

Title: Exception for use of quotations or extracts of copyright works IA No: BIS0310 Lead department or agency: IPO/BIS Other departments or agencies:	<h2 style="margin: 0;">Impact Assessment (IA)</h2>
	Date: 13/12/2012* Stage: Final Source of intervention: Domestic Type of measure: Secondary legislation Contact for enquiries: Robin.Stout@ipo.gov.uk

Summary: Intervention and Options	RPC Opinion: AMBER
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Cost of Preferred (or more likely) Option

Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2009 prices)	In scope of One-In, One-Out?	Measure qualifies as
£3.17m	£3.17m	£-0.35m	Yes	OUT

What is the problem under consideration? Why is government intervention necessary?

Many people wish to use quotes or extracts from other people's copyright works - books, films etc. - in their own works. Copyright law currently permits the use of quotations or extracts, without requiring permission from copyright owners, if such use is "fair" and done for the purpose of criticism, review or reporting current events. This exception does not cover other uses of extracts, so quotations for illustration or analysis that most people would consider fair (eg. a lyric or a few bars of music in a book about the history of pop music) may require copyright clearance and incur associated costs. Widening, and thereby simplifying, our current exception so it covers fair dealing for any extract, would remove these costs and support free expression.

What are the policy objectives and the intended effects?

The aim is to permit the use of extracts of copyright works for purposes not already covered by our existing exception for criticism, review and reporting current affairs. This would provide greater opportunities for the freedom of expression, and would reduce or remove the administrative and licensing costs associated with using extracts of existing copyright works in new works.

We aim to achieve this with minimal costs to copyright owners - so it should be possible to quote works only to the extent necessary, and without competing with sales of the original work.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

Option 0 – Do nothing, copyright exceptions permitting use of extracts remain limited to use for criticism, review and reporting current events.

Option 1 – Introduction of an exception permitting fair dealing with any extract or quotation, to the extent justified by its purpose, as long as sources are identified.

Our chosen option is Option 1, given its apparent benefits due to reduced administrative burdens. It is not possible to consider further options due to the limits of the EU directive.

Will the policy be reviewed? It will be reviewed. **If applicable, set review date:** 04/2020

Does implementation go beyond minimum EU requirements?			No		
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.	Micro Yes	< 20 Yes	Small Yes	Medium Yes	Large Yes
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)			Traded: n/a		Non-traded: n/a

I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs.

Signed by the responsible: SELECT SIGNATORY: Date:

Summary: Analysis & Evidence

Policy Option 1

Description: Introduction of an exception permitting fair dealing with any extract or quotation, to the extent justified by its purpose, as long as sources are identified.

FULL ECONOMIC ASSESSMENT

Price Base Year 2010	PV Base Year 2010	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: 1.1	High: 5.2	Best Estimate: 3.2

COSTS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	0	1	0	0
High	0		0.16	1.4
Best Estimate	0		0.08	0.7

Description and scale of key monetised costs by 'main affected groups'

For academic and scholarly extracts, the cost to individual copyright owners due to forgone licence fees; costing £0 to £0.17 per word in extracts averaging 50 words long, in an estimated 2,400 publications per year provides a range from £0 to £20,400 p.a. ($[\text{£}0 \text{ or } \text{£}0.17] \times 50 \times 2,400$), with best estimate of £10,200 p.a.

Other key non-monetised costs by 'main affected groups'

Given the "fair dealing" nature of this exception, we expect costs to copyright owners in non-literary works to be of a similar scale to those applying to literary works. However, we have been unable to monetise these costs, and note concern about more serious impact on certain business models - in particular in relation to audiovisual works and sound recordings - raised in the consultation.

