

**The Publishers Association Response to the Intellectual Property Office
Technical Review of Draft Statutory Instruments**

The Publishers Association ('The PA') is the representative body for book, journal, audio and electronic publishers in the UK. Our 114 members span the trade, academic and education publishing sectors and contribute £5bn per annum to the UK economy, £3.3bn of which comes from the sale of books and over £1.5bn from the sale of academic journals.

The PA greatly welcomes the opportunity to respond to this technical consultation. Below we set out responses to the questions posed along with proposed changes to the IPO's proposed amendments.

Given the complexity and wide-ranging nature of this exercise we strongly urge the IPO to conduct a further consultative exercise on the Draft Statutory Instruments prior to their submission to scrutiny by Parliament.

Private Copying

Answers to specific consultation questions

The exception is drafted as Section 28A of the Copyright, Designs and Patents Act. Subsection (1) defines who is permitted to make copies and under what conditions. These conditions include: the copier must be an individual, not a body corporate; the individual must have lawfully acquired, on a permanent basis, the copy from which further copies are made; the further copy must be made for the individual's private use, for non-commercial ends. Are these provisions an effective implementation of the Government's policy?

The copier must be an individual, not a body corporate

It is welcome that the Government intends for this section to confer a limited and narrow Private Copying exception, in line with the policy set out in *Modernising Copyright*. The word "individual" appears a number of times in the proposed draft, making clear that this exception is for an individual's private use. The first condition and the wording used in the draft is an effective implementation of the Government's policy.

The individual must have lawfully acquired, on a permanent basis, the copy from which further copies are made

Subsection 1(b) states that a copy from which the further copy is made is held by the individual on a "permanent basis", and explicitly excludes content that is "rented to the individual for a specific period or borrowed from a library." However, whilst the draft uses the term "lawfully acquired", this term needs further elaboration to make clear that the exception cannot be applied to content acquired through another exception, for example, through the research and private study exception. Accordingly, The PA proposes the insertion of the words "by authorisation", as set out below.

Similarly, The PA proposes (1)(c) below, to make clear that this exception does not apply to content classified as an on-demand service such as ebooks, and to cover all possible (future) scenarios. The full transposition of Article 6(4) is need for clarity, and to avoid consumer confusion.

The further copy must be made for the individual's private use, for non-commercial ends

“Private copying” is the term used in Article 5(2)(b) of the Copyright Directive, so it is understandable that the IPO has chosen to use this term in UK law. However, in other Member States where this exception has been implemented, “private copying” includes sharing with family/close circle. To make clear that the exception being introduced into UK law is narrow and that the making of a further copy is for the individual's private use only - in line with the IPO's stated policy objective - this exception should be titled either “Personal Private Copying” or “Sole Private Copying.”

The PA also recommends the addition of the word “private” before all references to “copy” in 28B(1) and 28B(3).

Subsection (1)(c) provides that, if technological copy protection measures are applied to a copy, the exception does not permit an individual to circumvent those measures in order to make copies. Is it necessary to provide subsection (1)(c), or is Section 296ZA, which already prohibits circumvention of technological measures, sufficient?

Whilst the Government acknowledges that the circumvention of TPMs is already prohibited under the law (296ZA) The PA believes that subsection (1)(c) proposed in this SI is necessary for absolute clarity and the avoidance of consumer doubt. Square brackets should therefore be removed.

The Government may wish to consider including (1)(c) as part of subsection (1)(2) as it is this section which addresses activities that constitute an infringement - circumventing technological measures applied to a copy being such an activity.

Subsection (2) is intended to ensure the exception does not allow the making of copies for multiple people – either by transferring a copy made under the exception, or by transferring the original and retaining the further copy. Does this provision meet this objective?

Yes, however it is unclear why this stipulation is required. As currently drafted subsection (2) is extremely confusing and will not provide clarity to consumers. The PA recommends the deletion of this entire section to avoid confusion as to whether transfers of any kind and type are lawful; they are not.

If the SI retains subsection (2) in spite of the comments made above, we strongly propose the adoption of our proposed changes below. This includes, for example, deletion of the word “permanently.” The PA recommends this word be deleted to avoid confusion that privately copied works can be transferred on any basis to another person – permanent or otherwise, and to avoid the implication that a copied work could be lawfully transferred to another person on a temporary basis. If a person copies a work, they should not be able to transfer that copy whilst simultaneously retaining the original file for their own use. Equally, they should not be able to transfer the original whilst retaining the copy for their own use. The PA proposes wording at (1)(2)(c) to make this clear, although we maintain that this subsection is unnecessary and confusing, and has no bearing on the policy aim.

Further, it is not clear from the language employed in the draft SI that copies made are for an individual's own private use only. “Private copying” is the term used Article

5(2)(b) of the Copyright Directive, so it is understandable that the IPO has chosen to use this term in UK law. However, as we note above, in other Member States where this exception has been implemented, “private copying” includes sharing with a family/close circle. To make clear, in line with the policy objective, that the exception being introduced into UK law is narrow and that the making of a further copy is for the individual’s private use only, this exception should be called “Personal Private Copying” or “Sole Private Copying.” The PA also recommends the addition of the word “private” before all references to “copy” in 28B(1) and 28B(3).

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

This question speaks to subsection (3) not (4). Whilst the provision largely meets the objective, The PA recommends the insertion of the word “private” after “further” and before “copy” for legal certainty.

Subsection (5) aims to prevent contract terms restricting use of this exception. Does this provision meet this objective?

There is a typographical error in the IPO’s document: this question actually speaks to subsection (4) not (5), and to the new proposed Subsection 1B (3).

Subsection 4 states that no contract provisions can override this exception and those that do are unenforceable. However, these provisions sit alongside other sub clauses about the enforceability of TPMs (subsection 1c), which are protected by the Copyright Directive and the revised 1988 Act (s 296ZA), and which may need to be supported by contract provisions. There would appear to be a legal inconsistency here, and one that would be highly likely to lead to consumer confusion.

Amendments to Schedule 2 to the Act apply this exception to rights in performances to the same extent as it applies to rights in copyright works. Does this provision meet this objective?

