Creators' Rights Alliance technical response to proposed changes to exceptions to copyright – tranche 2

2 August 2013

The Creators' Rights Alliance presents its compliments and our response to the second tranche of technical consultation on the proposed changes to exceptions to copyright, attempting to remain within the very narrow scope set out by the IPO.

As you very likely know, the Creators' Rights Alliance is an affiliation of organisations[1] representing the interests of over 100,000 original creators in a wide range of fields – including music, illustration, journalism, photography and writing. Most of the 100,000 creators we represent make their living by licensing copyright and performers' rights in their work.

0) Contract overrides

Without prejudice to our view that the contract override provisions of the proposed Statutory Instruments may not legitimately be implemented in the manner suggested, we offered in our response to Tranche 1 an indicative amendment to each to assist in an eventual solution that does not have the side-effects, uncovered in consultation meetings, of invalidating contracts far beyond the scope envisaged in government policy.

The provisions as drafted also introduce confusion and uncertainty by referring to "any contract" when the intention of government policy is clearly to deal only with contracts governing end-users.

Behind each end-user contract, of course, is a chain of others. The effect of the draft presented would appear, for example, to invalidate any clause in any contract in which a creator – an illustrator, for example – warrants to a publisher that their work is original and exclusive – since this would interfere, for example, with any exception permitting parody. Typically such a contract warranty would attract an additional fee – often several times the fee for non-exclusive use of the work. Would the publisher then be entitled to reclaim the difference in the event of a parody appearing and breaking exclusivity, since the warranty term would be voided?

Similar considerations apply to the contract override provisions discussed here.

Our indicative proposed amendments do not finally solve this issue, but would at least flag to the courts that Parliament, in passing the measure, did not intend such an effect.

1) Data analysis for non-commercial research

1.1) As noted in our Tranche 1 submission, there is an issue with the interactions of the exceptions. Could a copy of a work "lawfully acquired" for the purposes of one proposed exception then be lawfully copied under the proposed "private copying" exception?

The proposed Section 29A(2) goes some way to addressing this, and would serve as a useful template for the necessary additions to other amendments proposed by the government.

1.2) There is a further important issue of scope that is not addressed by the draft presented.

1 Appendix 1 below lists these.

Frequently, fundamental research is carried out in a "purely non-commercial" manner and setting, for example through Research Council funding in a university department. From time to time, such work will provide strong leads for applied research. (Purely for the sake of clarity, and since we are discussing legislation rather than the philosophy and sociology of science, we invent a clear distinction between "pure" and "applied" work.)

Consider, please, the case of a programme of research aiming at (a) fundamental understanding of the network of regulation of genes that controls production of the protein collagen in the human body; and (b) cataloguing of substances that affect that regulation. The research makes extensive use of published data, using the proposed exception. This might well lead to a clinical trial of a substance that ameliorates the effects of, but does not cure, arthritis. That would be one of the Holy Grails of drug research, worth not less than many tens of billions of pounds. (Had it *cured* arthritis, it would have been merely interesting.)

As we understand it, it is the policy of the Research Councils to encourage the original, pure, researchers to form partnerships at the earliest possible stage in this chain of discovery.

At what point does the research cease to be "purely non-commercial"?

What is the status of the original "pure" data-mining, when commercialised?

1.3) As the Publishers' Association points out, government policy is that publishers should be able to manage access to their databases. This is nowhere reflected in the proposed regulations.

1.4) Further, the consultation and impact assessment related to scientific research. The above example is within that framework for clarity.

The proposal as drafted, however, would allow, for example, "scraping" of news websites to conduct "research" on the time-series of events reported thereon; and presentation of summaries based on that "scraping".

1.5) The consultation concerned only analysis of text. The proposal is medium-agnostic, which may a good thing in principle but is not, therefore, government policy.

The proposal as drafted would allow "analysis" of all video footage present on a site, perhaps to educate a semi-automated video editing tool. This would impose serious costs on any organisation hosting a great deal of footage.

