courts to consider each case on its facts, taking into account the acts carried out in each case and the stated purposes. In the Government's view, defining in statute what constitutes fair dealing will not improve the copyright framework. The Government considers that further defining this term in legislation would be over-prescriptive and could undermine the Government's aim of ensuring exceptions can adapt to technological change.

Numbering of new and amended sections

The Government is aware that the numbering of sections in the draft legislation which will be laid in Parliament is different from the drafts that were published as part of the technical review. The Government has changed the numbering following advice from the Office of Parliamentary Counsel to ensure a logical flow. This is consistent with the Government's aims to make the new and amended legislation as accessible and readable as possible.

Government response by exception

Personal Copies for Private Use

The Government sought views on whether the draft legislation on private copying met the policy aim of allowing individuals who own copies of works to make further copies of those works for their own use, without allowing them to give copies away to other people.

Description of permitted act

A number of respondents to the consultation noted that the title of this provision in the technical review draft, "*Private copying*", may be misleading, as it suggested copying among a private circle, rather than personal copying by the owner of a copy of a work.

The Government agrees, and therefore in the draft regulations laid before Parliament, this provision is now entitled "*Personal copies for private use*".

Computer programs

Respondents from the computer software sector noted that the Computer Programs Directive (2009/24/EC) provides its own specific exceptions regime, permitting acts similar to those permitted by the private copying exception (backup, decompilation and other acts necessary for lawful use of computer programs, implemented in existing Sections 50A to 50C CDPA). They expressed the view that an EU Member State should therefore not go further in providing a general private copying exception which includes computer programs.

The draft regulations laid before Parliament have been amended make clear that the exception does not apply to computer programs. This is in line with the general approach taken in the CDPA to computer program exceptions and implementation of the Computer Programs Directive.

Description of copies

The technical review draft referred to "*a copy*" and "*a further copy*" to distinguish between copies made under the exception and copies from which those copies can be made. There were comments that the similarity of these terms could cause confusion, and that they did not adequately describe the nature of the copies. In particular it was argued that the description of copies, and other aspects of the exception, did not clearly indicate the personal nature of the copies being made. A number of suggestions were made as to how these copies could be defined.

The draft regulations laid before Parliament describe these copies as the *"individual's own copy*" and a "*personal copy*" respectively. Definitions of these terms are set out at section 28B paragraphs (2) and (3).

Description of permitted uses

A number of respondents sought reassurance that this permitted act would definitely allow all the activities that the Government intends it to allow, including format-shifting, storage and back up of copies. Others were concerned that without mentioning such acts explictly, users might expect the exception allowed more than intended.

In response, to provide clarity, the draft regulations laid before Parliament expressly state that private use for the purposes of this permitted act includes the making of back up copies and copies for format shifting and storage purposes.

Technological protection measures

Some respondents felt that it was necessary to provide a specific clause on technological protection measures (TPMs) within draft Section 28B, while others noted that this was not necessary as TPMs are protected separately to copyright (under Section 296ZA), and would continue to receive this protection. Many respondents considered that the complaints mechanism which will be available when technological measures prevent use of the exception should be set out in legislation.

Consistent with the approach taken in relation to other exceptions, no reference to TPMs is made within draft Section 28B. Effective TPMs which prevent copying of copyright materials will however continue to be protected, separately to copyright protection, under Section 296ZA CDPA, and circumvention of such measures will continue to be prohibited. It will therefore be possible to apply TPMs that restrict the making of personal copies, and which receive protection under Section 296ZA, even though the making of such copies will not infringe copyright under Section 28B.

As TPMs are important means for combating copyright piracy, the Government recognises that rights holders should be able to apply them even though this will sometimes conflict with the use of an exception. However, where any technology, device or component prevents or restricts the making of personal copies, and an individual considers the restriction to be unreasonable, they will be able to complain to the Secretary of State. Section 296ZE of the Act already provides such a complaints procedure, which applies to a number of permitted acts. The draft regulations laid before Parliament contain a new bespoke provision, Section 296ZEA, which sets out how such complaints will be dealt with in relation to Section 28B.

Representatives from the film and video sector, such as the Motion Picture Association of America, suggested that a bespoke mechanism, modelled after Article 6(4) paragraph 4 of the Copyright Directive, would be the best way to reflect the unique nature of the private copying exception, to set out the principles that the Secretary of State would consider to guard against unnecessary complaints, and to ensure compliance with the Copyright Directive.

Section 296ZEA reflects these concerns. It is similar to existing Section 296ZE, but differs in certain aspects. In particular, Subsection (4) recognises that it will usually be disproportionate for the Secretary of State to issue directions under this Section where works are commercially available in a form which permits the making of personal copies. The Secretary of State is required to take the commercial availability of such copies into account, and where they are available, a complaint is unlikely to succeed. It also recognises that copyright owners may apply measures which restrict the number of copies that can be made. Other aspects of Section 296ZEA are also drafted to follow more closely the language used by the Copyright Directive.

Transfer of copies

A number of respondents thought that the provisions on transfer of copies could provide a new 'exhaustion of rights' rule, allowing the resale of copies where it is currently restricted. However, distribution and communication of works to the public are restricted acts under Sections 18 and 20 of the CDPA, and Section 28B does not create exceptions to those restricted acts, which continue to prevent unauthorised public distribution and communication of works.