Not for The PA to answer.

Amendments to Schedule 5A to the Act apply the Section 296ZE complaints mechanism to this exception. Under this mechanism, individuals who are unable to access the exception as a result of technological copy protection measures applied to a work can complain to the Secretary of State. Does this provision meet this objective?

The current proposal appears to envisage users being able to file a complaint to the Secretary of State if technical protection measures (TPMs) prevent them making a private copy. However, in accordance with Article 6(4).4 of the Information Society Directive, ‘on-demand’ services (including both streaming and download services) cannot be subject to the intervention mechanism, on the grounds that they are works *“made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them.”* This applies to e-books and other digital publications which are

made available on demand in the same manner as it applies to audiovisual material and music. It needs to be made clear that an appeal relating to material accessed at a time and place of one's choosing would not constitute a valid appeal.

Additional point

Whilst referencing Article 5(2)(b) and acknowledging that one of the benefits of keeping a private copying exception narrow is so as to allow for appropriate compensation to be paid at the point of sale, there is no provision made in the draft SI for compensation to be paid to rights holders. Cases recently brought to the European Court of Justice have clarified that there is a presumption of harm to the right holder and hence there is a requirement to provide for fair compensation if reproduction devices are sold to consumers for private use ([Case C-467/08 SGAE v Padawan](#), Case C462/09 Stichting de ThuisKopie v Opus and C521/11 Amazon Int v Austro – Mechana). There is an argument to be made that introducing a private copying exception without mechanism for fair compensation is in breach of binding EU law.

Proposed changes:

(1) After section 28A insert:

“28B Personal Private copying

(1) Copyright is not infringed by an individual where ~~an 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 own private use for ends that are

neither directly nor indirectly commercial;

(b) the private copy from which the further private copy is made has been acquired and 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 or borrowed from a library);

(c) The provisions of the first and second subparagraphs shall not apply to works or other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them.

and

.(ed)the making of the further private copy does not involve the circumvention of effective technological measures applied to the copy from which it is made.

(2) Copyright is infringed where an individual who has made a further copy of a copyright work pursuant to subsection (1):

(a) ~~permanently~~ transfers or provides access to such further the copy to another person; or

(b) ~~permanently~~ transfers the original copy from which ~~it the further copy~~ is made without destroying the further copy ~~and the further copy shall in those circumstances be treated as an infringing copy; or-~~

(c) transfers the original to another person

(d) the making of a further private copy involves the circumvention of effective technological measures applied to the copy from which it is made

(3) Nothing in **this section** [subsection (2)] prevents an individual from storing a further **private** 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 his sole private use.

(4) To the extent that the term of any contract purports to restrict or prevent the doing of any act which would otherwise be permitted by this section, that term is unenforceable.”

(2) In Schedule 2 to the Act, after paragraph 1A insert:

“**Personal Private copying**

1B.—(1) Where copyright in a copyright work is not infringed by the making of a copy of that work in the circumstances set out in section 28A, the making of such a copy does not infringe any rights in the work conferred by this Chapter.

Quotation

Answers to specific consultation questions

The exception is drafted as Section 30A of the Copyright, Designs and Patents Act. As it will replace the present fair dealing exception for criticism and review, Sections 30(1) and 30(1A) will be deleted. Subsection (1) defines the scope of the exception. The exception permits the use of a quotation from a work for purposes such as criticism and review. In one dimension this slightly narrows the current criticism and review exception by permitting use only for the purpose of quotation. In another it slightly widens it by allowing such quotations to be used for purposes other than, but similar to, criticism and review. Is Subsection 1 an effective implementation of Government policy?

No.

The current proposal to widen the existing exception for criticism and review risks causing legal confusion both for rightsholders and users. The current exception for criticism and review allows for the use of images for such purposes. The use of the word “quotations” in this exception would seem to relate solely to literary or text based works, but we do not believe the intention of the proposed amendment is to limit the defence to textual works, given that *Modernising Copyright* characterised the forthcoming amendment as a minor widening of the existing defence.

The use of the word “such as” in 30A(1) is equally ambiguous, with permitted uses requiring further elaboration.

For the avoidance of doubt, the Government should retain sections 30(1) and 30(1A) and separately incorporate a new standalone quotation defence into the CDPA 1988, to sit alongside, rather than replacing, the current criticism/review defence. This proposal would allow the policy aim to be fulfilled but avoid confusion and the potential for litigation.

Subsections (1)(a) to (c) add further conditions of use to the exception. The work must have been lawfully made available to the public; the quotation must be accompanied by a sufficient acknowledgement; and the use of the quotation must be a fair dealing with the work. The first two of these conditions – subsections 1(a) and (b) are conditions of Article 5(d) of the Copyright Directive. The third condition, fair dealing, is intended to operate in a similar way to existing fair dealing provisions. It will permit use of a work for the purpose of quotation only to the extent that is fair. Do these conditions effectively implement the Government’s policy, including obligations under the relevant European legislation?

No.

Whilst 1(c) is welcome, The PA has concerns about the re-use of quotations and the way in which such use may interact with other proposed exceptions. For example, the proposed exception for text and data mining, or “data analytics.” It should therefore be made clear that the use of the quotation exception cannot allow the bringing together of a corpus of work that can then subsequently be mined under the data analytics exception and that works accessed through the quotations exception are not “authorised” for the purposes of data analytics.

To prevent such re-use of quotations, explicit wording should be included in the SI.

Further, as regards 1(b), The PA proposes that the IPO removes the caveat around sufficient acknowledgment: “where this is possible.” At the very least the burden of responsibility should be reversed so that the user has to have made an effort to source and make acknowledgement. This can be achieved through language such as “unless this is demonstrated to be impossible”. Such language more closely aligns with the Copyright Directive Article 5(3)(c) which states the author’s name should be included: “unless this turns out to be impossible”. Given that the IPO has routinely stated that one of the aims of this reform exercise is the better alignment of UK copyright law with the European Directive such a change would appear to help achieve this.

