

PA Response To Technical Review: Draft Statutory Instrument on Disability exceptions

The Publishers Association ('The PA') is the representative body for book, journal, audio and electronic publishers in the UK. Our 110 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 on journals.

The PA welcomes the opportunity to respond to this technical consultation. We have included responses to the questions posed and proposed changes to the SI as set out below.

Publishers have a long history of working closely with the visually impaired community to increase access to published works. This includes working closely with RNIB, who report an increasing number of bestselling titles being sold with text to speech functionality (48 out of 50 at last count). Publishers in Europe and globally are signed up to the European Trusted Intermediaries Network (ETIN) and TIGAR projects, helping establish a network of authorised entities through which accessible files can be shared more easily under certain conditions. Both The PA and the International Publishers Association participated in the WIPO Treaty negotiations leading to the conclusion of a treaty for the visually impaired, which we welcomed.

Section 31A: Disabled persons – making copies of copyright works for personal use

Subsections (1) (a), (b) and (c) set out the conditions required for the exception to apply. To benefit from this exception, a person with a disability must have lawful possession or use of a copy of a work, and copies of that work in a format accessible to that person must not be commercially available on reasonable terms. Does the drafting of this subsection achieve the intended policy aim?

No. Subsections 1(a) (b) and (c) set out some but not all of the necessary conditions required for the exception to apply.

Whilst the policy aim is to extend this exception to people with all types of disability, a more specific definition is needed. This is especially since the Government intends to delete section 31F of the current Act, which includes an important and necessary definition of visual impairment, and now intends to include both physical and mental impairment as a precondition for making use of this exception.

Unless alternative conditions such as Schedule 1 of what used to be the Disability Discrimination Act 1995 (now subsumed into the Equalities Act) are intended to apply here –and which therefore must appear in the SI - section 31F should be reinserted at the very least (notwithstanding that it will have to be added to). We would strongly urge the IPO to look at the Equalities Act, which has established and potentially useful wording such as “substantially disadvantaged in accessing.”

We also have concerns about the inclusion of wording “on reasonable terms” at 1(c) which, following “commercially available”, suggests potential interference with the market and introduces a new uncertainty to the applicability of the exception. Prices are set by the market, which is the only reliable authority as to the reasonableness of the prices of consumer products. Further, we are concerned that the insertion of this

wording may conflict with the ability of rightsholders to interpret certain key contractual terms on the exercise of this exception under UK and EU law, such as the use of Technological Protection Measures (TPMs). It is also unclear what dispute mechanism would apply to any challenge under this heading.

If “reasonable terms” is to remain we would urge the Government to distinguish between reasonable terms in a commercial sense (such as price) and which should therefore not be included in this SI, and reasonable terms specifically in relation to the provision of disabled access.

Subsection (2) provides that copyright is not infringed by the making of an accessible copy of a work using the copy described by subsection (1), if the accessible copy is made for the personal use of the disabled person. Is the wording of this subsection effective?

Yes, although the words “accessible copy” and subsequent definition are missing from the current draft and should be (re)inserted, not least to provide clarity that this exception applies to the making of *one* accessible copy. It is essential that all three of the preconditions (a) to (c) should be included so the reference to “subsection(a)” must be extended by including (b) and (c).

Subsection (3) provides examples of acts permitted by this exception. This list is non-exhaustive. Are such examples helpful?

We see no reason for the inclusion of this non-exhaustive list of examples. We also have strong concerns that the current wording could legitimise uses that are not in accordance with the legislation and which could lead to the copying of works for an unspecified group of people, together with the lack of a de facto limitation on the body who can do the relevant act. The PA recommends that this section be deleted; it serves no purpose and could be extremely damaging.

Subsection (4) retains the condition in the existing Section 31A which ensures the exception cannot be used for commercial gain. Subsection (5) sets out that any copy made pursuant to this Section must not be dealt with or transferred to a person who is not entitled to benefit from the exception. Is the wording of this subsection effective?

Yes.

Subsection (6) aims to ensure that the exception does not allow any dealing with the work beyond that expressly permitted by this Section. Is the wording of this subsection effective?

Yes.

Subsection (7) is intended to clarify that the exception cannot be overridden by contractual terms. Does the wording of this subsection achieve this?