BENEFITS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	0	1	0.29	2.5
High	0		0.44	3.8
Best Estimate	0		0.37	3.2

Description and scale of key monetised benefits by 'main affected groups'

Users of lit extracts save licence fees of between £0-£20,400p.a. as described in the cost summary box, with a best estimate of £10,200. Users and right-holders will save the administrative cost of licensing, which takes applicants 6 hours and right holders 4.5 hours, costs between £9.84 and £15.20 per hour, with a 16% overhead uplift, times 2,400 publications. Rounded, the range is £289,000 to £446,000 with a best estimate average of £367,500 ($10.5 \text{ hrs} \times [\text{£}9.84 \text{ or } \text{£}15.20] \times 1.16 \times 2,400$) p.a.

Other key non-monetised benefits by 'main affected groups'

Creators will be able to use extracts of other works to the extent that is fair without worrying about copyright issues. This will support freedom of expression; the diffusion of information and enable them to produce richer and more attractive works. Consumers would benefit from works with higher informative or entertainment value, as the most relevant extract could be used where before, due to high costs and lack of permission, it may not have been used, or an inferior one used in its place.

Key assumptions/sensitivities/risks	Discount rate (%)	3.5
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As this exception will be limited to "fair dealing" and extracts will be limited to the extent necessary to serve their purpose, works using extracts will not substitute for, or compete with, originals. "Fair dealing" in relation to literary works is likely to be similar to the limits currently set out in publishers' guidance, but in other sectors the limits are less clear so there may be risk and uncertainty until defined by case law.

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs: 0.1	Benefits: 0.4	Net: 0.3	Yes	OUT

Evidence Base (for summary sheets)

Problem under consideration;

Many people wish to use quotes or extracts from other people's copyright works - books, films etc. - in their own works. Extracts may be useful in formal works, such as academic and scholarly texts, historical accounts, biographies and documentaries, as well as more informal works, such as blogs and social media, to help illustrate arguments and engage in comment and debate.

Copyright law currently permits the use of quotations or extracts for the purpose of criticism and review, without requiring permission from copyright owners, as long as such use is "fair" and the author of the work is acknowledged. This exception does not, however, permit the use of quotations in other contexts similar to criticism and review, which many people would nevertheless consider fair. So a short quotation in an academic work, or the use of a few bars of music in a book about the history of pop music would infringe copyright, if not used in a critical context. Use of such extracts may require copyright clearance, incurring associated costs. Widening and thereby simplifying our current exception to cover any fair dealing with a quotation or extract would remove these costs and support free expression and debate. It would also align UK law with European and international norms.

Rationale for intervention;

Copyright incentivises and rewards the creation of new works of art, such as literature, music, song and film. It does this by giving creators and producers of creative works the rights to control how they are used and by whom, including the right to seek payment for this use. Copyright thus imposes costs on users and consumers of copyright works to the benefit of their creators and producers.

The Government agrees with the argument made by the Hargreaves Review that copyright should only restrict useful activity by third parties to the extent necessary to fulfil its fundamental purpose – the provision of incentives to creators. To this end, the Government consulted on the widening of the existing "criticism and review" exception, to the extent permitted by EU law.

Policy objective;

UK copyright law currently permits the use of extracts and quotations for the purpose of criticism, review or reporting current events. However, EU law (in line with international norms) permits exceptions for the use of extracts and quotations in a wider range of circumstances. For example, some EU states permit the general use of quotations, to the extent that this is fair (eg. for comment, polemic etc.).

Our aim is to ensure that the use of quotations is not unfairly restricted, in order to guarantee free expression and remove unnecessary costs, while protecting incentives to create new works.

Description of options considered;

Option 0 – Do nothing, copyright exceptions permitting use of extracts remain limited to use for criticism, review and reporting current events.

Users will continue to face administrative and potential licensing costs, as will copyright owners. These costs may put users off seeking clearance in the first place, resulting in projects being abandoned or copyright being infringed. None of the benefits identified would accrue and the policy objective will not be met.

Option 1 – Introduction of an exception permitting fair dealing with any extract or quotation, to the necessary extent, as long as sources are identified.