Instead, subsections (6) to (9) of new section 28B seek to deal with two situations:

First, they restrict the permanent transfer of copies to another person even where this is not a distribution to the public (for example, where it is a private distribution) and therefore ordinarily not a restricted act. Subsection (6) makes clear that the person making a copy under the exception cannot transfer it to someone else without infringing copyright unless the transfer is authorised by the copyright owner. This provision aims to prevent an individual making personal copies and giving them away to other people, even where that takes place within a private circle of friends and family.

Second, they achieve this without undermining the existing right to resell copies previously put into circulation in the European Economic Area with the authority of the copyright owner (the "exhaustion of rights" principle, set out in set out in Section 18 CDPA). Under this rule, a person is able to resell a copy of a CD or DVD they have bought. Section 28B(8) provides that, should that bought copy be resold, it is an infringement of copyright to retain, without the licence of the copyright owner, any copies made from it. However, nothing in subsections (6) to (9) creates a new right to resell copies, where that right does not already exist.

Definitions

A number of respondents, particularly those from the broadcasting industry (such as ITV), called for greater clarity that the proposals do not apply to copies which are ephemeral (such as those made during broadcasting) or held temporarily (such as rental copies). Some respondents also sought clarity around aspects of the remote storage provisions.

The draft regulations laid before Parliament define the individual's own copy of the work as a copy "*lawfully acquired on a permanent basis*" and state what this includes and excludes. In particular, they clarify that broadcast and rented copies do not fall within the scope of the exception. They also state that copies made under other permitted acts are not considered to be "*lawfully acquired*" under Section 28B.

The draft regulations have also clarified that personal copies may be made to a remote electronic storage area, if that area is accessible only by the individual or the provider of the storage area. It follows that, where the storage area is open to third parties, it is not permitted to store a personal copy in it. Any personal copy made available to third parties over the internet would be subject to the relevant restricted acts in Chapter II CDPA, and the existing laws on liability of online service providers would continue to apply.

Education

The Government proposed to amend the current permitted acts for education so that they apply to all types of copyright work and can be used in conjunction with modern teaching methods and technology without risk of copyright infringement.

The Government asked whether this policy aim was met by the replacement of Section 32 of the Act with a general fair dealing exception allowing any provider of education – whether part of an educational institution or otherwise – to make minor reasonable uses of copyright material without infringing copyright, provided the use is minimal, non-commercial and fair.

Replacement of Section 32 with a fair dealing for instruction provision

Some respondents noted that, as Section 32 has its basis in Article 5(3)(a), of the Copyright Directive it would be preferable to copy out the phrase "*for the sole purpose of illustration for teaching', which is used by the Directive*[ii].

The Government agrees that the use of the wording from the Copyright Directive would clarify the narrow focus of this exception and emphasise the alignment of the new provision with EU law. It has amended the drafts accordingly. However, the word 'instruction' has been maintained for consistency with current and historic UK copyright legislation in this area.

Some respondents suggested that the exception as drafted could allow private music tutors to reproduce sheet music and circulate to students, undermining the market for music teaching books. In the Government's view such use would not be permitted under this exception, as it is not non-commercial, and is unlikely to be considered either illustrative or fair dealing.

Educational institutions were generally supportive of the inclusion of examination in this Section, but some requested clarification that it would cover post-examination uses such as reproducing exam questions in preparatory material. The Government's view is that such use is likely to be considered fair dealing and so would be permitted by this exception.

As well as it being possible to use materials under fair dealing for instruction, it should be noted that extracts of materials used for the purpose of setting examination questions, for example, may well fall within the fair dealing for quotation exception (Section 30).

Amendments to Sections 35 and 36

The Government also proposed to amend Sections 35 and 36 so that together they apply to most types of copyright work, and so that copies made under these exceptions may be used with distance learning technology. As under the current legislation, where licences are available authorising the activities in question, educational establishments must hold those licences. However, where licences are not available then these exceptions allow educational establishments to reproduce copyright works without risk of infringement.

It was suggested that Section 32 should expressly exclude the licensed activities and acts that are permitted under Sections 35 and 36. Rights holders argued that educational institutions may mistakenly believe that they could use materials because of the provisions of Section 32 instead of obtaining licences under Sections 35 and 36.

Although the Government recognises that the availability of licences is a factor which may restrict the scope of the fair dealing exception, it does not believe that the provision of licences under Sections 35 and 36 should expressly exclude fair dealing under other exceptions. This is consistent with the general approach to exceptions, each of which may be relied on independently (as stated in Section 28(4) CDPA).

Some respondents suggested that the draft wording in Section 35 "*by a person situated within the premises of an educational establishment*" should be changed to "*by or on behalf of an educational establishment*" to further reflect how distance learning operates in practice. The Government agrees that it is unhelpful to require a teacher to be on the premises of their educational establishment for the purposes of distance learning, and has amended the draft accordingly.

Some respondents expressed confusion over the draft wording in Section 36(2) *"In this section "relevant work" means a copyright work other than a broadcast or an artistic work (which is not incorporated into another work)"*. The intention was to apply this section to virtually all copyright works. Broadcasts are necessarily excluded from this section as they are covered by Section 35. The Government proposed to exclude standalone artistic works as it is not meaningful to talk about a 5% extract of an artistic work. However where an artistic work is incorporated into another work, such as an illustration accompanying a page of text, it would be permissible to copy the text and the illustration together as a single extract. The section has been redrafted to make this more clear.