No. See our response regarding 31B subsection 12, below.

Section 31B: Making copyright works for disabled persons generally

Subsections (1) (a), (b) and (c) set out the conditions required for the exception to apply. To benefit from this exception, an educational establishment or body not conducted for profit must have lawful access to a work and accessible

copies of the work must not be commercially available on reasonable terms. Does the drafting of this subsection achieve this?

No.

Crucial wording in the current Act 31D is missing and must be reinserted, to make clear that the making of accessible copies under an exception does not apply to the extent that a licensing scheme is in place.

Further, there needs to be a clear categorisation of “a body not conducted for profit” which, as currently drafted, is too broad. The IPO may wish to note the wording of the WIPO VIP Treaty Article 2c, and adopt the wording used regarding “authorised entity”, specifically an entity that is “authorized or recognized by the government to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis.” Authorised entity also includes a “government institution or non-profit organization that provides the same services to beneficiary persons as one of its primary activities or institutional obligations.”

Subsection (2) mirrors subsection (1), but applies to broadcasts. This enables the deletion of current Section 74, and allows recordings of broadcast works to be dealt with in the same way as copies of other works under this Section. Does the drafting of this subsection achieve this?

Not for The PA to answer.

Subsection (3) is intended to provide that an educational establishment or body not conducted for profit may make and supply accessible copies of qualifying works for people with disabilities without infringing copyright. Is the wording of this subsection effective?

Yes, notwithstanding the alternative wording suggested (“authorised entity”) as explained above.

Subsection (4) provides examples of acts permitted by this exception. This list is non-exhaustive. Are such examples helpful?

As stated above, we see no reason for the inclusion of this non-exhaustive list of examples. We also have strong concerns that the current wording could legitimise uses that are not in accordance with the legislation and which could lead to the copying of works for an unspecified group of people, together with the lack of a de facto limitation on the body who can do the relevant act. The PA recommends that all but subsection (c) be deleted, as it serves no purpose and could be extremely damaging.

Subsection (5) retains the conditions in the current legislation requiring that the accessible copies must be accompanied by a statement that it is made under this exception and a sufficient acknowledgement. Subsection (6) retains the condition in the existing Section 31B ensuring the exception cannot be used for commercial gain. Subsection (7) provides that an educational establishment can only use the exception for educational purposes. Subsection (8) requires that a body making and supplying copies under this exception maintain records and allow copyright owners, or their representatives, to inspect these records. Subsection (9) requires that a body making and supplying copies under this Section must notify the copyright owner or their representative within a reasonable time of making an accessible

copy. Subsections (10) and (11) are intended to prevent copies made under this exception being transferred to a person who is not entitled to receive it or to a body that is not entitled to make copies under this exception. Subsection (11) aims to ensure that the exception does not allow any dealing with the work beyond that expressly permitted by this Section. Are these safeguards acceptable?

Yes, although it is unclear why the burden of proof for sufficient acknowledgement in Subsection 5 has been weakened (it is not present in sections 31A (4) or 31B (5)). This drafting should be amended, in line with the Copyright Directive. Further, subsection 13 (and therefore 11) should expressly reference the communication to the public right.

Most important of all though, the SI must include the current Section 31E, dealing with limitations following infringement of copyright.

Subsection (12) is intended to clarify that the exception cannot be overridden by contractual terms. Does the wording of this subsection achieve this?

As stated in our previous response to the other draft SIs under technical review, The PA strongly opposed the insertion of a clause relating to the unenforceability of contractual override in each of the SIs. The PA opposes this term specifically with regard to the disability exception as it is unclear how such a subsection sits alongside the licensing schemes already in operation for this exception – and which presumably will still remain in place. This contradiction can only be resolved if the unnecessary and confusing contract override clauses in both 31A and 31B are removed.

The PA also opposes the insertion of this subsection more generally, 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 placing a question mark over the validity of 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 conflicts with the 2001 Copyright 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.” The proposed provision directly conflicts with these provisions, and it is unclear 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 will now be put at significant competitive disadvantage, as investors 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 often imposed 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 general 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, for reasons already outlined.
- (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.