It would allow "analysis" of mapping data, permitting the structure of maps (but not, the courts may find, the protected "expression" of the maps) to be reproduced. Certain powerful Californian corporations may regret this.

And we haven't even put our thinking caps on about likely future interpretations and implementations of "analysis".

The restriction that the "research" must be "non-commercial" is of little comfort given the prevalence of "new business models" that involve giving "content" away so that others may sell advertising alongside it.

The Creators' Rights Alliance observes that a website maintained by its Chair is already regularly "crawled" and (one presumes) "scraped" by a web robot that belongs to an organisation *claiming* to be "non-commercial". Going to court at its alleged domicile in Seattle, Washington State is problematic enough, without introducing an additional legal obfuscation.

1.6) The specification in the proposed Section 29A(2) that only "permanently" transferring the data covered by the proposed exception is prohibited defeats the intention to limit the exception and therefore contradicts government policy.

1.7) The proposal does not address the database right. It is therefore incoherent – in fact it fails to permit almost all the things that government policy holds should be permitted, while permitting the above activities and more which are not part of government policy.

1.8) The formulation that attribution is mandatory unless "impossible for reasons of practicality or otherwise" is odd, to say the least. On the face of it, here as in the educational exceptions and elsewhere, the only instance when acknowledgement is *impossible* is that where an orphan-works licence would be required, were it not for the exception. [In that instance, attribution to an "author unknown" would be educative in proper citation practice.]

The provision as formulated would impose serious costs on creators to determine what it means through litigation and appeal. The prospect of those costs would be so daunting that the more likely outcome is that the provision, if enacted as drafted, would be nugatory because those taking advantage of the exception could be confident that it will never be tested.

We therefore propose deleting the underlined words, *passim*. We recognise that they have been in legislation since The Copyright and Related Rights Regulations 2002[2] – only in connection with the exceptions that it is proposed to amend.

Q1: Are these provisions an effective implementation of the Government's policy?

Not quite.

See Q2 below.

Q2: Do these provisions have any effect that is not consistent with the policy aim?

Yes.

See above for some of the uncertainties that the current draft would introduce; these uncertainties rightly form no part of the stated policy.

Q3: Is the term "lawful access" effective?

No.

See our previous submission on Tranche 1 concerning this phrase in the "private copying" exception and the proposed amendment, *mutatis mutandis*.

Q4. Does the term "electronic analysis" capture the range of analytical techniques used in scientific research?

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Probably. We presume that the courts would eventually find that quantum computing, were it ever to work, would be included in this definition. We would be very wary of any attempts to widen this definition toward "analysis" in general, which would appear to be an exercise in loophole-creation.

Q5: Is this wording [intended to provide that "a copy made for these purposes may not be distributed or used for any purpose other than non-commercial research"] effective?

Not sure. See 1.2 above for concerns about the definition of "non-commercial research".

Q6: Is this wording [intended to provide contract override] effective?

No.

See our point **(0)** above.

In summary: we do not offer suggested wording. We strongly urge the government to withdraw this proposal and think again.

We note that the representatives of those who would benefit from such an exception [or rather from the exception for *textual* analysis for the purposes of *scientific* research which is government policy] agree that the present draft is incoherent[3].

3 Private communication at consultative meeting

2) Amendments to Exceptions for Education

2.1) Our primary concern here is that the proposed new Section 32 would, if enacted as drafted, encourage a perception that uses which are currently licensed were covered as an exception.

The creation of material specifically for educational purposes is poorly enough remunerated as it is. Coercive imposition of unfair contracts is common. Income distributed through the Authors' Licensing and Collecting Society and the Design and Artists' Copyright Society provides support to those who have dedicated themselves as professionals to the specialised work involved. Were there not to be such dedicated, independent creators, the provision of educational material would increasingly rely on sponsored material, patrons and amateurs – all of whom are likely to be motivated by an agenda other than the impartial imparting of skills and knowledge. This is not, we believe, government policy.

We are not clear that the InfoSoc Directive[4] permits the proposed Section 32 to permit those *receiving* instruction to make copies.