Quotation

The Government proposed to reimplement the Copyright Directive's quotation exception (Article 5(3)(d)) by replacing the current fair dealing exception for criticism and review (CDPA Section 30) with one based more closely on the language of the Directive.

Replacement of criticism and review

A number of respondents opposed replacing the criticism and review exception with a quotation exception. Some argued that doing so could narrow the extent to which materials could be used for criticism and review purposes, as such use would have to be justified as a "quotation". Some who benefit from the current exception were concerned that replacing it would disrupt the body of case law upon which they relied.

With regard to the first argument, the Government notes that the scope of the current exception for criticism and review must in any case be construed in light of the Copyright Directive. However, the Government is mindful of the benefits of retaining continuity with the existing provisions. Therefore, the legislation has been reframed along the lines suggested by a number of respondents, retaining the current exception for criticism and review and adding to it a new subsection to cover quotations expressly.

Fair dealing, fair practice, and extent of use

The technical review draft required that use of a work for the purpose of quotation must be a fair dealing with the work, and stated that a dealing was not a fair dealing unless it was in accordance with fair practice, or required by the specific purpose. This language was taken from Article 5(3)(d) of the Copyright Directive, on which the exception is based.

Most respondents were against any attempt to define the limits of fair dealing in this way. In particular, it was felt that the notion of "fair practice" was poorly understood and indistinct from fair dealing.

The Government agrees that the general requirement for fair dealing makes it unnecessary to provide an additional requirement for use to be in accordance with fair practice. It considers it helpful to state the Copyright Directive's requirement that use be to the extent required by the specific purpose, but has included this as a separate requirement to fair dealing.

Parody, caricature and pastiche

Many works that are made for the purpose of caricature, parody or pastiche involve some level of copying from another work. The Government is introducing a new exception to permit some limited use of copyright material for that purpose, without infringing the copyright in the underlying work(s). The technical review document clarified that although not required by the Copyright Directive, the Government has chosen to frame this exception on the basis of fair dealing. Respondents to the technical review agreed that this was sensible given the precedent set by existing exceptions.

Scope of the exception

Some respondents queried whether the Government intended the exception to include caricature and pastiche. This intention was set out in *Modernising Copyright* (p.31). The Government notes that the relevant European law covers parody, caricature and pastiche. There are differences of nuance and emphasis between the terms caricature, parody or pastiche, but in fact a given re-use may involve a mixture of the three. Inclusion of the three terms avoids the need to make subtle differentiations as to whether use of a work is properly seen as one or another of the three categories and therefore best meets the policy intent.

Some respondents thought that the exception should be narrowed so as to restrict the target of a parody to the work itself (or its author). It was their view that a parody, caricature or pastiche drawing on a copyright work should not be used to criticise or ridicule another target or theme. However, no such constraint is implied by European law and it is the Government's view that such an approach would greatly reduce scope of the exception.

Application of the exception

The exception is intended to apply to all acts restricted by UK copyright law, including live performances of a copyright work. Some stakeholders put forward the view that the acts that may be subject to an exception under the Copyright Directive include reproduction and communication to the public but exclude, for example, the public performance right. They therefore proposed that live public performances of copyright works should be excluded from the remit of this exception. The Government has considered these points, but believes it is important that the exception continues to permit both recorded and live use of caricature, parody or pastiche. It is also the Government's view that it is lawful, in implementing EU Directives, to make amendments to neighbouring provisions if required. Therefore the regulations laid before Parliament include the public performance right, permitting, for example, the televising of a comedy show with elements of parody before a live audience.

As a result of input at technical review, the Government has made a change to the formulation of the exception in relation to performers' rights. The revised regulation now reads *"Fair dealing with a performance or a recording of a performance for the purposes of caricature, parody or pastiche does not infringe the rights conferred by* [CDPA 1988 Part II Chapter 2 Rights in Performances] *in the performance or recording."* This changed formulation clarifies that the exception covers performances in which there is no copyright – not just recordings of copyright works. The phrasing is also now consistent with that used in the existing Schedule 2 CDPA 1988, which allows use of performances for criticism or review.

Research and Private Study

The Government's policy aim is to amend the Research and Private Study exception (Section 29) to cover all copyright works. This will permit some limited copying of sound recordings, films and broadcasts for research and private study, without permission from the copyright holder. This will include copies provided to users by libraries. As is the case in the current research and private study exception, the fair dealing provisions will apply. The Government also intends to reduce administrative burdens on libraries that provide copies for their users.

Libraries, educational establishments, museums and archives will also be permitted to offer access to copyright works on the premises via electronic terminals for research and private study.

The Government sought views on whether the draft Section 29 met the Government's policy aim of extending this exception to cover all types of copyright work. The response to the technical review indicated that the amendments did achieve this goal.

Some respondents felt there should be further definition of certain terms, including "*private study*" (to clarify that this does not include wider private use), "*non-commercial*" and "*research*". The Government is of the view that further defining these terms is unnecessary. These terms have long been used in copyright legislation and no evidence has been provided which suggests that they have been misunderstood.

A number of respondents queried whether the limitation to fair dealing with a work was sufficient to meet the policy intent, and suggested additional limitations. Suggestions included provisions requiring that copies are deleted, and conditions linking the use of this exception to an accredited course of study, preventing the wider transfer and selling of copies. These requirements are not present in the current legislation and the Government is of the view that these are not necessary.