Draft Regulations on exceptions for people with disabilities

Disability

[] – (1) For sections 31A to 31F substitute:

“31A Disabled persons – making copies of copyright works for personal use

(1) This section applies where a person (“the disabled person”)

- (a) has lawful possession or lawful use of a copy of the whole or part of a copyright work (“the work”);
- (b) by reason of physical or mental impairment does not by using that copy have the same level of access to the work as a person who does not have that physical or mental impairment; and
- (c) copies of the work are not commercially available ~~on reasonable terms~~ with the authority of the copyright owner in a form which would give the disabled person same level of access to the work as someone who does not have the physical or mental impairment.

(1A) In Subsection 1, “disabled persons” in the case of a literary work means a person who is blind; who has an impairment of visual function which cannot be improved, by the use of corrective lenses, to a level that would normally be acceptable for reading without a special level or kind of light; who is unable, through physical disability, to hold or manipulate a book; or who is unable, through physical disability, to focus or move his eyes to the extent that would normally be acceptable for reading.

OR

Adapted wording from Schedule 1 of the Disability Discrimination Act (now subsumed into the Equality Act.

(2) Where this section applies, copyright is not infringed by the use of the copy referred to in subsections 1(a) (b) and (c) to make a copy of the work for the personal use of the disabled person in a form that enables the disabled person to have improved access to the work (an “accessible copy”).

(3) The acts authorised by this section must be exclusively for disabled persons, to the extent required by the specific disability, include:

- ~~(a) in the case of an audio-visual work, the making of a copy of the work incorporating subtitles; and~~
- ~~(b) in the case of a literary work, performing the work and producing a sound recording of the performance.~~

(4) An accessible copy may include facilities for navigating around the version of the copyright work but may not include—

- (a) changes that are not necessary to overcome problems caused by visual impairment; or
- (b) changes which infringe the right (provided by section 80) not to have the work subjected to derogatory treatment.

(4) Where a person charges a disabled person for making a copy of a copyright work under this section, the charge must not exceed the cost of making and supplying the copy.

(5) Copyright is infringed by

- (a) the transfer of a copy made pursuant to this section to any person who:
 - (i) is not entitled to have such a copy made for them; or
 - (ii) does not intend to transfer that copy to a person entitled to have such a copy made for them;
- (b) any dealing with such a copy by any person.

(6) A copy held by a person otherwise than in accordance with this section is to be treated as an infringing copy and any dealing with the copy by that person is an infringement of copyright.

(7) 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.

(8) In subsections (5) and (6) references to “dealing” mean, selling, letting for hire, communicating to the public, offering or exposing for sale or hire or including in a broadcast or cable programme service.

31B Making accessible copies for disabled persons generally

(1) This section applies where an educational establishment or a body authorised entity not conducted for profit:

- (a) has lawful possession of a commercially published copy of the whole or part of a copyright work (“the work”);
- (b) persons with a physical or mental impairment (“disabled persons”) do not have the same level of access to the work as persons who are not disabled persons;
- (c) copies of the work are not commercially available on reasonable terms by the authority of the copyright owner in a form which would give a disabled person the same level of access as a person who is not a disabled person.

(1A) Section 31B does not apply to the making of an accessible copy in a particular form if—

- (a) a licensing scheme operated by a licensing body is in force under which licences may be granted by the licensing body permitting the making and supply of copies of the copyright work in that form;
- (b) the scheme is not unreasonably restrictive; and
- (c) the scheme and any modification made to it have been notified to the Secretary of State by the licensing body.

(2) This section also applies where an educational establishment or a body authorised entity not conducted for profit:

- (a) has lawful access to a broadcast;
- (b) persons with a physical or mental impairment (“disabled persons”) do not have the same level of access to the broadcast as persons who are not disabled persons;
- (c) access to the broadcast is not commercially available on reasonable terms by the authority of the copyright owner in a form which would give a disabled person the same level of access as a person who is not a disabled person.

(3) Where this section applies, copyright in the work or the broadcast is not infringed where the educational establishment or body authorised entity not conducted for profit uses its copy of the copyright work or the broadcast to produce copies (“accessible copies”) for disabled persons which afford those persons improved access to the work or broadcast.