Subsection (2) adds two restrictions to the requirement for fair dealing. It means that the use of an extract that is greater than required for the specific purpose, or the use of an extract which is not in accordance with fair practice, will not be permitted under the exception. These conditions are provided by Article 5(d) of the Copyright Directive, which this exception implements. By setting out what is not, rather than what is, fair dealing, this subsection aims to allow a court to consider additional factors in any fair dealing analysis, which could further limit the use of this exception. Does Subsection (2) effectively implement the Government’s policy, including obligations under the relevant European legislation.

Yes. We welcome the addition of two restrictions to the requirement of fair dealing (subsection 2), although it highly probable that the co-existence of fair dealing and fair practice conditions will cause confusion both for users and rightsholders.

This is an area in which The PA and its members intend to do further, possibly through the production of industry guidelines and we would welcome the opportunity to share our developing thinking with the IPO.

Proposed changes

“30A Quotation

(1) Copyright is not infringed in a copyright work by the use of a quotation from that Work to the extent required by the specific purpose ~~for purposes such as criticism or review~~ provided that:

- (a) the work has already been lawfully made available to the public;
- (b) use of the quotation is accompanied by sufficient acknowledgement (~~where this is possible~~ unless this is demonstrated to be impossible); and
- (c) the use or re-use of the quotation is fair dealing with the work

Parody

Answers to specific consultation questions:

Article 5(3)(k) of the Copyright Directive does not require fair dealing for the exception to apply. However, we have opted to limit the exception in this way. Our view is that the concept of fair dealing is well-established in UK copyright law and needs no further definition. By framing paragraph (1) as outlined below are we meeting the objective outlined above?

No.

Whilst the concept of fair dealing may be well-established in UK copyright law as regards certain established exceptions, there is no experience of a parody exception in the UK and therefore of what fair dealing means in this context. It is therefore impossible to determine whether this exception is sufficiently limited: it will fall to the courts can determine what it means.

The confusion inherent in the framing of Section 1 is compounded by the fact that no definition is provided for parody, caricature or for pastiche. This, alongside the use of “fair dealing” as some sort of limit means it is unclear what a user may be permitted to do with a work; how much of the work they may be able to use in pursuit of this; and how this applies to the three different types of exception broadly categorised as Parody. It is highly probable this will lead to greater confusion for users and rightsholders, with the need for litigation to obtain clarity. (N.b. the potential costs of such litigation are not reflected in the Impact Assessments.)

The PA strongly objects to the inclusion of pastiche and caricature within the scope of this draft SI. No definition has been provided in Modernising Copyright, in the Impact Assessment, or in draft SI as to what constitutes “pastiche” or “caricature.” This can only lead to confusion and uncertainty as to what one can do with a work and, again, ultimately to action through the courts. It is unclear, in the absence of such crucial definitions, as to whether the Government’s policy objective has been achieved: this has not been set out. Whilst Annex C of *Modernising Copyright* is entitled “Parody, caricature and pastiche”, its analysis is limited exclusively to parody. Similarly, the Impact Assessment of December 2012 dealt exclusively with the introduction of an exception allowing works for parody. Neither pastiche nor caricature have been properly explored, analysed nor mentioned in the policy objective, yet are within scope of this SI. Hence, we propose limiting the SI solely to parody.

By making this a fair dealing exception authors of original work will be protected from abuse of this exception. We do not want this exception to be used as a defence for outright copying of an original work. Is this sufficiently clear?

No.

It is insufficiently clear that this exception cannot be used as a defence for outright copying of an original work, as there is no attempt to define allowable uses and what would constitute fair dealing of works in such cases. In the case of “pastiche” for example, it is not clear that whole works cannot be used or plagiarised and passed off under this exception. Pastiche remains undefined, as does fair dealing in this new

context, so it is impossible to determine whether an author's original work will be protected from abuse.

We also have deep concerns about the impact of this proposed exception on authors' moral rights. An author's established moral right to object to the derogatory treatment of their work will now be set on collision course against the newly minted right of the user with respect of parody. This will give rise either to expensive litigation, or authors having to just accept parodies, pastiches or caricatures of which they may rightly disapprove. Whilst *Modernising Copyright* states that "respect for moral rights could be a factor in whether an act is considered fair dealing" an author would only be able to invoke their moral rights *after* damage had already been done, and through the courts. These legal costs were not included in the Impact Assessment, and damages so far awarded by UK courts for infringement of moral rights have so far been very small. In addition to this, given that authors will now only be able to object to uses of their work after damage has already been done, the claim of an unaltered moral rights regime does not ring true. If those making use of this exception are to understand and be mindful of an author's moral rights, they must be explicitly directed to it within the SI.

The PA also supports the inclusion of additional safeguards to provide protection for authors. These include amendments to the proposed Section 30B(1) to make clear that the work would have to be the subject of the parody, not simply used to enhance a parody in any way. The US example of "target parodies" may be instructive here. Given that this section will now be a separate fair dealing exception such clarity in the law is essential.

Further, *Modernising Copyright* states that the introduction of a parody exception with a fair dealing limitation would still allow licensing, particularly of whole works, to take place. This should be included in the SI if the policy objective is to be achieved and if authors are to be protected from abuse of this exception.

For reasons we set out in respect of the proposed Quotation exception above, we maintain that the onus should be with the user to determine that it has been impossible to acknowledge the author. In the case of parody, it is difficult to envisage the circumstances under which such effort would prove impossible.

This is a new exception; we intend to group it close to other fair dealing exceptions in the CDPA 1988. Is this a suitable place for it to be inserted?

Yes.

Proposed changes

Parody

1.—(1) After section 30A insert:

"30B ~~Caricature, parody or pastiche~~

(1) Copyright in a copyright work is not infringed **d** by any fair dealing with the work for the purposes of ~~caricature, parody or pastiche~~ 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 rightholder, are not fair dealing.

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

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

(2) To the extent that the term of a contract purports to restrict or prevent the doing of any act which would otherwise be permitted under this section, that term is unenforceable.”

Data Analysis for non commercial research

Answers to specific consultation questions

The exception is drafted as Section 29A of the Copyright, Designs and Patents Act. Are these provisions an effective implementation of the Government’s policy? Do these provisions have any effect that is not consistent with the policy aim?