Copies for text and data analysis for non-commercial research

A new research exception for text and data analysis will ensure that it is not an infringement of copyright for a person who already has a right to access a copyright work (whether under a licence or otherwise) to copy the work as part of a technological process of analysis and synthesis of the content of the work. This is for the sole purpose of non-commercial research. A licence governing access to a work will not be able to prevent or restrict use of the work in accordance with this exception, but it may impose conditions of access to the licensor's computer system or to third party systems on which the work is accessed.

Defining the permitted activity

The Government asked whether the term "*electronic analysis*" captured the range of analytical techniques used in research. Some respondents felt that the term was appropriately technological neutral and broad enough to include the range of activities normally meant by text and data mining. Others, felt that a more detailed definition of text and data mining was necessary. Another group of respondents felt that the term electronic analysis was too technology-specific and proposed the alternative term "*computational*". The Government's intention is that the legislation should be technologically neutral and should permit all activities that could reasonably be considered to be "text and data mining". Therefore, the draft has been updated with the alternative wording "*computational analysis*" and the headings have been updated to read "*text and data analysis*" as opposed to "*data analysis*" in the technical review draft.

Some stakeholders raised concerns about the definition of non-commercial research. As for section 29, the Government's view is that further definition is unnecessary. Additionally, some stakeholders suggested that the qualifier "*scientific*" should be added to the phrase "*non-commercial research*". The Government's view is that including the qualifier "*scientific*" would not improve clarity of the legislation. This might lead researchers to the incorrect view that the exception only applies to academic papers or only to STEM research. However, the wording has, for consistency, been amended to mirror that of the existing section 29.

Access to material

The Government asked whether the term "*lawful access*" is effective. Some respondents agreed that the term was appropriate. Others felt language around lawful use would be more appropriate. Others felt that the legislation needed to make a distinction between licensed and unlicensed access to content. Having considered the arguments, the Government's view is that the term "*lawful access*" is the most appropriate as it provides the clarity that the exception applies to all material to which the researcher has legitimate access based on a proper application of the UK's legal framework and, where applicable, relevant contract terms. This covers both paid-for subscribed content and content that is not paid for, such as that available under a creative commons licence.

The Government asked whether the contract override clause was effective in ensuring that researchers could benefit from the exception whilst ensuring that other contractual terms are not affected. Some respondents felt that the clause was worded effectively. Other respondents were concerned that the drafting of the contract override clause would not allow publishers to adequately control access to their networks without explicit reference to this on the face of the legislation. However, the contract override clause only renders unenforceable contract terms that purport to prevent or restrict the making of a copy which is permitted by the legislation. Contract terms that are not directly related to copyright will not be affected, including, for example, contract terms controlling how much material a user can access. Therefore, the contract override clause

will not stop publishers imposing controls that are reasonably necessary for the purpose of ensuring the security and stability of their systems, as long as any restriction on the act of copying the work for non-commercial text and data mining resulting from these controls is incidental. For the avoidance of doubt, this point is reiterated in the accompanying guidance.

Dealing and transfer

Several stakeholders queried the dealing and transfer provisions, including suggesting that communication to the public should be explicitly forbidden. The Government agrees with stakeholders that the draft as it stood could be clarified. The draft has been modified to make clear that copyright is infringed where a copy made under the exception is transferred without the copyright owner's authorisation, including deleting the word "*permanently*", which was felt by several stakeholders to be redundant. In addition, the legislation now separately includes a no-dealing provision, including a definition of "*dealt with*", in line with other exceptions.

Acts that are infringements under other provisions of the CDPA, such as communicating to the public, are not expressly mentioned as infringing acts in this exception. However, the accompanying guidance makes clear that communicating to the public is an infringement.

Sui generis database right

Some respondents queried whether there was a need for a parallel exception to the sui generis database right to ensure the legislation met the policy aims. The sui generis right limits the database user's rights to extract and reutilise material from a database.

The EU Database Directive allows member states to introduce an exception to the extraction right for the purposes of non-commercial research. The UK has implemented this exception in regulation 20 of the Copyright and Rights in Databases Regulations 1997. The Government's view is that this existing exception will permit the extraction of whole works if required for text and data mining through the provision for "*fair dealing with a substantial part.*"

Stakeholders also raised concerns that the attribution requirements of the database exception are more stringent and that they may be impossible to meet because of the large volumes of material that can be used in a text and data mining analysis. As the Copyright Directive has been copied out exactly in this respect, there is no flexibility for softening the attribution requirement. The Government's view is that the requirement to attribute is likely to be met by citing the database and not the individual works within the database, if this is impossible for reasons of practicality.

Acknowledgement

Some stakeholders questioned whether the wording of the section on attribution was correct. Rights holders tended to suggest that attribution should occur in all cases whereas researchers and representative bodies questioned whether determining what was "*impractical*" placed an undue burden on researchers and therefore that "*impossible*" would be preferable. The Government's view is that the current wording, which mirrors the current wording of section 29, strikes a fair balance between ensuring the author is recognised whilst recognising that a text and data mining analysis might include so many works that to list them all is impractical.

Process and results of text and data mining

Some respondents were concerned that the draft legislation could be read as restricting the extent of permitted copying to a single copy, which may not be consistent with the practice of text and data mining. The Government agrees that it should be possible to make multiple copies of the same document for the limited purpose set out in the exception. Section 6 (c) of the Interpretation Act (1978) is clear that words in the singular include the plural and vice versa. The title of the exception has also been updated to ensure it is clear that multiple copies are permitted.