2.2) Acknowledgement of sources is crucial in educational uses.

It is unclear why the government has chosen to adopt the loose wording in the proposed Section 32(1)b: "sufficient acknowledgement (where this is possible)". The example set by other proposed Statutory Instruments "sufficient acknowledgement (unless this would be impossible for reasons of practicality or otherwise)" is preferable; as noted at (1.4) above, doubt and uncertainty would be removed by simply specifying "sufficient acknowledgement (unless this would be impossible)".

The proposed 32(3) is bizarre, introduces confusion, contradicts the commitment to "simplify"[5], and should be removed.

2.3) The intent behind the qualification "non-commercial purpose" is unclear in the context of successive governments' policy of encouraging for-profit provision of education and instruction. We presume that the University of Buckingham, Master Grayson's enterprise (in the event that it survives) and certain so-called "free schools" will require licences for all uses. The risk, however, is of expensive litigation leading to an interpretation of "non-commercial purpose" that flatly contradicts its dictionary meaning – an outcome which would contradict the government's stated policy of simplifying copyright law.

2.4) What is the purpose of loosening the licensing provision in Section 35 from "does not apply if or to the extent that there is a licensing scheme" to "...if, or to the extent that, licences are available authorising the copying in question and the person making the copies knew or ought to have been aware of this fact"? The proposed new Section 36, and Schedule 2(6)1b dealing with performances, do the same thing.

We do not find a proposal thus to loosen the exception in "Modernising Copyright": we do find a commitment that "educational institutions will continue to require licences for general reprographic copying"[6]. We therefore submit that it does not implement government policy.

Surely it is not government policy that authors, performers and the intermediaries who distribute our works should have to go to court or to the Copyright Tribunal to discover the meaning of

4 Directive 2001/29/EC Article 5 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:NOT> accessed 10/07/2013

5 "Modernizing Copright" *passim*

6 "Modernizing Copyright" p 4

"ought to have been aware"? The exception is for the benefit of educators, who ought to know how to make themselves aware.

[2.5) *post scriptum* We are grateful to the Society of Authors for raising a fundamental concern about the scope of permitted use in the proposed Section 36(4): specifically the interaction between the "Not more than five percent" provision and the new, unannounced provision that "a work which incorporates other copyright work shall be treated as a single work".

This would, as drafted, mean that the *entirety* of any poem that formed less than five per cent of a compilation of poems could be copied; as could any illustration or photograph that formed less than five per cent of a published work, any song that comprised less than five per cent of a sound recording, or indeed, to those who seek loopholes, any complete opera that formed less than five per cent of a large digital file of operas.

The very least of the dangers posed by this is that creators and publishers will have to waste cash and a part of their lives in the Copyright Tribunal determining the effect of this provision on the licences that do and will exist.]

[2.6) also *post scriptum:* We trust that others will have spotted that the exclusion of musical scores from the exception, in the current Section 32(4), has disappeared: we are not aware of anything that could justify a claim that this is government policy.]

Q1: Are [the Section 32] provisions an effective implementation of the Government's policy?

No.

See above. Further, the policy set out in *Modernizing Copyright* was to implement an exception allowing *de minimis* uses, for the purposes of illustration.

Our indicative proposed wording would be:

(1) For section 32, substitute:

"32 Fair dealing for the purpose of instruction

(1) Fair dealing with a copyright work for the sole purpose~~s of instruction~~ of illustration for teaching 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 would 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 in a non-commercial educational institution; ~~and~~
~~(b) by a person receiving instruction;~~ and
(~~e~~b) for the purposes of an examination in a non-commercial educational institution by way of setting the questions, communicating the questions to the candidates or answering the questions.

(3) Uses that would normally be licensed or otherwise exploited are not fair dealing.
~~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 would be in breach of a term of a contract, that term is unenforceable.

These changes do not necessarily address the point that the InfoSoc Directive permits such an exception to apply only to a subset of the exclusive rights.

Q2: Do [the Section 35] provisions meet [the stated] objectives?

