Creators' Rights Alliance technical response to proposed changes to exceptions to copyright – tranche 3 (disabilities)

11 September 2013

The Creators' Rights Alliance presents its compliments and our response to the third 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.

In general, the CRA recognises the *social* need to facilitate access for people with print disabilities. We do observe that developments in technology reduce the need for legislation to meet this need.

New and re-issued textual works should increasingly be issued in digital formats that conform to standards for structure and mark-up that enable polished output to be generated in an indefinite number of accessible ways, including text-to-speech and Braille.

We note with interest the patent applied for by Bill Gates and others for "a method of converting user-selected printed text to a synthesized image sequence".[2] This has been presented as an aid to high-school students who are unwilling to read text. It does suggest to us a tendency in technological development to move toward or prepare for a post-literate society. This reinforces our concern about over-broad definitions of "disability" – a concern that several of our member organisations have raised throughout the process of negotiating the World Intellectual Property Organization Treaty for the Blind (implemented as the Marrakesh Treaty).

Concerning non-textual works, audiovisual works for example will increasingly be issued and re-issued with subtitling for those with hearing impairments; and progress in automatic speech-to-text systems is to be expected. There are synergies here which will facilitate such progress: the most economical way to store and transmit audio descriptions, for example, may well be as well-structured text which can be rendered as speech or in other modes.

We also, recognise, however, the possibility of a *legislative* need to implement the terms of the WIPO Marrakesh Treaty; though the proposed Statutory Instrument goes well beyond the requirements of this instrument, particularly in the (undefined) wide range of disabilities it attempts to address.

---

1 Appendix 1 below lists these.

2 US Patent and Trademark Office, application 20130188887 of 25 July 2013: http://appft.uspto.gov/netahtml/PTO/srchnum.html

Questions not asked:

As is regrettably frequent, some of the most important issues raised by the proposed changes are not covered in the questions posed in the "technical consultation".

We note that the relevant policy objectives set out in "Modernising copyright" are:

- Government will allow people with disabilities the right to obtain copyright works in an accessible form, if there is not a suitable one on the market already.

- This will apply to all types of disability that prevent someone from accessing a copyright work, and to all types of copyright work.[3]

…

The Government will restrict the exception that permits organisations to make copies on behalf of disabled people to cases where commercial copies of an accessible format are unavailable. This important restriction applies to the existing exception for visually impaired people and ensures that rights holders continue to have incentives to provide their own accessible versions of works.[4]

… The Government will ensure that the benefits of this exception cannot be undermined by contracts, and notes that the existing exception for visually impaired people already prohibits unreasonably restrictive licence terms. The Government also recognises that the record keeping and notification requirements currently found in this exception are important to rights holders, and intends to retain these requirements.[5]

The CRA observes that:

A) The above policy statement does not explicitly specify that the current process for licensing is to be abandoned. The feature of UK law by which certain exceptions to copyright hold until and unless a licensing scheme exists is frequently held up as permitting a flexible response to changing circumstances and the CRA sees no reason to abandon it. In particular, the vague nature of the definition of "disability" in the proposed Regulations will require *either* the retention of licensing, with the aforementioned flexibility, *or* a legislative revisit following a succession of court cases at great expense to authors, performers and other "rightholders".

B) The above policy statement does not specify that the requirement for acknowledgement is to be repealed or weakened. Current law, as revised in 2002, demands that:

> 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.[6]

We have proposed that there should be consistent wording across the proposed exceptions, providing simply and clearly that sufficient acknowledgement shall be given: see below.

---

3 "Modernising copyright" p 5
4 "Modernising copyright" p 43
5 *ibid*
6 Copyright Designs and Patents Act 1988 (as amended) S. 31A(4)

C) The above policy statement does not specify that the existing requirements that:

> 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.[7]

are to be repealed.

To repeal them, as proposed here, would be to introduce an entirely new exception allowing for the making of *derivative works*, not accessible copies.

The above safeguards must be re-introduced.

D) The above policy statement does not specify that the existing provision that the exceptions do not apply if:

> the master copy is of a musical work, or part of a musical work, and the making of an accessible copy would involve recording a performance of the work or part of it;[8]

are to be repealed.

To repeal them, as proposed here, would be to introduce an entirely new exception allowing for the making of *new performances without a licence*, not accessible copies.

The above safeguards must be re-introduced.

E) The above policy statement does not specify that the existing provision that the exceptions do not apply if:

> the master copy is of a database, or part of a database, and the making of an accessible copy would infringe copyright in the database[9]

are to be repealed.

To repeal them, as proposed here, would be to introduce an entirely new exception allowing for the making of *new databases*, not accessible copies. Further, the CRA is unclear that this repeal complies with the EU Database Directive.[10]

The above safeguards must be re-introduced.

---

7 CDPA S. 31F(4)
8 CDPA S. 31A(2)a and S. 31B(2)a
9 CDPA S. 31A(2)b and S. 31B(2)b
10 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31996L0009:EN:HTML accessed 08/09/2013

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.

We must repeat that 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 warrants to a publisher or broadcaster that their work is original and exclusive – since this draft would permit, for example, the creation of derivative works and new performances (see above). 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 derivative work or new performance appearing and breaking exclusivity, since the warranty term would be voided?

Our indicative proposed amendment does 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.

Questions asked

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

5. 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.

Q. Does the drafting of this subsection achieve the intended policy aim?

See the above observations on questions not asked in this consultation.

A) The CRA appreciates that the wording "This section applies where a person... has lawful possession or lawful use" derives from the 2002 revision of the law. Like other stakeholders, however, the CRA has raised concerns over the interaction between the proposed widened exceptions in the three tranches of this consultation.