No, these provisions are not an effective implementation of Government policy and are entirely inconsistent with the stated policy aim for the following reasons:

- a. *Modernising Copyright* is clear that “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.” This is repeated in the preamble to the draft SI. However, wording giving effect to this is totally absent from the draft text. In fact, 29A(3) and Schedule 2C(3) of the draft SI rule out both restriction and prevention in a contract making it impossible, as currently drafted, for publishers to impose any conditions of access.

Unless the SI is amended to make explicit that publishers may impose conditions of access prior to the mining of works, this SI is unacceptable and fails to meet the stated policy aims.

Further, the contract override clause, as well as being problematic in and of itself (see pp.27-29) runs up against the stated policy aim of allowing publishers to control access. This must be amended.

- b. The relevant Impact Assessment which accompanies *Modernising Copyright* focuses solely on scientific research, journal articles and publishers. A proposal to allow the harvesting and mining of other data and content, or even broadly defined “research” has never been consulted upon. It is our view – and clearly that of the IPO’s to date – that this exception is for the text mining of scientific scholarly works published by academic publishers. However, the word “scientific” is missing from this SI, as is (therefore) incomplete transposition of Article 5(3)(a).

Subsection (1) establishes that where a person has lawful access to a copy of a copyright work, copyright is not infringed where a copy is made for the purposes of carrying out an electronic analysis of anything recorded in that work. Is the term “lawful access” effective?

No.

The term “lawful access” is not sufficient and requires further explanation. In particular, there must be a distinction between subscribed as opposed to unsubscribed content. *Modernising Copyright* and discussions with the IPO over the last two years have led us to believe that this exception applies to subscribed content only. *Modernising Copyright* p37 states that this exception will apply to a person “who already has a right to access a work”, which in the context of journal articles (referenced several times in *Modernising Copyright Annex E*) is under terms and conditions imposed by licence. By contrast, unsubscribed to content may include any information available on the open internet. There has been no consultation on such a policy and such a policy would, among other things, have obvious privacy

implications. The term “lawful access” therefore needs to be replaced to give proper effect to the policy aim.

This subsection must also 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 and we propose a similar amendment to that in the Private Copying SI.

Does the term “electronic analysis” capture the range of analytical techniques used in scientific research?

No.

Under a section entitled “Data analysis for non-commercial research”, *Modernising Copyright* states that the Government proposes to amend the Copyright, Designs and Patents Act 1988 so that it is not an infringement of copyright for a person who already has a right to access a work “to copy the work as part of a technological process of analysis and synthesis of the content of the work.” No definition of “data analysis” is supplied in *Modernising Copyright* but p37 talks about making a copy of a work “as part of a technological process of analysis and synthesis of the content of the work.” Additional and alternative terminology is now being introduced in the draft SI, including both “data analysis” and “electronic analysis.” It is unclear whether this captures harvesting, and linking, for example. Publishers have always understood this exception to refer to text mining and have shared details of what this process involves with IPO officials.

Broad and inconsistent terms have therefore been used, making it impossible to determine what the Government aim is (despite constant questioning to this end from The PA) and whether there is an effective implementation of policy via this draft. A clear, consistent and tight definition of terms is required, to ensure publishers and researchers are clear about what is being granted here.

Wording expressly limiting this exception to scientific research is also missing from the transposition of Article 5(3)(a). It is our view – and to date, that of the IPO’s - that this exception is for the text mining of scientific scholarly works published by academic publishers. To this end, the word scientific should be inserted to avoid the impression that this exception applies to all (undefined) research. Similarly, Section 29A must expressly limit this section to particular types of content, specifically those that have featured in the policy document and impact assessment: scientific research, journal articles and publishers’ licensed content.

Subsection (2) establishes that a copy made for these purposes may not be distributed or used for any purpose other than non-commercial research. Any such action infringes copyright. This protects the owners of rights in the copied works. Is this wording effective?

No.

- a. The PA recommends the removal of the word “permanently” from 29A(2) to make clear that even temporary copies must not be transferred, and that such action infringes copyright.

- b. The draft language must also safeguard against the copying and mining of works to produce outputs that could reasonably replace the original content (e.g. a programme that rewrites the factual content of a document in different but equivalent words).
- c. Unlike some of the other exceptions, there is no section about users not being able to circumvent TPMs. This must be included.
- d. Clarity is required as to what constitutes “non commercial” use in this context, using tighter wording along the lines of that proposed in the Private Copying SI.

Subsection (3) protects the exception to copyright from override by contract, while not restricting other contractual terms, as outlined above. Is this wording effective?

No. As stated above, there is no wording in this draft that suggests publishers can manage access and restrict other contractual terms in line with the policy objectives. This must be remedied as a matter of urgency. Including such a provision is totally contra to the stated policy aim in Modernising Copyright and the preamble of the draft SI.

Proposed changes

Data analysis for non-commercial research

1.—(1) After section 29, insert:

“29A Data analysis for non-commercial research

(1) Where a person has ~~lawful access to a copy of a copyright work, 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 ~~non-commercial~~ scientific research that is neither directly nor indirectly commercial; and
- (b) the copy is accompanied by sufficient acknowledgement ~~(unless this would be impossible for reasons of practicality or otherwise)~~.

(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 ~~and where such a copy is permanently transferred to another the copy shall be treated as an infringing copy~~

(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) involves 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) To the extent that the term of a contract purports to restrict or prevent the doing of any act which would otherwise be permitted by this section, that term is unenforceable”

(4) 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) To the extent that the term of any contract purports to restrict or prevent the doing of an act which would otherwise be permitted by this paragraph, that term is unenforceable.”

Education

Answers to specific consultation questions

Subsection 32 will be substituted with a new fair dealing provision for the purpose of instruction. As set out in Subsection (1), this permitted act, which is based on Article 5(3)(a) of the Copyright Directive, only permits fair dealing with a work for the purposes of instruction when done for non-commercial purposes and accompanied by sufficient acknowledgement. Subsection (2) sets out what is meant by the term “instruction”, namely acts done by persons giving and receiving instruction, as well as acts done for the purpose of examination. The exception will thus encompass much of the current section 32(3), which concerns copying for the purposes of examination. However, unlike the current provision it will be limited by fair dealing. Are these provisions an effective implementation of the Government’s policy?