No.

See our observation at **(2.4)** above on the "ought to have been aware" provision.

Q: Do these amendments effectively simplify this provision [Section 35]?

No.

They complicate it, as noted above.

Q: Are [the Section 36] provisions an effective implementation of the Government's policy?

No.

See our observations at (2.2), (2.3) and (2.4) above.

Q: Does [the Section 36(2)] provision meet these objectives?

Would this be another matter for the courts?

Q: Does [the Section 36(4)] provision meet these objectives?

No.

See all observations above. Further, the current proposed 36(6) permits side-effects to propagate throughout the licence, for example nullifying licence terms requiring that access to online learning environments be secure. We propose an alternative.

Our indicative suggestions for amendments are therefore as follow below:

() 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.

(2) In this section "relevant work" means a copyright work other than a broadcast or an artistic work (which is not incorporated into another work).

(3) A copy made pursuant to this section must:

(a) be accompanied by a sufficient acknowledgement (except where this would be impossible ~~for reasons of practicality or otherwise~~); and

(b) be made for the purposes of instruction which is for a non-commercial purpose.

(4) Not more than five percent of any work may be copied pursuant to this section by or on behalf of an establishment in any period of twelve months and for these purposes a work which incorporates other copyright work shall be treated as a single work.

(5) The activities mentioned in subsection (1) are not authorised by this section if, or to the extent that licences are available authorising those activities ~~and the person undertaking those activities knew of ought to have been aware of that fact~~.

(6) No ~~The~~ term~~s~~ of a licence granted to an educational establishment authorising acts permitted under this section~~,~~ shall have effect so far as ~~they~~ it purports to restrict the proportion of a work which may be copied (whether on payment or free of charge) to less than would have been permitted by this section.

(7) 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."

3) Amendments to Exceptions for Research, Libraries and Archives

The Creators' Rights Alliance is in favour of archiving.

As we have noted since the days of yore of the Gowers Review, the (separate) government policy urging libraries to become virtual online institutions accidentally encourages them to become, in effect, publishers and distributors. The restriction of access to archival copies "on the premises" may appear archaic, but (a) this is the least bad provision we know of to ensure that libraries do not undermine legitimate market in creators' works; (b) when the fashion for Tweeting™ dies down will be seen as no bad thing, since it encourages would-be scholars to leave their garrets, get some exercise and meet other scholars in a great institution of learning; and (c) libraries as physical locations are a necessary public good and must be maintained, not least to provide those creators of the future who hail from chaotic or overcrowded homes with a relatively calm place in which to do their homework.

Our answers to all the questions posed are "probably", with the following exceptions:

3.1) In Section 29(1B) it would make sense, as argued above, to substitute:

> "No acknowledgement is required in connection with fair dealing for the purposes mentioned in subsection (1) where this would be impossible ~~for reasons of practicality or otherwise~~."

3.2) As argued above in the context of other exceptions, the proposed subparagraph 29(5) introduces uncertainty over the scope of contracts and should be amended.

3.3) In the proposed Section 43A it is unclear why educational institutions are included (at proposed subsection 43A(1)b); and it would simplify the legislation to insert the words "not conducted for profit" after "institution" in 43(A)1.

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Appendix 1: CRA member organisations and observers

Member organisations include:

- ABSW (Association of British Science Writers)
- AOI (Association of Illustrators)
- BAPLA (British Association of Picture Libraries and Agencies)
- BASCA (British Academy of Songwriters, Composers & Authors)
- CIOJ (Chartered Institute of Journalists)
- GMG (Garden Media Guild)
- ISM (Incorporated Society of Musicians)
- MU (Musicians Union)
- NUJ (National Union of Journalists)
- PCAM (Producers and Composers of Applied Music)
- PCO (Professional Cartoonists' Organisation)
- OWPG (Outdoor Writers and Photographers Guild)
- SOA (Society of Authors)
- WGGB (Writers Guild of Great Britain)

Observers include:

- ALCS (Authors' Licensing and Collecting Society)