   The CRA proposes that the opportunity be taken to make the law clear and consistent by adopting the same wording that we have proposed for other exceptions: that they should apply where a person:

   > has a private copy of a copyright work lawfully acquired by him by authorisation

   It would be unfortunate if, for example, copies lawfully acquired under any workable exception for data analysis that may eventually be proposed were to be further copied...

B) The proposed definition of the beneficiaries of the exception is unnecessarily broad and, as observed in general terms above, lends itself to creeping expansion as court try hard cases, not least those arising from powerful companies "trying it on" by claiming a right to make

copies for the benefit of persons who no-one would *today* imagine as having a disability.

The CRA draws the government's attention to the careful and thoroughly-negotiated definition made in the WIPO Marrakesh Treaty, which should serve as a template for a proper definition in any measure to enact it:[11]

> **Art. 3** A beneficiary person is a person who:
> (a) is blind;
> (b) has a visual impairment or a perceptual or reading disability which cannot be improved to give visual function substantially equivalent to that of a person who has no such impairment or disability and so is unable to read printed works to substantially the same degree as a person without an impairment or disability[12]; or
> (c) is otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading;
> regardless of any other disabilities.

C) To leave the definition of "reasonable terms" on which accessible copies may be available to the courts is to impose a burden of cost and business uncertainty on creators and other "rightsholders", which is not part of stated government policy and indeed is arguably contrary to it. We see no reason not to retain the 2002 wording:

> does not apply... if, or to the extent that, copies of the copyright work are commercially available, by or with the authority of the copyright owner, in a form that is accessible to that person.[13]

D) The CRA proposes that the existing requirement that such a copy must be accompanied by a sufficient acknowledgement be retained. There has been no consultation, nor even any policy statement, on its removal.

Further, this clear and simple requirement should be applied across all the proposed exceptions, as we have argued in our submissions on Tranches 1 & 2. To do otherwise would be to introduce complexity and uncertainty, contrary to stated policy.

E) In the proposed subsection 31A(1)c we think the government means "give the disabled person the same level of access" and the sub-editors we represent slap its wrist. We are puzzled over why this definition is retained from the 2002 legislation here, but in the proposed subsection 31A(2) the definition is weakened to "improved access".

This would appear to have the effect that a person may deem or claim that a commercially-available form of a work does not offer "the same" level of access – an argument which is, it is true, may be difficult to rebut on epistemological grounds, since it is a different version – and then claim the right to produce a version which merely offers "improved access".

Where is this effect set out in government policy?

---

[11] www.wipo.int/meetings/en/doc_details.jsp?doc_id=245323 accessed 08/09/2013

[12] **Agreed statement [of the Marakech Diplomatic Conference] concerning Article 3(b):** Nothing in this language implies that "cannot be improved" requires the use of all possible medical diagnostic procedures and treatments.

[13] CDPA S. 31A(3)

6. 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.
Q. Is the wording of this subsection effective?

No. Not unless a definition of "accessible copy" is included in the Regulations.

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

We'll find out in court, we suppose. Would illustrative examples not better appear in an Explanatory Note?

8. Subsection (4) retains the condition in the existing Section 31A which ensures the exception cannot be used for commercial gain.

9. 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.
Q. Is the wording of this subsection effective?

It would be more effective it it were stated on the face of the Regulations that the person receiving a copy for transfer to another under this Section shall not retain any copy.

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

Probably.

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

See our general concerns above. We propose the clearer wording:

> () To the extent that the doing of any act which would otherwise be permitted by this section would be in breach of a term of any end-user contract, that term is unenforceable.

Section 31B: Making copyright works for disabled persons generally

12. 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.
Q. Does the drafting of this subsection achieve this?

No. See all our comments on the proposed Section 31A(1) above.

Further, while recognising that the wording "educational establishment or a body not conducted

for profit" is taken from the 2002 legislation, copyright law would be clarified and simplified – a key goal, recall, of stated government policy – if the beneficiaries were defined as:

> a non-commercial educational institution or body conducted for the benefit of people with disabilities and not for profit

13. 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.
Q. Does the drafting of this subsection achieve this?

No. See all our comments on the proposed Section 31A(1) above and our comment on the beneficiaries immediately above.

14. 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.
Q. Is the wording of this subsection effective?

No. See our comment on the proposed 31B(1) above.

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

Again, would illustrative examples not better appear in an Explanatory Note?

16. 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.

17. Subsection (6) retains the condition in the existing Section 31B ensuring the exception cannot be used for commercial gain.

18. Subsection (7) provides that an educational establishment can only use the exception for educational purposes.

19. 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.

20. 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.

21. 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.
Q. Are these safeguards acceptable?

No.

A) See our comments above about "sufficient acknowledgement". We observe further that the strict requirement in the existing Sections 31A *ff* have produced no problems nor have complaints reached our ears.

B) The requirement that a body representing copyright owners must, before seeking information under the proposed S. 31B(9), have:

> given notice to the Secretary of State of the copyright owners, or the classes of copyright owner, represented by it

introduces by stealth, and contrary to stated government policy, a new regulation of such bodies. It should be sufficient that the body requesting such information give notice *with the request* of whom it represents.

C) See our comment on the proposed 31A on the advisability of stating on the face of the Act that an intermediary intending to transfer a copy to an eligible person should not retain a copy.

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

No. See our comments on the contractual subclause of the proposed S. 31A.

Mike Holderness
Chair, Creators' Rights Alliance
Headland House
308 Gray's Inn Road
London WC1X 8DP
www.creatorsrights.org.uk

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)