

ALLIANCE
FOR INTELLECTUAL
PROPERTY

Viscount Younger of Leckie
Minister for Intellectual Property
Department for Business, Innovation & Skills
1 Victoria Street
London SW1H 0ET

18th December 2013

Dear Minister

Re: Suggestions for revised legislative language to implement reforms to copyright exceptions

In the meeting of 3rd December with the Secretary of State and yourself to discuss the statutory language of the copyright exceptions regulations, it was suggested that we submit our thoughts on how the current proposed language could be revised to ensure that the regulations not only give effect to the government's policy intent but also protect businesses and creators from being adversely impacted by the proposals. Please find these attached.

We recognise that it may not be possible to affect the current drafting process but would hope that these points can be taken into account before the SIs are made. While we also appreciate that a further formal consultation on the proposed wording is not possible, we would welcome some feedback on whether the points raised are able to be addressed.

If you have any questions or require further information please do not hesitate to get in touch.

Yours sincerely

Susie Winter
Director General

Members:

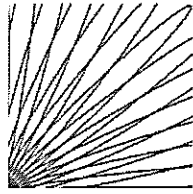
Anti-Copying in Design
Anti-Counterfeiting Group
Authors' Licensing and Collecting Society
British Brands Group
BPI (British Recorded Music Industry) Limited
British Video Association
Business Software Alliance
Cinema Exhibitors Association
Copyright Licensing Agency
Design and Artists Copyright Society
Educational Recording Agency
Entertainment Retailers Association
Federation Against Copyright Theft
Film Distributors Association
Motion Picture Association
Premier League
PRS for Music
Publishers Association
Publishers Licensing Society
UK Interactive Entertainment
UK Music

Supporters:

British Jewellery, Giftware & Finishing Federation
Video Standards Council

The Alliance For Intellectual Property Limited
Director General: Susie Winter

Chair: Richard Mollet Vice Chairs: Dids Macdonald, Ian Moss Treasurer: Kim Bayley
Registered Office: 1st Floor, Colonnade House, 2 Westover Road, Bournemouth BH1 2BY
Mailing address: 2nd Floor Riverside Building, County Hall, Westminster Bridge Road, London SE1 7JA Telephone 020 7803 1319
www.allianceforip.co.uk
Registered in England and Wales. Company number: 5976983



**RECOMMENDATIONS ON AMENDMENTS TO LEGISLATIVE LANGUAGE TO IMPLEMENT REFORMS
TO COPYRIGHT EXCEPTIONS PROPOSED IN MODERNISING COPYRIGHT**

As requested by the Secretary of State for Business, below are recommendations on how the legislative language of the statutory instruments could be amended to ensure that the government's policy intention is given effect by the statutory language and that businesses and creators are not adversely impacted by the proposals. Suggested revised wording on a number of the exceptions has been submitted previously by Alliance member organisations including the MPAA, the Publishers Association, UK Music and the Educational Recording Agency.

Contract override

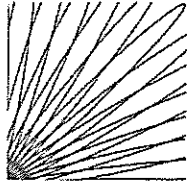
Current wording across all SIs to be replaced with:

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

This wording would deliver government policy whilst not suggesting to users that parts of the terms and conditions are unenforceable for any reason other than working around the application of recognised permitted acts.

Private copying

1. Retitle this exception 'Private Copying for Sole Personal Use' to avoid confusion with wider private copying exceptions which exist on the Continent.
2. Include the word 'private' before all references to 'copy' in 28B(1) and 28B(3). This also makes clear, in line with the policy objective, that the exception being introduced into UK law is narrow.
3. Make clear that 'lawful acquisition' does not apply to video-on-demand or any other content downloaded at a time and place of ones choosing, such as ebooks. To be compliant with the Information Society Directive this exception can only apply to material offered via the Reproduction Right and not content accessed via the Making Available Right.
4. In section 1 (1)(b) replace 'held' with 'owned'. This will aid consumers in their understanding that this does not apply to content they have access to under a licence. The 'for example...' should include a reference to the fact that this also does not apply to copies accessed on demand or at a time or place of their choosing.
5. Delete the word 'permanently' from subsection (2)(a). A temporary transfer would still constitute an infringement the inclusion of this word is, at best unnecessary and possibly confusing as it suggests that transferring a temporary copy may somehow be legal.
6. Delete subsection (2)(b). In its current form it implies that individuals can transfer digital works provided they delete the original. They cannot, as this action falls outside the scope of this exception and would be incompatible with Article 3 (3) of the Information Society Directive.