Some stakeholders questioned whether, in order effectively to permit text and data mining, the legislation needed to clarify the status of works that result from text and data mining analysis. Outputs from text and data mining are expected to be factual and are thus not covered by copyright. The Government's view is that any clarification would simply restate existing law and therefore would not be consistent with good drafting of legislation. The accompanying guidance reminds researchers that they must ensure they obey copyright laws when publishing the results of their analysis.

Libraries, archiving and preservation

The Government's policy is to allow copying of all types of copyright works for non-commercial research and private study, and is therefore amending existing sections 37 to 40, 41 and 43 of the CDPA, which relate to libraries and archives, to achieve this.

It is also Government policy to expand the existing exception that permits librarians and archivists to copy certain works for preservation purposes to include all classes of work and to extend this exception to museums and galleries. Section 42 will be amended to achieve this.

The Government is also seeking to remove the bureaucratic designation process from Sections 61 and 75, which allow archives to record folk songs and broadcasts for preservation purposes.

Cross cutting issues

The Government sought views on whether the amended libraries and archives provisions achieved the objective of making it easier for declarations to be made in digital format. Some respondents were concerned that it was unclear whether the draft legislation specifically allowed for electronic declarations to be used. The Government is of the view that the draft regulations do allow electronic and digital declarations.

The Government also sought views on whether the legislation was sufficiently clear that it is the person providing a false declaration who infringes copyright, rather than the librarian. Respondents agreed that the draft legislation achieved this aim.

The Government was also asked to consider whether it was possible to simplify the way libraries charged when supplying copies. The Government understands that libraries operate in different ways, and has therefore removed the requirement that libraries and archives charge students, researchers and other libraries or archives when making and supplying a copy of a work. The Government's view is that libraries should have the flexibility when to charge for copies, on the condition that when a charge is applied the sum is calculated in reference to the cost of production.

A number of respondents commented that some of the amended sections did not include a provision to bar contracts from overriding the exception. The Government's policy is to prevent exceptions from being undermined by contracts, as long as such use is fair. The Government has therefore inserted the missing contract override provisions for the exceptions where libraries make single copies of published works and where libraries supply single copies to other libraries. No contract override provision is included in the dedicated terminals exception, in line with the Copyright Directive. Nor is one included where libraries make copies of unpublished works, in line with the existing provision which allows the copyright owner to prohibit copying of the work.

Copying by librarians: supply of single copies to other libraries

The Government sought views on whether this amended section achieved the policy aim to expand the exception to cover any published work. Several respondents felt that the objective was achieved.

One respondent queried whether illustrations embedded in a work are covered, and suggested that the regulations explicitly include these. The Government is of the view that the draft regulations are broad enough to cover circumstances where part of a published work that includes an illustration can be copied, on the proviso that the conditions as set out are met.

It was noted there was an omission of an existing limitation in the Librarian and Archivist Regulations that while a library that is conducted for profit may make and supply a copy under this section, only a library that is not conducted for profit may receive such a copy. The Government is of the view that this limitation should remain, and this is now reflected in the draft regulations.

A further suggestion was made that the use of the term "*published editions*" may preclude other categories of works such as films. The Government policy is to allow access to all types of works, and the revised text therefore does not refer to "*editions*".

Copying by librarians, etc: replacement copies of works

The Government sought views on whether the draft regulations effectively achieved the policy aim of making it easier for cultural institutions to preserve creative content by expanding Section 42 to include all classes of copyright work and to extend it to cultural organisations such as museums and galleries.

Some respondents felt it would be preferable to explain that the definition of museum can include a gallery, rather than referring to galleries specifically in section 42. The Government agrees and has amended Sections 42 and 43B accordingly.

Several respondents suggested that the wording of the exception seemed to imply that only a single copy of a work could be made for preservation purposes. The Government recognises that the wording used in the draft regulations was a little ambiguous. The regulations have been reworded to provide greater clarity that multiple copies of a work can be produced when necessary for preservation purposes.

Some respondents from the cultural heritage sector noted that the draft regulations precluded archival copying of works held by cultural institutions that are not accessible by the public. They pointed out that such institutions often hold works which are subject to restrictions on access (e.g. because of personal data), but which are of cultural or historic value so will still need to be preserved. The Government took this suggestion on board and has amended the regulations to allow copying of such works for preservation purposes.

Several respondents noted that the wording was ambiguous in the case of works being supplied to institutions whose copy of the work had been lost or stolen as it was not clear which institution should not be conducted for profit. The Government has amended the wording of this provision to make it clear that all cultural institutions can make and supply copies under this exception, but only cultural institutions that are not conducted for profit can receive such copies.

Views were also sought whether the exception effectively safeguarded the interests of copyright owners. Several respondents argued that the commercial availability requirement was less relevant in the digital era as digital objects may not be available to purchase in a form that allows their long-term preservation (many digital formats corrupt or become obsolete in a relatively short space of time). They suggested that the "reasonable practicability" of acquiring a replacement copy should be based on several factors including the suitability of the commercially available copy for long-term preservation.

The Government is of the view that these concerns are already addressed by the legislation, as the exception does not apply when a copy is available on commercial terms "*to fulfil the purpose [of preservation]*". Therefore, if a digital copy is not commercially available in a format that ensures long-term preservation then this requirement would not be met, and the exception would apply.

Copying by librarians: single copies of published works

The Government sought views on whether the amended provisions which permit copying by librarians and archivists for the purposes of research and private study (currently sections 37 to 40 in the CDPA) were appropriately merged and simplified. It also sought views whether the amended section achieves the Government's objectives to expand the classes of work which could be made or supplied under this section.