No.

- a) *Modernising Copyright* states that the permitted acts provided by Section 32 (currently permitting non-reprographic copying for the purpose of instruction and copying for the purpose of examination) will be replaced by a single non-commercial fair dealing exception for teaching, which will permit the use of copyright works “to the extent necessary by way of illustration in order to teach about a subject.” However, this has been replaced by wording in the draft SI to permit the use of copyright works “for the purpose of instruction.” The policy document language and SI language do not align.
- b) The replacement of the word “illustration” with “instruction” – or at least the continued reliance on this wording despite the changing nature of the exception - 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. As *Modernising Copyright* suggests, amendments to Section 32 are intended to facilitate uses such as digital display on interactive whiteboards and changes to s32 are intended to “complement and underpin educational licensing schemes.” Accordingly, the provisions should be explicit that they apply only to non-reprographic copying, and are without prejudice to existing licensing schemes. Similarly, the existing wording of the CDPA Section 32(1)(b), which excludes acts done by reprographic process, must be retained.
- c) The provisions attempt to define what is meant by the term “instruction” but the definition proposed is capable of being interpreted more widely and therefore perhaps being applied to acts well beyond the “de minimis” examples given in *Modernising Copyright*. For instance, “acts done by a person giving instruction” is unlimited and could apply to any teaching activity, such as that by private tutors. The interplay between such potentially broad uses under “instruction” and non-commercial use is also unclear, for example education in the workplace.
- d) In fact, such “de minimis” uses as cited in *Modernising Copyright* already take place without the need for these provisions, as all of the examples given would be covered by the s. 36 exception. For instance “third party quotes” in an exam paper would likely fall within the present 1% limit. The Copyright Licensing Agency also already licences such activity. Interactive whiteboard display is also already covered by the CLA licence or, to the extent that a particular work is not covered by the CLA licence, can be covered by the new Section 36 exception

covering digital uses. The policy aim of “enabling de minimis” uses is therefore already achieved.

- e) As currently written this section would apply to the use of audiobooks. However, it is unclear what might constitute fair dealing for (the purposes of illustration for) instruction with an audiobook. Educational use of audiobooks are already licensed via the CLA, so should not be used under section 32, not least because the policy aim set out in *Modernising Copyright* is not designed to facilitate the use of audio books above and beyond what is already possible and licensable.
- f) The PA recommends the removal of the caveat around sufficient acknowledgement (“where this is possible”). At the very least the burden should be reversed, for example “unless this is demonstrated to be impossible”, in line with the Directive Article 5(3)(c). It is unclear why 32(3) is necessary to achieve the policy aim.
- g) Section (2)(b) needs to be deleted because it does not comply with EU law, nor is there any reference to this in *Modernising Copyright*. Article 5(3)(a) of the Copyright Directive allows use for the sole purpose of illustration for teaching or scientific research. There is no mention of this exception applying to those receiving instruction or illustration and this was never the stated policy aim.

The current Section 36 is amended so that it applies to all types of relevant copyright work. Subsection 36(1)(b) is intended to allow the use of copies permitted by Section 36 to take place both on the premises of an educational establishment and via a secure distance learning network, provided the copyright material is not transmitted to persons unaffiliated with the educational establishment. Are these provisions an effective implementation of the Government’s policy?

The PA suggests the insertion of the word “teaching” before “staff” in 36(b) to provide clarity on who may make use of this exception. It is not sufficient for someone to merely be affiliated with the education establishment or to make use of the education exception by virtue of working for an education establishment in any capacity; they must teach there.

With reference to draft 36(1)(b)(2) ‘...via a secure distance learning network’; further guidance is required, including as to whether this would include overseas locations i.e. ones in different legal jurisdictions possibly with greater security risk.

Subsection 36(2) is intended to provide that this provision does not apply to broadcasts (as they are covered by Section 35), or to artistic works which are not incorporated in another work (allowing, for example, reproduction of extracts from a textbook including embedded photographs). Does this provision meet these objectives?

Not for The PA to answer.

Subsection 36(4) raises the amount of a work that may be copied under these provisions from the present one per cent per quarter of a calendar year, to not more than five percent in any period of twelve months. Does this provision meet the objective?

Yes.

Proposed changes

(1) For section 32, substitute:

“32 Fair dealing for the purpose of instruction-illustration”

(1) Fair dealing with a copyright work for the sole purposes of illustration for of [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 ~~(where this is possible)~~unless this is demonstrated to be impossible; and
- (c) is not done by means of a reprographic process-

(2) For the purpose of subsection (1) “instruction” means acts done:

- (a) by a person giving instruction or in preparation for instruction; and
- ~~(b) by a person receiving instruction; and~~
- (c) for the purposes of an examination by way of setting the questions, communicating 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.

(3) No acknowledgement is 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) To the extent that the term of a contract purports to restrict or prevent the doing of any act which would otherwise be permitted by this section, that term is unenforceable.

Section 36

(3) 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 of extracts of that work by or on behalf of an educational establishment;
- (b) the provision of those extracts by that 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.

Research, Libraries and Archives

Answers to specific consultation questions

Amended Section 29 subsections (1) and (1C) seek to provide that all types of copyright work may be dealt with for the purposes of non-commercial research and private study (as long as that dealing is a fair dealing). As the scope of subsections (1) and (1C) will now encompass typographical arrangements, subsection (2) has been deleted. Do these amendments achieve the Government's policy regarding the type of works covered by this provision?

Yes.

Section 29 (3)(a) prohibits copying by librarians unless it is permitted in section 37, which is to be amended as discussed below. Does the wording achieve this?

Yes

15. A new subsection has been inserted to prevent the acts permitted by this section from being excluded by contracts. Does this subsection achieve this?

Yes, but The PA has wider concerns about the blanket application of this provision as set out on pp.27-29.

Section 37

The provisions which permit copying by librarians and archivists for the purposes of research and private study (Sections 37 to 40) have been merged into a single section (Section 37). The existing Sections 38, 39 and 40 will be deleted. Is this an appropriate way to simplify these provisions?