7. Move subsection (1)(c) 'the making for the further copy does not involve the circumvention of effective technological measures applied to the copy from which it is made' to subsection (2) as a new subsection (2)(b) and redraft it to read 'has made the a further copy by circumventing the technical protection measures applied to the copy'.
8. Insert wording to explicitly rule out the data analysis of work lawfully acquired under another exception e.g. through the research and private study, quotations or education exceptions.
9. Insert clarification that copying onto a cloud service can only take place under this exception if it is in to a facility that is provided for and only used for his sole personal and private use.
10. Insert new clause to provide for a mechanism by which compensation for rights owners can be calculated. The Government has not sufficiently explained how creators and rightsholders will be fairly compensated under this exception. Since Modernising Copyright's publication in December 2012 the Government's understanding of fair compensation has been challenged by research (including that which it commissioned itself) and legal judgments in relevant cases before the European Court of Justice.

Proposed new text (amendments in bold):

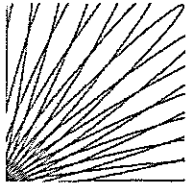
(1) After section 28A insert:

"28B Private Copying for Sole Personal Use

- (1) Copyright is not infringed **by an individual** where that individual uses a **private** copy of a copyright work lawfully acquired by him **by authorisation** to make a further **private** copy of that work provided that:
 - (a) The further copy is made **exclusively** for that individual's **sole personal and private** use for ends that are neither directly nor indirectly commercial;
 - (b) The **private** copy from which the further **private** copy is made is **held** by the individual on a permanent basis (for example it is not a copy that is rented to the individual for a specified period, borrowed from a library or **accessed via an on-demand service**);

(1A) Authorisation under subsection 1 does not include copyright works acquired through another exception.

- (2) Copyright is infringed where an individual who has made a further private copy of a copyright pursuant to subsection (1):
 - (a) **Transfers or provides access to such further** copy to another person
 - (b) **has made the a further copy by circumventing the technological protection measures applied to the copy**
- (3) Nothing in subsection (2) prevents an individual from storing a further copy made pursuant to subsection (1) in an electronic storage facility accessed by means of the internet or similar means, where that facility is provided for and **only used for his sole personal and private use**, provided that:



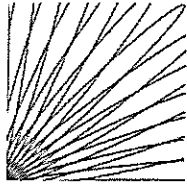
- (a) Nothing in this section authorises, or enables an individual to authorise, the provider of an electronic storage facility to make the further copy; and
- (b) Nothing in this section authorises, or enables an individual to authorise, any other of the acts restricted by the copyright in this Part in relation to the further copy.

28C Private copying compensation scheme

- (1) The Secretary of State must by regulations make provision for a compensation scheme to pay compensation to rightsholders for copies made under section 28B. The regulations must provide for –
 - (a) Compensation to be paid by the manufacturers or retailers of devices, media or services used for making or storing copies and
 - (b) The level and type of compensation to be determined by an independent body which shall consult representations of rightsholders and the aforementioned manufacturers and retailers.
- (2) Section 28B shall come into force when the compensation scheme has been established.

Data Analysis for Non-Commercial Research

- 1. Include wording that explicitly states that conditions of access may be imposed on systems on which the work is to be accessed, in order to give effect to the Government's stated intention to not prevent publishers from applying technological protection measures.
- 2. Include wording that allows rightsholders to implement the exception via a licence that delivers equivalent access and usage rights, to give effect to the Government's wider policy intention to see the development and widespread user of mining and analytic technologies.
- 3. Replace 'lawful access' in 29A subsection (1) with 'where a person has been authorised to use a copyright work'. The SI must make a distinction between subscribed as opposed to unsubscribed content. Access to unsubscribed content may include any and all information available on the internet – a policy implication which has not been analysed in the impact assessment, and which, amongst other things, has clear implications for data protection and privacy.
- 4. The term 'electronic analysis' requires further explanation. This is a new phrase which was not used in Modernising Copyright and, again, is a wider concept than was subject to analysis in the impact assessment.
- 5. Insert wording regarding non-commercial use to mirror that used in the proposed private copying exception ('neither directly nor indirectly commercial').
- 6. Insert wording to explicitly rule out the data analysis of work lawfully acquired under another exception e.g. through the research and private study, quotations or education exceptions.
- 7. Insert 'scientific' to avoid impression that this exception applies to all (undefined) research.