A number of respondents agreed that the wording of the draft legislation achieved the Government's policy objectives. Some respondents felt archives should be explicitly included in the amended provisions. The Government understands that the function of a library and an archive can overlap. An archive that loans material could be considered to be a library and would therefore be allowed to make and supply copies of works for students and researchers under this exception.

Some respondents suggested additions to the text, including that the exception is limited to an "*article from a published periodical*", and that "*reasonable proportion*" is replaced with "*fair dealing*". In amending the provisions for librarians copying published works, the Government has used existing language from the CDPA. The current terminology has not been problematic; therefore, the current drafting is retained.

Copying by librarians or archivists: single copies of unpublished works

The Government sought views on whether the provisions achieved the policy objective of covering all classes of unpublished works. Several respondents felt that the draft regulations achieved the policy aims.

A number of respondents noted that the term "*unpublished*" in the draft regulations did not fit well with the extension to sound recordings, broadcasts and films, as "*unpublished*" did not explicitly mean that the work had not been communicated to the public. The Government agrees and has inserted a reference to communicating a work to the public which should provide clarity for works that are "*communicated to the public*" in addition to being "*published*".

One respondent observed that an existing condition, where copies of material made under this exception could not be passed on to another person, had been omitted. This provision has now been inserted into the draft legislation.

Libraries, educational establishments and other institutions: making works available through dedicated terminals

This is a new exception that will allow cultural institutions to make works available via dedicated terminals on the premises of certain institutions. The Government sought views whether the draft legislation achieved its intended policy objectives and whether the exception would (as intended) only apply when there were no licensing or contractual terms to the contrary.

A number of stakeholders felt that a definition of a dedicated terminal was required, along with specific stipulations as to what facilities could or could not be provided on these terminals such as word processing, facilities to enabling the copying of the displayed works, email or the provision of remote access. The Government has as far as practical used the language contained in the Copyright Directive and therefore has not introduced additional definitions. There are no restrictions on rights holders setting licence terms on works made available through dedicated terminals.

Some stakeholders raised concerns that the draft was incompatible with the Copyright Directive as it does not limit the measure to institutions that are "*not conducted for profit*".

The Government is of the view that the draft legislation is compatible with the Copyright Directive: it essentially copies out the wording of Article (5)(3)(n) of the Directive, as it applies the exception expressly to the establishments referred to in Article 5(2)(c), that is publicly accessible libraries, educational establishments or museums, or archives.

The two Articles allow these institutions to carry out "*specific acts of reproduction... which are not for direct or indirect economic or commercial advantage*" (Article (5)(2)(c) and "*use by communication or making available, for the purposes of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in Article 5(2)(c)*...."

There was a suggestion that terminals should be limited to provide only the corresponding number of copies that were owned by that institution. As there are no restrictions on rights holders setting licence terms on works made available through dedicated terminals, the Government's view is that this additional provision would be unnecessary.

The Government agrees with stakeholder concerns that referring to works that had been purchased would exclude works which had been lawfully acquired (e.g. given to the institution). The draft legislation has therefore been amended to make clear that lawfully acquired works are included..

Respondents felt that the wording ensured the exception only applied when there were no licensing or contractual terms to the contrary, as intended.

Recording of folksongs

This is an existing exception which permits the recording of folksongs for archival purposes. The Government sought views on whether the draft regulations made Section 61 less bureaucratic for archives by removing the requirement for organisations using the exception to be designated by the Secretary of State. Instead, the exception will apply to any body that is not established or conducted for profit. Respondents were generally content with the legislation.

It was noted that the draft regulations stated that an archivist could only make and supply a copy of a work when they were satisfied that the user only intended to use it for research or private study. However, there is nothing to say how they may be satisfied. One respondent suggested that the user should be required to provide a written declaration, as with sections 37 and 43. The Government agrees with this point and has amended the draft legislation accordingly.

Recording of broadcasts for archival purposes

Section 75 is an existing exception which permits the recording of broadcasts for archival purposes. As with Section 61, the Government sought views on whether the removal of the designation process made Section 75 less bureaucratic for archives. This exception was amended to apply to any body that is not established or conducted for profit.

It was noted that this section, in conjunction with Section 43, may create an unintended loophole in which not-for-profit bodies could record and then distribute entire broadcasts and underlying works for non-commercial research or private study. Due to the definition of publication many films/broadcasts qualify as unpublished and so would fall within the scope of Section 43. This concern has been remedied by amending Section 43 so that it only applies to works that have not been published or communicated to the public.

Access for disabled people

The Government's policy aim is to extend the existing exceptions for visually impaired people to include all types of impairment that prevent someone from accessing a copyright work, and to all types of copyright work. The aim of this is to help ensure that all people are able to access cultural materials, regardless of any impairment they may have.

Section 31A

This exception is intended to permit a disabled person, or someone acting on their behalf, to make a single accessible copy of a protected work for private use.

The Government sought views as to firstly whether the regulations were effectively drafted to ensure that copyright is not infringed by the making of an accessible copy of a work for the personal use of a disabled person, and secondly that the exception is limited to situations where the disabled person has lawful possession or use of a copy of the work, and accessible copies of that work are not commercially available on reasonable terms.