Under this option, people would be able to use extracts and quotations from published works in their own work, without permission, as long as doing so is fair. The exception would be implemented by widening the existing "criticism and review" exception so that it also applies to quotations for other purposes. The exception would remain, as now, a "fair dealing" exception. "Fair dealing" is a legal defence, which is ultimately for courts to determine. In practice it means that any quotation that is too extensive, is not justified by the context it was used in, or has the potential to substitute for or compete with original works, is unlikely to fall within the scope of the exception.

Monetised costs and benefits of this option

Benefits arising from reduced administrative costs, estimate £300,000 - £475,000 p.a.

To estimate the total benefits to all users and copyright owners, an estimate is needed of how many uses are made – and how many permissions sought – per annum. This is difficult, as anyone who creates a copyright work and wishes to use an extract from another work is potentially affected. A very high end estimate could include uses by the 30 million British people who are signed up to Facebook, or use Twitter or a blog service. Many of these people will use small extracts of other people's works without seeking clearance (though they face a risk of being sued for copyright infringement), so this group is not useful for estimating the total admin costs associated with clearing extracts.

Those most likely to currently seek clearance for uses of extracts are commercial authors and publishers. Of this group, those most likely to need to use extracts will probably be academics and other scholars, but we have been unable to determine precise figures for the number of works they publish every year in the UK. However, research from the Association of Learned and Professional Society Publishers (ALPSP) found that more than 24,000 new academic and scholarly titles were published in 2010 [2]. This figure is based on data from a representative sample of 171 scholarly publishers (from a total of 400 who were surveyed). This figure is a useful starting point for estimating the size of cost savings due to this measure, and allows us to calculate minimum costs and benefits. But it should be viewed as a sub-sample of the total number of works covered, which will be higher, as it includes works that are not academic books/journals, and non-literary works such as films.

In addition to the number of works affected, we require data on the number of extracts that need to be cleared for use in these works. There appears to be no existing data on this, and no usable data was received during the consultation, so we have developed an estimate of this based on reasonable assumptions. We assume that 10% of the 24,000 titles identified above will use one extract that requires clearance, resulting in 2,400 clearances. This estimate appears conservative, as there is a high likelihood of academic publications using quotations, and using more than one quotation per publication. On the other hand, many such publications adhere to permissions guidelines that allow the use of short quotations without express permission (the STM Guidelines for Quotation, for example), and many quotations covered by this exception are likely to fall within this category. In this context, it makes sense to use a conservative estimate.

Both the users of extracts and quotations and the right-owners spend time applying for clearance and handling the 2,400 clearance requests that are made.

For the user: A British Library/ARROW study on mass digitisation by libraries and archives found that on average, it took almost 6 hours to clear the rights to digitise a single book [1]. The typical actions involved in obtaining permission to copy a literary work (e.g. a book), includes

- 1) Researching and identifying who owns the copyright in a work;
- 2) Contacting the copyright owner;
- 3) Negotiating with the copyright owner;
- 4) Paying for the right to copy the work.

We believe this is a fair estimate of the average time taken to clear use of an extract, as the steps involved in obtaining permission to use an extract will be the same as those involved in obtaining permission to digitise a work, and those seeking to use extracts will face similar challenges (e.g. difficulty in locating heirs of deceased authors).

For the right-owner: A PwC report for the Copyright Licensing Agency, which is a collecting society that clears rights on behalf of right-owners in literary works, estimates that it takes about 4.5 hours for a copyright owner to clear the use of a work [3, see table 10], in four discrete steps:

- 1) Respond to user
- 2) Negotiate with user
- 3) Invoice user
- 4) Receive and process payment

The act of clearing a copyright licence request is a set of relatively standard actions, so we take this estimate which is drawn from the education sector, to be representative of the actions that authors and publishers would have to undertake when receiving a licensing request for a quote or extract. In total there is then 10.5 hours of administrative time taken by the user (6 hours) and right-owner (4.5 hours) in clearing a quote or extract.