8. Expressly limit Section 29A to particular types of content, specifically those that have featured in the policy document and impact assessment: scientific research, journal articles and publishers' licenced content.
9. Delete 'permanently' from Section 1 subsection (2). Any form of transfer, even temporary, would constitute an infringement.
10. Insert section to make explicit that users are not able to circumvent technical protection measures, in line with the UK's obligations under the Information Society Directive, Article 6.4.

Proposed new text (amendments in bold):

Data analysis for non-commercial research

1. – (1) After section 29, insert:

"29A Data analysis for non-commercial research

- (1) Where a person has been authorised to use a copyright work, copyright is not infringed where that person makes a copy of the work for the purposes of carrying out an electronic analysis of anything recorded in the work provided that:
 - (a) It is done for the sole purpose of scientific research that is neither directly nor indirectly commercial: and
 - (b) The copy is accompanied by sufficient acknowledgement.

(1A) Authorisation under subsection 1 does not include copyright works acquired through another exception.

- (2) Any dealing with a copy made pursuant to section (1) for a purpose other than the purpose referred to in subsection (1) is an infringement of copyright.

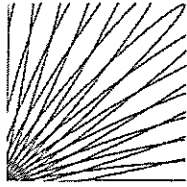
(2A) A copy shall be treated as an infringing copy where:

- i) Such a copy is transferred to another; or
- ii) Where the dealing with a copy made pursuant to section (1) involved the circumvention of effective technological measures applied to the copy from which it is made; or
- iii) Where the dealing with a copy generates outputs that could reasonably replace the original content.

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

- (4) Copying is not authorised by section 29A if or to the extent that a licence is available authorising the permitted act.

- (5) Subsection (3) does not apply to a term of contract governing access to a licensor's computer system or to a third party's computer system on which the work may be accessed.



(2) In Schedule 2, after paragraph 2B insert:

"Data analysis for non-commercial research

"2C. – (1) Anything which, by virtue of section 29A (data analysis for non-commercial scientific research), may be done in relation to a copyright work without infringing copyright in that work, may be done in relation to a work in which rights are conferred by this Chapter without infringing those rights.

(2) Where by virtue of section 29A a copy made pursuant to that section is to be treated as an infringing copy, such a copy shall be treated as an illicit copy for the purposes of this Chapter.

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

Parody, Caricature and Pastiche

1. Remove the inclusion of caricature and pastiche from this exception. No definition has been provided as to what constitutes caricature and pastiche and no assessment was made of its economic impact in the impact assessment of December 2012 which dealt exclusively with the introduction of an exception for parody.
2. Amend 30B subsection (1) so that it is clear that the exception will apply only to material which is itself the subject of the parody, as opposed to the exception applying to material used to create a parody of another work.
3. Insert explicit reference that uses that would normally be licensed or otherwise exploited or unreasonably prejudice the legitimate interests of the rightsholder are not fair dealing.
4. Insert explicit reference that this exception does not override an author's moral rights.

Proposed new text (amendments in bold):

Parody

1. – (1) After section 30A insert:

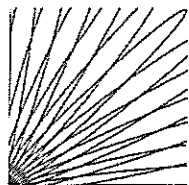
"30B Parody

(1) Copyright in a copyright work is not infringed by a fair dealing with the work for the purposes of parody **and where the work is itself the subject of that parody.**

(1A) uses that would normally be licensed or otherwise exploited, or unreasonably prejudice the legitimate interests of the rightsholder, are not fair dealing.

(1B) This section is without prejudice to an author's moral rights.

(1C) use of the work for purposes under this section must be accompanied by sufficient acknowledgement, unless it is demonstrated to be impossible.