Some respondents were concerned about the use of the word reasonable when describing commercial terms. It was argued that only the market could decide what was reasonable and the use of this term could lead to legal uncertainty. However, the Government disagrees with this point, both here and in section 31B. It should not be permitted for unreasonably-priced accessible works to prevent disabled people from having access to cultural materials. The term reasonable is well-understood by the courts, and it is certain that market factors would be taken into account when determining whether specific commercial terms were reasonable.

Some respondents suggested changing the definition of disability from "*physical or mental impairment*" to "*physical, cognitive or mental impairment*". This is because dyslexia is considered by some people to be a cognitive rather than mental impairment. However, the Government decided to retain the original definition used (a person with a physical or mental impairment) both here and in section 31B as this correlates with the definition used in the Equalities Act 2010. In fact, the British Dyslexia Association notes on their website that dyslexia falls within the definition provided in the Equalities Act.

It was also suggested that the definition of "*disability*" should be brought even closer in line with that provided in the Equalities Act to ensure consistency across the law as the definition in the draft regulations contained no reference to whether an impairment is a long-term condition. The Government's view is that it is not necessary to precisely mirror the language used in the Equalities Act as any court would be sure to take this legislation into account when deciding if a person qualified as disabled.

The Government sought views on whether the wording of the draft regulations were effective in preventing copies made using the exception from being dealt with or transferred to persons who are not entitled to benefit from the exception.

It was suggested that reference to "*communication to the public*" should be included within the no-dealing provisions and it was also noted that the term "*cable programme service*" is no longer used in the CDPA. The dealing provisions have been altered for consistency with the other exceptions both here and in section 31B. Acts that are infringements based on other provisions of the CDPA are not redefined in the exception.

The technical review asked respondents whether a non-exhaustive list of acts permitted by the exception would be helpful. The comments received were almost unanimous in the view that such a list was not helpful. Respondents argued that the list only cited two examples and, from the perspective of blind people, does not mention the making of Braille copies. It was suggested that this would probably be better dealt with outside of legislation in guidance. The Government agrees with these suggestions and the subsection has been deleted.

Section 31B

This exception is intended to allow educational institutions and organisations not conducted for profit to make and supply accessible copies of protected works on behalf of disabled people. Views were sought whether the regulations were effectively drafted to ensure that an educational establishment or body not conducted for profit may make and supply accessible copies for disabled people without infringing copyright, provided they have lawful access to the work and accessible copies are not commercially available on reasonable terms.

Some respondents suggested that there should be a provision allowing bodies to share intermediate and accessible copies with each other to reduce costs. This is something allowed under the current s31C for intermediate copies. The Government agrees with this suggestion and has made the necessary amendment.

The technical review asked respondents whether a non-exhaustive list of acts permitted by the exception would be helpful. There was some disagreement over whether such a list was helpful in this instance. However, the respondents were unanimous that the provision allowing bodies to make intermediate copies (copies that are not accessible, but which are necessary for the production of accessible copies) would need to be retained. The Government agrees with this suggestion and opted to delete the other examples of permitted acts.

Several stakeholders suggested that the regulations should retain the provision in the current legislation that requires accessible copies of digital works to have the same, or equivalent, TPM protections applied as the original. The Government agrees with this suggestion as it provided an important safeguard for rights holders.

The Government also asked whether the exception was effectively drafted to permit the inclusion of broadcasts within the exception. This is intended to enable the deletion of the current Section 74, which allows the making of sub-titled copies of broadcasts for persons who are deaf or hard of hearing. Some respondents noted that there may be confusion around how this applies to the copyright works contained in a broadcast. For instance, the draft regulations stated that the exception would apply if a body has "*lawful access*" to a broadcast, whereas they would need "*lawful possession of a commercially published copy*" of any work contained within that broadcast. This could be problematic as a body may have access to a broadcast, but not possession of the works contained within it (e.g. films, music, etc.). The Government agrees

with this suggestion. The new legislation states that, provided a body has lawful access to a broadcast, they can copy that broadcast and any works contained within it, for the purpose of providing accessible.

One respondent noted that there was an issue with the statement that it is not an infringement for a body to "*[use] its copy of the copyright work or the broadcast*" to create accessible copies. This was problematic as there was no provision allowing the body to make its own copy of the broadcast in the first place (the draft regulations only referred to a body having "*access*" to the broadcast). A body would need to be able to record the broadcast before they could make the necessary changes to make it accessible. The Government agrees with this suggestion and has made the necessary changes.

Public administration and reporting

The Government's policy is to make amendments to sections 47 and 48 to allow public bodies to make material that is open to public inspection or on an official register available to the public through online services. This will mean that the public will be able to obtain copies of relevant information easily and conveniently – including third party copyright material, such as letters and emails. The extension will not include material that is commercially available to purchase or license.

The Government sought views on whether the draft legislation achieved its intended policy aims; whether the legislation should refer to "*electronic transmission*"; and whether the wording sufficiently protected commercially available works. Overall the responses agreed that the regulations met the policy aims. There was a suggestion that the Government should extend the right to cover "*communication to the public*". However, this would go as far as to include broadcasting, which was not part of the stated policy on which the Government consulted.

Section 47

The draft changes to section 47 referred only to "*with the authority of the appropriate person*". Some respondents to the technical review suggested that this could preclude the appropriate person themselves from carrying out the permitted act. The Regulations have therefore been redrafted to read "*by or with the authority of the appropriate person*". This wording avoids any perceived narrowing effect and will be consistent with the phrasing used in other parts of the Act.