One consequence of merging sections 37-40 into a single section is that new, undefined terms are introduced. For example, the proposed section 37 allows the making of a single copy or an article in a periodical or a "reasonable proportion" of any other published copyright work. "Reasonable proportion" is not defined and, as is inconsistent with draft language put forward in other SIs. The PA would prefer to see reference to fair dealing at the very least, similar to the wording used in the quotations exception. The PA also intends to develop fair practice guidelines, in discussion with members.

Section 37, subsection (1) sets out that the exception only applies to libraries that are not conducted for profit. This condition is currently prescribed by the Copyright (Librarians and Archivists) (Copying of Copyright Material) Regulations 1989, which will be repealed. Subsection (1) (a) is intended to clarify that articles in periodicals can be copied, regardless of the medium in which they are recorded. Subsection (1) (b) is intended to expand the exception to cover all classes of published work. Do these amendments achieve these objectives?

The PA has concerns about Section 37 and the use of the words “make and supply”, very likely to be interpreted now (as opposed to in 1988 when used in the CDPA) as permission to create unlicensed digital copies of hard-copy works via scanning.

The PA would like to see additional safeguards against the creation of digital files, for example by scanning hard-copies which have not so far been published by the author or publisher in digital form. Allowing libraries or users to do this would create new (unlicensed) digital copies now under library or educational institution control, and much easier to disseminate and copy further than the present hard copies. Some authors specifically do not want their books to be digitised at all. And enabling libraries or users to do this under exception could compete with the primary market.

If “make and supply” is going to be used, it must be accompanied by clear and specific provisos against any further use, copying or exploitation, in line with those proposed by The PA at (3A) below. This amendment should be supported by deletion of the words “in such a medium as the person may request” to avoid confusion.

Subsections (3) (b) and (c) retain the provisions in the current Sections 38 and 39 that only a single copy of a work can be supplied by a librarian. Subsection (3) (d) retains the requirement currently in the Librarian and Archivist Regulations that a written declaration must be provided, but removes the requirement that the declaration needs to be made using the form provided in those Regulations. This is intended to simplify and clarify these provisions, and to make it easier for declarations to be made in a digital format. Does the change achieve these objectives?

Yes.

Subsection (3) (d) (iii) retains the condition in the current Sections 38 and 39 which prevents the copies being used for purposes other than non-commercial research or private study. Subsection (3) (d) (iv) retains the conditions set out in the current Section 40 which prevent multiple copies of material being provided to different persons for the same purpose. Subsection (4) is intended to retain the provision in the librarian and archivist regulations that removes liability from librarians when they have been provided with a false declaration, unless they were aware that the declaration was false. Does this provision achieve this objective?

Yes.

Subsection (5) is intended to clarify that, when false declarations are provided, the person requesting the copy will be liable for infringement of copyright. Does this provision achieve this objective?

Yes.

Section 40A

The word “prescribed” will be removed from subsection 40A (2) due to the revocation of the Copyright (Librarians and Archivists) (Copying of Copyright Material) Regulations 1989. Does this provision achieve this objective?

Yes.

Section 41

The amendment to Section 41 subsection (1) is intended to expand this exception to cover any published work. Does this provision achieve this objective?

Yes.

However, we have a separate concern about the wording used in Section 41. Section 41(2) (c) says that the supply of copies to other libraries, under certain welcome conditions, should also include a requirement on the other library to “pay for the copy and pays a sum representing the cost attributable to its production.” As a further safeguard against confusion with the commercial market, The PA recommends replacing this wording with reference *only* to the costs incurred by the supplier library – not “including” these, as is currently worded. The same applies to Section 37 (3)(f) and Section 43(1)(d)(f).

Archiving and Preservation

Section 42

This exception will remain as Section 42 of the Copyright Act. Subsection (1) has been expanded to apply to any copyright work, as opposed to just literary, dramatic and musical works. This subsection is also intended to extend the exception to cover museums and galleries as well as the curators of such institutions. Does the wording of this subsection achieve these objectives?

Yes. However, it is unclear why these provisions are necessary to achieve the Government’s policy aim. Instead, it may avoid duplication and assist security if such copying for preservation were restricted to the six deposit libraries who have a specific mandate to do this and who already have security procedures in place under the new 2013 Legal Deposit Regulations. It is unclear why this provision is needed for all libraries to scan or copy smaller amounts to archive themselves.

Subsection (2) (b) is intended to ensure that the exception does not conflict with the normal commercial exploitation of copyright works by limiting the exception to situations when it is not reasonably practicable to purchase a replacement copy. Does this provision meet this objective?

Yes.

Subsection (3) is intended to ensure that the acts permitted by this exception cannot be prohibited by contractual terms. Does this provision meet this objective?

See separate comments on contract override, pp.27-29.

Section 43

Subsection (1) is amended so that this provision will cover all classes of unpublished work. The works covered under this provision are those which were unpublished at the time they were deposited at the library or archive. Is this achieved by the wording used in the regulations?

Yes. However, The PA notes that The Enterprise and Regulatory Reform Act includes legislation relating to unpublished works. We would welcome clarity on how this subsection sits alongside the ERR Act provisions.

Subsection (1) (d) retains the requirement in the Librarian and Archivist Regulations that a written declaration must be provided, but removes the requirement that the declaration needs to be made using the form provided in the regulations. This is intended to simplify and clarify these provisions, and to make it easier for declarations to be made in a digital format. Do these changes achieve this objective?

Yes.

Subsection (2) is intended to retain the provisions in the Librarian and Archivist Regulations which remove liability from librarians and archivists when they have been provided with a false declaration, unless they were aware that the declaration was false. Does this provision achieve this objective?

Yes.

Subsection (3) is intended to clarify that, when false declarations are provided, the person requesting the copy will be liable for infringement of copyright. Does this provision achieve this objective?

Yes – and it is a welcome clarification.