Rights clearance of an extract could be done either by the individual (an author/creator) seeking to use the extract, or by their publisher, and treated as an administrative task. We estimate the hourly costs using the 2011 Annual Survey of Hours and Earnings (ASHE)¹ for administrative/secretarial workers (hourly pay £9.84) and artistic and literary occupations (hourly pay £15.20). We factor in a 16.4% [4] uplift to account for overheads and multiply by the 2,400 publications that we assume each uses one quotation.

Rounding to the nearest £5,000, this provides a range of cost saving from £289,000 at the low to £446,000 at the high estimate (10.5 hrs x [£9.84 or £15.20] x 1.164 x 2,400). The best estimate is the average of the two, £367,500.

Costs and benefits from foregone licence fees, transfer of between £0 and £20,400 from rights holders to users

Due to its restriction to fair dealing (where the extent taken and the competing nature of the use are relevant factors) the vast majority of extracts permitted by this exception will be small in extent and limited in economic impact. As such, many will be cleared for no licence fee, or if a fee is charged, most if not all of the fee is likely to go towards covering the costs of clearance. This is supported by the following analysis.

Text quotations

Society of Authors guidance on rates says that “Permission for brief illustrative quotations outside the scope of ‘fair dealing’ will usually be granted without charge” [5, p.1]. They suggest that a reasonable rate for prose extracts is £170 per 1000 words and that “fair dealing” may cover the use of a single extract from a prose work of up to 400 words [5]. The International Association of Scientific, Technical and Medical Publishers, in their Permission Guidelines (2009) and Quotation Guidelines (2008), like other academic publishers, recommend granting permission for short quotations free of charge, acknowledging that “Publishers accept that the use of short quotations is normal in scholarship, generally intended to place the new work in scholarly context or to comment on the quoted work or its impact, and that there is minimal potential in such practices of negatively impacting the demand for the original work” [6, p.1-2].

The assumption that a “fair dealing” extract could be 400 words long was challenged by respondents to our consultation. Fair dealing is a flexible concept, so it could permit the copying of 400 words in certain circumstances, but in other circumstances it would only permit the copying of much shorter quotations. We accept that the use of an estimate of a 400 word extract in our initial impact assessment may have given the false impression that the average quotation was likely to be of this length. As many textbooks have a word count of around 500 words per page, a 400 word quotation is likely to be rare, and a quotation is less likely to be considered “fair” the longer it is. We have therefore scaled down our estimate. Based on our own analysis of reference works we estimate the average “fair” quotation in a reference work of 500 words per page to be about 50 words long (1/10 of the page).

From this, we estimate a fee for an average quotation to be about £8.50, based on the above rate for 1000 word extracts from the Society of Authors (50 x £170/1000 = £8.50).

In practice, many publishers by convention permit the use of quotations without payment, up to certain limits. Often guidelines will be available to users of such quotations, setting out how much they can copy and removing the need to undertake the clearance process described above. For example, Wiley and Blackwell guidelines say that book quotations of over 300 words and newspaper/journal/magazine quotations of over 50 words usually don’t require permission or a fee. The STM Guidelines for Quotation and other Academic Uses, to which a number of academic publishers are signatories, permit the use of extracts of less than 100 words without permission. Such an approach makes sense given the low value and relatively high transaction costs to writers and publishers associated with clearing short quotes, as well as the importance of quotation to the creation of new written works.

1 <http://www.ons.gov.uk/ons/publications/re-reference-tables.html?edition=tcn%3A77-256648>

The presence of such guidelines will mean some quotations will not need to be cleared for use, which is why we have taken a conservative estimate of the number of clearances above. It also suggests that, for an average quotation that does need to be cleared, there may often be no fee (no cost to users, no benefit to copyright owners).

This industry practice suggests that a fee of £0 is more likely to be charged for the use of a 50 word extract than the hypothetical fee of £8.50. We therefore take £0 to be our low estimate and £8.50 to be our high estimate. Multiplying by the number of clearances used above [2,400] gives a transfer of between £0 and £20,400, best estimate £10,200.