(4) The acts authorised by this section must be exclusively for disabled persons, to the extent required by the specific disability including ~~include:~~
(a) ~~in the case of an audio-visual work or a broadcast, the making of a copy of the work incorporating sub-titles;~~
(b) ~~in the case of a literary work, performing the work and producing a sound recording of the performance;~~
(c) the making of any copy which is not itself an accessible copy but is necessarily created for the purposes of the production of accessible copies (“an intermediate copy”).

(5) An accessible copy made under this section must be accompanied by
(a) a statement that it is made under this section; and
(b) a sufficient acknowledgement (unless this is not possible for reasons of practicality) ~~determined to be impossible~~

(6) If a body that makes copies pursuant to this section charges for supplying a copy, the sum charged must not exceed the cost of making and supplying the copy

(7) A body making copies under this section must, if it is an educational establishment, ensure that the copies will only be used for its non-commercial educational purposes.

(8) A body making copies under this section must:
(a) keep records of accessible and intermediate copies made by it and the persons to whom they are supplied; and
(b) allow the copyright owner or his representative, on giving reasonable notice to inspect the records at any reasonable time.

(9) Within a reasonable time of making an accessible copy, a body must notify
(a) any body which:
(i) represents particular copyright owners or owners of copyright in the type of copyright work concerned; and
(ii) has given notice to the Secretary of State of the copyright owners, or the classes of copyright owner, represented by it;
(b) or, if there is no such body, the copyright owner (unless this is determined to be impossible ~~it is not reasonably possible to ascertain the name and address of the copyright owner~~).

(10) Copyright is infringed where:
(a) an intermediate copy is transferred otherwise than to a body entitled to make accessible copies;
(b) an accessible copy is transferred to a person who
(i) is not a disabled person entitled to receive such a copy under this section; or
(ii) does not intend to transfer that copy to a disabled person entitled to receive such a copy under this section;

(11) A copy made pursuant to this section shall be treated in the hands of a person not entitled to it as an infringing copy and any dealing with the copy by that person is an infringement of copyright.

(12) 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.

~~(12) 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.~~

(13) In subsection (11) references to “dealing” mean, selling, letting for hire, communication to the public, offering or exposing for sale or hire or including in a broadcast or cable programme service.

(2) Section 74 is omitted.

(3) In Schedule 2 after paragraph 2 insert:
“Accessible copies for disabled persons

2A.—(1) Where copyright is not infringed by the making of accessible copies in the circumstances mentioned in sections 31A or 31B, the making of accessible copies in those circumstances does not infringe any rights conferred by this Chapter.

(2) Where by virtue of sections 31A or 31B a copy made pursuant to either of those sections is to be treated as an infringing copy, such a copy shall be treated as an illicit recording for the purposes of this Chapter to the extent that it records a performance in respect of which rights are conferred by this Chapter.

~~(3) 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 paragraph, that term is unenforceable.”~~

(3) 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.

(4) Omit paragraph 20 of Schedule 2.

31E Limitations, etc. following infringement of copyright

(1)The Secretary of State may make an order under this section if it appears to him that the making of copies—

(a)under section 31B; or

(b)under a licence granted under a licensing scheme that has been notified under section 31D,

has led to infringement of copyright on a scale which, in the Secretary of State’s opinion, would not have occurred if section 31B had not been in force, or the licence had not been granted.

(2)The order may prohibit one or more named approved bodies, or one or more specified categories of approved body, from—

(a)acting under section 31B; or

(b)acting under a licence of a description specified in the order.

(3)The order may disapply—

(a)the provisions of section 31B; or

(b)the provisions of a licence, or a licensing scheme, of a description specified in the order, in respect of the making of copies of a description so specified.

(4)If the Secretary of State proposes to make an order he must, before making it, consult—

(a)such bodies representing copyright owners as he thinks fit; and

(b)such bodies representing visually impaired persons as he thinks fit.

(5)If the Secretary of State proposes to make an order which includes a prohibition he must, before making it, consult—

(a)if the proposed order is to apply to one or more named approved bodies, that body or those bodies;

(b)if it is to apply to one or more specified categories of approved body, to such bodies representing approved bodies of that category or those categories as he thinks fit.

(6)An approved body which is prohibited by an order from acting under a licence may not apply to the Copyright Tribunal under section 121(1) in respect of a refusal or failure by a licensing body to grant such a licence.]