Section 43A

This is a new exception that is intended to allow cultural institutions to make works available via dedicated terminals based on their premises. Subsection (1) sets out the types of institution that will be able to benefit from such an exception. Subsection (2) sets out the conditions that need to be satisfied before a work can be made available. This exception is only intended to apply to works that have been legitimately acquired by the institution. This is covered by Subsection (2)(a). As with Sections 37 and 43, these works can only be used for the purposes of non-commercial research or private study, as set out in Subsection (2) (b) (i) and (ii). Subsection (2) (b) (iii) sets out the conditions, mentioned above, that the dedicated terminals need to be based on the premises of the cultural institution. These conditions are intended to correspond with the conditions set out in Article 5(3)(n) of the Copyright Directive. Do the regulations achieve the intended objectives?

The PA would like to see the inclusion of the wording “not conducted for profit” inserted after “institution” in Subsection 43A(1), in line with the wording currently used in Subsection 42(1)(b).

Further, The PA supports the removal of “an education establishment” from this section/list of eligible institutions given that educational establishments are covered by the provisions set out in Sections 32, 35 and 36. Introducing further provisions here is complicating and confusing, and could undermine existing licensing schemes.

As regards Subsection(2)(b)(iii), the Government should make clear that each terminal may only display the corresponding number of copies owned by the institution in question. It is also unclear whether remote access to such terminals is allowed (we would suggest not) and how this will work in practice to avoid copyright infringement.

Subsection (2) (c) is intended to ensure that the exception only applies when there are no licensing or contractual terms to the contrary. Does the wording of this subsection achieve this?

Yes.

Sections 61

In order to make Sections 61 less bureaucratic, the requirement that organisations benefiting from the exception need to be designated by the Secretary of State will be removed. Instead, Subsection (1) states that the exception will apply for any body that is not established or conducted for profit, a condition currently found in of the Copyright (Recording of Folksongs for Archives) (Designated Bodies) Order 19893 (which will be revoked). Does this amendment meet this objective?

Not for The PA to answer.

Section 75

As with Section 61, the requirement that organisations benefiting from the exception need to be designated by the Secretary of State will be removed. Subsection (1) of Section 75 will be amended so that the exception applies to any body that is not established or conducted for profit. References to “designated bodies” and “broadcast(s) of a designated class” have been removed. These conditions are currently found in of the Copyright (Recording of Archives of Designated Class of Broadcasts and Cable Programmes) (Designated Bodies) Order 1993 (which will be revoked). Do these amendments meet the objective?

Not for The PA to answer.

Proposed changes

Libraries and archives

2.—(1) For section 37 to 40 substitute:

“37 Copying from published works by librarians for non-commercial research

and private study

(1) This section applies where a person makes a request to a librarian of a library which is not conducted for profit for the librarian to make and supply to the person making the request a single copy ~~(in such medium as the person may request)~~ of:

- (a) an article in a periodical (irrespective of the medium in which the periodical is recorded); or
- (b) a ~~reasonable~~ proportion of any other published copyright work, in accordance with fair practice
- (c) to the extent that the use of the proportion is fair dealing.

(2) Where the librarian accedes to a request of a kind described in subsection (1), the making and supply of the copy does not infringe copyright in the work copied provided that the conditions in subsection (3) are met.

(3) The conditions mentioned in subsection (2) are:

- (a) the copy is supplied for the purposes of non-commercial research or private study;
- (b) where the request relates to an article in a periodical, only a single copy of a single article is supplied from any single issue of the periodical;
- (c) where the request relates to the supply of a copy other than an article in a periodical, a person is not furnished with more than one copy of the material;
- (d) the person making the request has delivered to the librarian a declaration in writing which:
 - (i) identifies the name of the person making the request and the material which the person requires a copy of;
 - (ii) states that the person has not previously been supplied with a copy of that article by any librarian;
 - (iii) states that that person will only use the copy for non-commercial research or private study; and
 - (iv) states that to the best of the person's knowledge, no other person with whom the person making the request works or studies has made or intends to make, at or about the same time as the request, a request for substantially the same material for substantially the same purpose; and
- (e) the librarian is satisfied as to the truth of the matters stated in the declaration; and
- (f) the person making the request is required to pay and pays a sum not less than the cost (including a contribution to the general expenses of the library) attributable to its production.

(3A) 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.

“41 Copying by librarians: supply of copies to other libraries

(1) Subject to the conditions in subsection (2), a librarian may make and supply to another library at its request a copy of the whole or part of any copyright work without infringing any copyright in

- (a) an article in a periodical; or

(b) the whole or part of any other published work

(2) The conditions mentioned in subsection (1) are:

(a) the other library is not furnished with more than one copy of the material requested;

(b) where the request is for a copy of the whole or part of a published edition, the name and address of a person entitled to authorise the making of a copy of the copyright work cannot by reasonable enquiry be ascertained.

(c) that the other library is required to pay for the copy and pays a sum representing ~~the cost (including a contribution to~~ the general expenses of the library) ~~attributable to its production.~~

43 Copying by librarians or archivists: unpublished works

(1) Where a person requests a copy of a copyright work which was unpublished at the date it was deposited in a library or archive, the librarian or archivist may make a copy of the work and supply it to that person without infringing any copyright in it provided that:

(a) the copy is made for the purposes of non-commercial research or private study;

(b) the copyright owner has not prohibited copying of the work;

(c) no person is furnished with more than one copy of the material;

(d) the person making the request has delivered to the librarian or archivist a declaration in writing which:

(i) identifies person making the request and the material which the person

requires a copy of;

(ii) states that the person has not previously been supplied with a copy of that

article by any librarian or archivist;

(iii) states that that person will only use the copy for non-commercial research

or private study;

(e) the librarian or archivist is satisfied as to the truth of the matters stated in the declaration; and

(f) the person making the request is required to pay and pays a sum equivalent to but not less than

the cost (~~including a contribution to the~~incurred as general expenses of the library) ~~attributable to its production.~~

(2) A librarian may rely on a declaration made for the purposes of this section as to any matter that the librarian is required to be satisfied on unless he is aware that it is false in a material particular

(3) Where a person requesting a copy makes a declaration that is false in a material particular and is supplied with a copy which would have been an infringing copy if made by him:

(a) he is liable for infringement of copyright as if he had made the copy himself;

and

(b) the copy is to be treated as an infringing copy.