Non-text extracts

A quotation exception would not only apply to traditional text quotations. The use of other copyright works – eg. photographs, film clips – would also be permitted under it (to the extent that such use was fair). In response to our consultation, a number of respondents from the audiovisual sector in particular raised concern. They suggested that the following scenarios may occur as a result of the widening of this exception:

- News agencies argued that many organisations would cease to purchase footage, removing the benefit of gathering it in the first place, and causing significant damage to their industry. This would happen because a news clip could be argued to be a “quotation”. They also warned that cuttings agencies and news aggregators would be able to extract and distribute extensive quotations that could substitute for primary sales of newspapers and similar works. They predicted millions of pounds of lost income. The ITN submission, for example, provided evidence showing that, in 2011, 42% of licences issued by ITN Source were for clips under 60 seconds long, with a further 45% for clips between one and four minutes in duration. They believe that these would be at particular risk of being included in a broadened exception.
- Film archives argued that the majority of clips (often 10, 20, 30 seconds each) that they sell would fall within the scope of the exception, seriously undermining licensing income. The Imperial War Museum predicted a 50% loss of income, given that 60-70% of its licences are for short extracts of films.
- A music collecting society (PRS) noted that a substantial part of their licensing activity was for music clips of 30 seconds or less, and argued that the revenue from this activity (£801,500 – 42% of rate card revenue) could be undermined as a result of this exception.

The strength of this evidence is unclear. Although estimates of the potential damage caused by this exception were submitted (some confidentially) it was not clear how these estimates had been derived, so their robustness cannot be determined. In addition, many of the uses described appear to be either covered by existing exceptions (for criticism, review and news reporting in particular) or would not be considered “fair dealing”, given that, to be fair, a use must not compete with the normal exploitation of a work by its owner. For example, the extensive use of quotations by news aggregators is unlikely to be considered fair, as it would compete with sales of original news articles. The availability of licenses for film clips and the existence of a commercial market for short clips will also be relevant to an assessment of fair dealing. The more extreme scenarios of lost income are therefore almost certainly outside the scope of this exception.

However, fair dealing is a flexible concept depending on a number of factors, and its limits are ultimately defined by the courts. So we cannot rule out that some of these activities may fall within the scope of fair dealing, depending on the specific circumstances.

In view of the above, we expect some costs to business as a result of this exception in the above sectors, but these costs are not expected to be of the scale forecast by respondents to the consultation and the benefits will outweigh the costs. In absence of clear examples we have been unable to quantify the potential costs to these sectors.

Non-monetised costs and benefits

This exception will have an economic, cultural and social impact by removing restrictions on free expression, allowing extracts to be included in works where not currently possible – either due to a lack of clearance or, more likely, because copyright owners cannot be located. In some cases this will mean that works can be published that otherwise would not have been due to their high cost. In others it will mean that works will have more impact and appeal to consumers. These benefits have not been monetised (and it will be very difficult, if not impossible, to do so).

Although users and owners of extracts of copyright works will overlap substantially, owners are more likely than users to be established creators (as their works are published and others are aware of them). As such, the administrative costs currently associated with clearance of extracts may fall disproportionately on up-and-coming creators. This exception is thus expected to reduce barriers to entry.

Summary of Costs and Benefits (Best Estimates)

Annual costs		
<i>Stakeholder affected</i>	<i>Administration costs</i>	<i>Licensing revenue lost</i>
Copyright owners	£0	£0.01m
Users of copyright works	£0	£0

Annual benefits		
<i>Stakeholder affected</i>	<i>Administration savings</i>	<i>Licensing fee saving</i>
Copyright owners	£0.16m	£0.00m
Users of copyright works	£0.21m	£0.01m

Risks and assumptions;

The main risks associated with this measure are related to the scope of the exception and the concept of “fair dealing”. Fair dealing is well established in UK law, and similar fairness tests are present in EU law, but its application depends on the specific facts of a case.