Responses to the technical review also suggested redrafting to ensure that the existing permitted act of issuing material to the public was not inadvertently narrowed by the introduction of the new constraining factor that prevents public bodies from publishing third party material online where that material has been made commercially available to the public (with the authority of the copyright owner). The Regulations have been reviewed and amended accordingly, so that the commercial availability restriction applies only in relation to making information available online.

Contrary to the approach adopted in the technical review draft, a provision rendering contractual override provisions unenforceable is not now included in section 47. Since this exception concerns material which is provided by persons pursuant to statutory provisions for statutory purposes, it is considered that there is no scope for the provision of such material to be made subject to contractual terms. Such a provision would be inappropriate and possibly misleading.

List of individuals, institutions and organisations that responded

- AAA (Association of Authors' Agents)
- Advanced Access Content System Licensing Administrator, LLC
- ALCS (The Authors' Licensing and Collecting Society)
- Alistair Willis (Open University)
- Allan Rae (Colleges Scotland)
- Alliance for IP
- ALMA-UK (Archives, Libraries and Museums Alliance UK)
- ALPSP (Association of Learned and Professional Society Publishers)
- Amazon
- AOL (America Online)
- Archives and Records Association
- Arts Council England
- Associated Press
- Association of British Orchestras
- Association of European Performers' Organisations
- Association of Illustrators
- Association of Photographers
- BAPLA (British Association of Picture Libraries and Agencies)
- BBC (British Broadcasting Corporation)
- BD+ Technologies, LLC

- BFI (British Film Institute)
- BILETA (British and Irish Law, Education and Technology Association)
- Bircham Dyson Bell LLP
- BPI (British Recorded Music Industry)
- British Copyright Council
- British Equity Collecting Society
- British Institute of Professional Photography
- British Library
- Brunel University Library
- BSA, The Software Alliance
- BVA (British Video Association)
- City of London Law Society
- CLA (Copyright Licensing Agency)
- Colleges Scotland
- Concert Promoters Association
- Corbis
- CREATe (Creativity, Regulation, Enterprise and Technology)
- Creators' Rights Alliance
- Cutbot
- DACS (Design and Artists Copyright Society)
- Digital Transmission Licensing Administrator, LLC
- DVD Copy Control Association, Inc.
- Editorial Photographers UK
- Endemol UK
- ERA (Educational Recording Agency)
- Euromonitor

- European Bioinformatics Institute
- Film Distributors' Association
- FOCAL International
- Getty Images
- Gillian Spraggs (Action on Authors' Rights)
- Google
- Graham Titley (Plymouth University)
- Hallé Orchestra
- Harbottle & Lewis LLP
- Harper MacLeod
- Hat Trick Productions
- IAML (International Association of Music Libraries, Archives and Documentation Centres)
- IFTA Irish Film and Television Academy
- International Artist Managers' Association
- International Association of Scientific, Technical & Medical Publishers (STM)
- IP Federation
- ITN (Independent Television News)
- ITV (Independent Television)
- Janet Ltd
- Jazz Services
- JISC Collections
- John Wiley & Sons
- Judith Stansfield (British Dyslexia Association New Technologies Committee)
- Katie Hambrook (Oxford Brookes University Library)
- Law Society of England and Wales Intellectual Property Working Party
- Libraries and Archives Copyright Alliance

- Lionel Bently (University of Cambridge)
- Loupe Images
- Master Photographers Association
- Maurizio Borghi (Bournemouth University)
- Microsoft
- Middlesex University
- Ministry of Defence
- MMF (Music Managers Forum)
- Motion Picture Association
- Music Publishers Association
- National Centre for Text Mining
- National Library of Wales
- National Music Council
- Natural History Museum
- Neil Smith (PPA, GRAC, Wilmington Group)
- NEN (The National Education Network)
- Newspaper Publishers Association
- Newspaper Society
- NLA Media Access
- NMDC (National Museum Directors' Council)
- NUJ (National Union of Journalists)
- Open Rights Group
- PA (The Publishers Association)
- PACT (Producers Alliance for Cinema and Television)
- Pearson
- Pirate Party UK

- PLS (The Publishers Licensing Society)
- PPA (The Professional Publishers Association)
- Pro-Action - Visual Artists in Business
- Procartoonists.org
- PRS for Music
- Reed Elsevier
- Research Councils UK
- Royal National Institute of Blind People (RNIB)
- SAS Software Limited
- Scibella
- Scottish Council on Archives
- Share The Vision
- Silicon & Software Systems (S3 Group) Ltd
- Society of Authors
- Society of London Theatre
- Stavroula Karapapa (University of Reading)
- Stop43
- TechUK (formerly Intellect)
- The British Press Photographers Association
- The Communication Trust
- The Master Photographers Association
- The Newspaper Society
- The Royal Photographic Society
- Thomson Reuters
- Tiger Aspect
- Tim Padfield (Archives and Records Association)

- TMA (Theatrical Management Association)
- Town Hall & Symphony Hall, Birmingham
- UK Music
- UK Professional Cartoonists' Organisation
- UKIE
- UKTV
- University of Brighton
- University of Huddersfield
- University of Kent
- University of Middlesex
- Virgin Media
- WB Entertainment UK
- Wellcome Trust
- Yahoo!

The Government also received a number of personal submissions from individual members of the public.

Concept House
Cardiff Road
Newport
NP10 8QQ

Tel: 0300 300 2000
Fax: 01633 817 777

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