43A Making works available through dedicated terminals

(1) Copyright is not infringed where a work is made available in accordance with the conditions in subsection (2) by an institution which is not conducted for profit and which is:

(a) a publicly accessible library;

- ~~(b) an educational establishment;~~
 - (c) a museum; or
 - (d) an archive.
- (2) The conditions mentioned in subsection (1) are:
- (a) the work (or a copy of it which is not an infringing copy) must have been lawfully acquired by the institution;
 - (b) the work must be made available by the institution:
 - (i) to individual members of the public;
 - (ii) for the purposes of non-commercial research or private study; and
 - (iii) through dedicated terminals on the institution's premises; and
 - (c) the making available of the work in accordance with this section must not be precluded by the terms of any licence or the terms on which the work was purchased.

Additional Point

Bundling: This draft deals with two separate exceptions: private study and libraries and archives. It is hoped that the bundling of these two unrelated exceptions will be amended when the SIs are tabled before the House, to allow for detailed scrutiny of each of the separate provisions.

Public Administration

Does the wording sufficiently capture the policy aim?

Yes.

Does the wording need to explicitly refer to electronic transmission?

Section 47(2)(a)(iii) appears to do this, as does Section 3(b)(iii).

Does the suggested wording in (2)(c) and (3)(d) sufficiently protect commercially available works?

Yes.

Contract Override

All of the proposed amendments include a provision which would render unenforceable contracts which sought to restrict or prevent the relevant exception. The PA is strongly opposed to this provision in each case and for the following reasons:

- (i) The provision represents a dramatic change to UK contract law and is of enormous import and consequence to rightsholders. It should therefore at least be subject to full debate by Parliament, rather than an element of a number of statutory instruments which may only receive cursory attention on its way through legislative proceedings. The PA proposes that any contract override provision be the subject of a separate SI, or subject to the primary legislative process.
- (ii) The provision is potentially harmful to all stakeholders, including consumers. Currently contract terms can allow users – such as content services – to do more with rightsholders’ content than would be permissible under copyright law. Contracts introduce balance, flexibility and mutual benefit into the rights licensing system. By imposing a blanket ban on such contracts these features will be lost from the licensing environment.
- (iii) The provision runs into conflict with the ability of rightsholders to ensure the enforceability of Technical Protection Measures, as set out in Article 6 of the Copyright Directive and section 296ZA of the Copyright Act. Rightsholders are permitted to restrict or prevent certain acts through the use of TPM if certain criteria are met. It is unclear from the current drafting how this area of the law will square up to the proposed provision on contract enforceability. As with many areas of these proposals, the most probable outcome is consumer and rightsholder confusion.
- (iv) Override of contract is not required by the Directive governing exceptions under European law. Recital 45 of the Directive on the harmonisation of certain aspects of copyright and related rights in the information society states that “the exceptions and limitations referred to in Article 5(2), (3) and (4) should not, however, prevent the definition of contractual relations designed to ensure fair compensation for the rightsholders insofar as permitted by national law.” Article 9 states that “This Directive should be without prejudice to...the law of contract.” It is unclear how the proposed provision sits alongside these, or why it is felt to be necessary.
- (v) We also note that the current fair dealing defences do not contain such a provision and yet generally operate effectively. The IPO has failed to set out a compelling case as to why the provisions are required and exactly what the problem is that they may solve.
- (vi) Given the vague language used in the proposed SIs to introduce new copyright exceptions, the ability to clarify permitted uses for users via contract terms is absolutely vital to avoid litigation.
- (vii) The international dimension has been insufficiently considered. Content providers from abroad may supply content under a contract governed by their domestic law. A term of that contract which restricts an exception may (therefore) be unenforceable in the UK. It is unclear how UK unenforceability

will operate alongside UK enforcement of a foreign judgement under the Reciprocal Enforcement of Judgements regime.

- (viii) Similarly, British creators would be put at significant competitive disadvantage, as investors may be inclined to turn away from the UK and invest in content made in other jurisdictions where the ability to freely negotiate contracts remains a fundamental tenet of the law. Alternatively, British creators will have to accept business terms agreed under foreign jurisdiction. From a business perspective this also represents an additional and unnecessary administrative burden.
- (ix) It is notable – and additional pause for thought – that no other EU jurisdiction with the exception of the Republic of Ireland has such a provision in law. Such a provision will put the UK at a significant commercial disadvantage compared to the rest of the EU if not globally.
- (x) Preventing businesses from setting their own licence terms amounts to providing an untrammelled exception for those from abroad. For example, publishers will not be able to prevent purported researchers in China from having a right to mine UK works.

Alternative Proposal

Given that the IPO's policy aim is to ensure that the use of the exceptions should not be restricted we propose an alternative solution that would take account of the above but still fulfil the policy aim: the inclusion of a "reasonableness test" (such as set out in the Unfair Contract Terms Act 1977 "UCTA").

Schedule 2 of UCTA states that contracts can be assessed for reasonableness according to five grounds:

“(a) the strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customer's requirements could have been met;

(b) whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having a similar term;

(c) whether the customer knew or ought reasonably to have known of the existence and the extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties);

(d) where the term excludes or restricts any relevant liability if some condition was not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable;

(e) whether the goods were manufactured, processed or adapted to the special order of the customer.

As set out above, we believe that any contract override provision must be considered in a separate SI or put forward via primary legislation. However, any provision should include the following clause, based upon the definition of reasonableness elucidated above, and along the follow proposed lines:

To the extent that the term of a contract **unreasonably** purports to restrict or prevent the doing of any act which would otherwise be permitted under this section, that term is unenforceable.

Concluding Remarks

Again we are grateful for this opportunity to provide detailed thoughts and comments to the IPO as part of its technical review of the draft SIs and we look forward to further engagement through the stakeholder consultation sessions. It is absolutely vital to British rightsholders and users that the copyright law is clear and unambiguous and our proposed changes to the IPO's draft amendments are focused on achieving this.

Richard Mollet
Chief Executive

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Head of Public Affairs

17 July 2013