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

Education

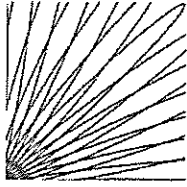
1. Replace “for the purpose of instruction” with “for the purpose of illustration”. This was the original wording in Modernising Copyright and replacing “illustration” with “instruction” gives the mistaken impression that this section will permit reprographic copying and potentially conflict with section 36 and the licensing scheme in place for reprography.
2. Make explicit that provisions only apply to non-reprographic copying and are without prejudice to existing licensing schemes.
3. Retain existing wording in s32(1)(b) CIPA which excludes acts done by reprographic process.
4. Exclude the use of audiobooks from this exception. Educational use of audiobooks is already licensed via the CLA and so should not be used under section 32.
5. Reverse the caveat around sufficient acknowledgement.
6. Delete Section 32 (2)(b) “by a person receiving instruction”. It does not comply with EU law nor is there any reference to it in Modernising Copyright. Article 5(3)(a) of the Information Society Directive allows use for the sole purpose of illustration for teaching and scientific research. There is not mention of the exception applying to those receiving instruction or illustration and this was never the stated policy aim.
7. Amend Section 35 to make it clear that licensing options under this section apply to both the making of copies and subsequent communication to the public of such copies within the scope of s35 provisions.
8. Insert “teaching” before “staff” in s36(1)(b) to provide clarity on who may make use of this exception.

Proposed new text (amendments in bold):

- (1) For section 32 substitute:

“32 Fair dealing for the purpose of illustration

- (1) Fair dealing with a copyright work for the **sole purpose of illustration for [teaching or] instruction** does not infringe copyright in the work provided that the dealing is:
- (a) For a non-commercial purpose; and
 - (b) Accompanied by a sufficient acknowledgement **unless this is demonstrated to be impossible; and**
 - (c) **Is not done by means of a reprographic process.**



ALLIANCE
FOR INTELLECTUAL PROPERTY

- (2) For the purposes of subsection (1) "instruction" means acts done:
- (a) By a person giving instruction or in preparation for instruction; and
 - (b) For the purposes of an examination by way of setting the questions, communication the questions to the candidates or answering the questions.

(2A) For the purposes of subsection (1) uses that would normally be licensed or otherwise exploited are not fair dealing.

[Or]

(2A) Subsection (1) does not apply to any use by or on behalf of an educational establishment to the extent that licences are available authorising the use in question under the provision of s35 or s36 and the person making use of the work for the purposes of illustration ought to have been aware of this fact.

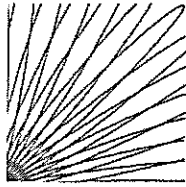
- (3) No acknowledgement if required pursuant to subsection (1) (b) where this would be impossible for reasons of practicality or otherwise.
- (4) A copy of a work made in reliance on this section shall be treated as an infringing copy for all subsequent purposes if, without the licence of the owner of the copyright it is:
- (a) Sold or let for hire;
 - (b) Offered or exposed for sale or hire; or
 - (c) Communicated to the public otherwise than as permitted under this section.
- (5) Where an act is permitted under this section, it is irrelevant whether or not there exists any term or condition in an agreement which purports to prohibit the act.

Section 35

For section 35(1A), (2) and (3) substitute:

(1A) Copyright is not infringed where a recording of a broadcast or a copy of such a recording, whose making was by virtue of subsection (1) not an infringement of copyright, is communicated to the public by a person situated within the premises of an educational establishment provided that the communication is received:

- (a) On the premises of that establishment; or
 - (b) Where it is received off the premises, by means of a secure electronic network which is only accessible to staff or pupils of the establishment.
- (2) Acts which would otherwise be authorised by this section are not authorised if, or to the extent that, licences are available authorising the use in question and the person or educational establishment responsible for the use knew or ought to have been aware of this fact.
- (3) Where a copy which would otherwise be an infringing copy is made in accordance with this section but is subsequently dealt with, it shall be treated as an infringing copy for the purposes of that dealing, and if that dealing infringes copyright for all subsequent purposes.



ALLIANCE
FOR INTELLECTUAL PROPERTY

For this purpose “dealt with” means sold or let for hire, offered or exposed for sale or hire or communicated from within the premises of an educational establishment to any person outside those premises other than as provided by this section.

Section 36

(4) For section 36 substitute:

“36 Copying and use of extract of works by educational establishments

- (1) Subject as follows, copyright is not infringed in relation to a relevant work (including in relation to any typographical arrangement of that work) by:
- (a) The copying for the purposes of instruction extracts of that work by or on behalf of an educational establishment;
 - (b) The provision of those extracts by the educational establishment to a member of teaching staff or pupil of that establishment:
 - (i) In the form of physical copies of those extracts; or
 - (ii) In the form of electronic copies of those extracts accessible (whether on or off the premises) through a secure electronic network which is only accessible to such members of staff or pupils; and
 - (c) The making of further copies of the extract by such a member of teaching staff or pupil for the purposes of instruction given by that establishment.

18 December 2013