We have assumed that, although the concept of “fair dealing” is applied on a case-by-case basis, with attendant uncertainty, its fundamental principles will not change when applied to this exception. Although it will never be absolutely clear whether a use will be “fair”, this is true now of the criticism and review exception, and publishers already provide guidance on “fair dealing”. As such, no additional legal uncertainty is expected to be introduced by this exception (and indeed there may be greater certainty, as fairness will be the only consideration and there will be no need to identify the limits of “criticism” or “review”).

Some consultation respondents have challenged our assumption that the new exception would only liberalise content use without competing with sales of the original work. They argued that our proposal to widen the exception contradicts models for production and rights exploitation of news content in particular, since news programmes - unlike dramas and other long-form content - have no secondary life and value after first transmission, so the only subsequent monetary value in this content is the sale of short clips. They consider that the proposed new exception would compete with sales of the original works and, by removing news archives’ main revenue source, undermine incentives to creators.

However, when establishing whether or not a particular act is considered to be “fair dealing”, many factors are taken into account, with competition with a right holder’s exploitation of their work likely to be the most important factor, so any use which negatively impacts on copyright owners revenues would be unlikely to constitute fair dealing. For this reason, the concerns of ITN and other respondents who share similar views (e.g. Reed Elsevier, Thomas Reuters and Imperial War Museum) are likely to be unjustified.

Preferred option

Our chosen option is Option 1, given its benefits due to reduced administrative burdens.

Direct Costs and Benefits to Business Calculations (following OIOO methodology)

Under the “One In, One Out” rule, whereby a measure that has a net cost to business must have a measure or measures of equivalent cost removed in order to be implemented. We have identified net benefits of £0.3m to businesses per year and so therefore have identified this as an OUT.

Evaluation

A full evaluation strategy and Post Implementation Review is being developed for the introduction of the Hargreaves recommendations. The Post Implementation Review will detail the benefits associated with the introduction of the copyright reforms and will include input from external stakeholders. The plan will also set out how and when the benefits will be measured. This will depend on the type of benefit, as some benefits will be measured by applications and take-up that can be measured from the first year of operation, whereas others will depend on information that will take several years. The evaluation strategy will set out the activities that will be undertaken in order to evaluate the policy, drawing on management information collected through the copyright system, as well as research commissioned in order to measure the benefits.

The main source of data available for evaluation will be collated using industry figures. These statistics, alongside other management information on the operation of the system will be used by Government to assess the impact of the copyright reforms, including assessing whether benefits have been achieved and how policy or operations can be developed to realise benefits more effectively.

References

- [1] Stratton, Barbara. 2011. “Seeking New Landscapes: A rights clearance study in the context of mass digitisation of 140 books published between 1870 and 2010.” London: British Library/ARROW <http://pressandpolicy.bl.uk/imagelibrary/downloadMedia.ashx?MediaDetailsID=1197>
- [2] APLSP. 2010. “ Survey of academic book publishers’ policies and practices” http://www.alpsp.org/ngen_public/article.asp?aid=224142
- [3] PwC. 2011. An economic analysis of copyright, secondary copyright and collective licensing. http://www.cla.co.uk/data/corporate_material/submissions/2011_pwc_final_report.pdf
- [4] European Commission, Eurostat Website. http://epp.eurostat.ec.europa.eu/portal/page/portal/labour_market/labour_costs/main_tables
- [5] Society of Authors. 2010. “Estate department rates, 2010”. http://www.candlebooknews.com/documentosgaleria/Anthology_and_quotation_rates.pdf
- [6] International Association of Scientific, Technical and Medical Publishers. 2008. “Guidelines for quotation and other academic uses of excerpts from journal articles.”

*Note:

This Impact Assessment (IA), which is one of a series of IAs concerning copyright exceptions, was originally published in December 2012 alongside the policy statement “Modernising Copyright”. It was republished to accompany the publication of the secondary legislation that implements the chosen options set out in the IAs. Since the original publication of the IAs the Government has engaged extensively with stakeholders both formally (through a technical review of the draft legislation) and informally. No new evidence has been provided that has led the Government to alter the overall numerical assessment of the costs and benefits contained within this IA.