The City of London Law Society

4 College Hill
London EC4R 2RB

Tel +44 (0)20 7329 2173
Fax +44 (0)20 7329 2190
DX 98936 – Cheapside 2

mail@citysolicitors.org.uk

www.citysolicitors.org.uk

RESPONSE ON BEHALF OF THE CITY OF LONDON LAW SOCIETY

TO THE TECHNICAL REVIEW OF DRAFT LEGISLATION ON COPYRIGHT EXCEPTIONS

Data Analysis, Education, Research, Libraries and Archives

2 August 2013

The City of London Law Society ("CLLS") represents approximately 15,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees. This response in respect of the IPO Technical review of draft legislation on copyright exceptions has been prepared by the CLLS Intellectual Property Law Committee. It focuses on the Exceptions in relation to Data analysis, Education, and Research, Libraries and Archives. It is further to our response of 17 July 2013 in relation to Private Copying, Parody, Quotation and Public Administration.

The CLLS is pleased to have the opportunity to comment on this review. We have responded to those questions where we believe that the CLLS may contribute or express an informed opinion.

CLLS Response

1 General points

We begin with the two points of general application which we made in our response of 17 July 2013, which have equal applicability to the exceptions considered here.

Copyright Directive wording

As the government's intention is to implement the Copyright Directive exceptions as far as possible, in general, it should do so in a way that replicates the wording of the Copyright Directive, as far as possible.

The practice of altering the wording of a Directive when intending to implement that Directive has been regularly criticised and discouraged by the Court of Appeal. Indeed, the Court of Appeal prefers to refer directly to the underlying Directive. See, for example:

> *The UK has implemented the Directive, amending the Copyright Designs and Patents Act 1988 by the Copyright and Rights in Database Regulations 1997 (SI 1997/3032). Both sides were agreed that nothing turns on the Act as amended: that it means exactly whatever is meant by the Directive, no more and no less. As is so depressingly common the draftsman has gone to a lot of trouble to re-phrase and re-write what he could and should have simply copied from the Directive. I do not bother with the re-write.* Per Jacob LJ in *Football Dataco Ltd v Sportradar GmbH* [2011] EWCA Civ 330 at [12]
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> *The key legislation is the Trade Marks Directive. The UK Act of Parliament implementing it is the 1994 Act. No one suggests the Act has a different meaning from the Directive. Pointlessly it renumbers and to some extent re-words the language.* Per Jacob LJ in *Intel Corporation Inc v CPM United Kingdom Limited* [2007] EWCA Civ 431 at [13]
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> *Before proceeding to do so, I set out the two infringement provisions in play here. I take them from the Directive because it makes this judgment more intelligible to a reader in another EU country, our Parliamentary draftsman having unhelpfully implemented the Directive verbatim but with re-numbering.* Per Jacob LJ in *Reed Executive plc v Reed Business Information Ltd* [2004] EWCA Civ 159 at [19]
>
> *It is common ground that the scope of protection of a UK registered design is now governed by the Registered Designs Act 1949 as very substantially amended to implement the Designs Directive 98/71. As usual neither side saw any point in referring to the amended Act. What matters is the text of the Directive.* Per Jacob LJ in *Dyson Limited v Vax Limited* [2011] EWCA Civ 1206 at [3].

Contract over-rides

We have serious doubts about the legality of using a statutory instrument to interfere with a fundamental tenet of English law, namely freedom of contract, in the absence of a Directive requiring that interference.

It is not standard practice to make all exceptions under UK copyright law subject to mandatory overrides of conflicting contract terms. Instead, this has been introduced in a limited number of specific cases as a result of implementation of

specific provisions of copyright Directives, in particular under the Software Directive and the Database Directive.
There is no basis in Article 5.3 of Directive 2001/29 for supporting permitted exceptions with a mandatory contract override. Instead the permitted exceptions are carefully limited and expressly made subject to the Berne Convention 3 step test.
Moreover, Article 9 of Directive 2001/29 makes it clear that the provisions of the Directive are without prejudice to the law of contract. In contrast to specific provisions in the Software Directive (Dir 2009/24 Article 8) and Database Directive (Dir 96/9 Articles 13 and 15), Article 9 of Directive 2001/29 does not contain any provisions stating that contractual terms conflicting with permitted exceptions are null and void. The only express restrictions on rights holders are in Article 4, in the context of technological measures and rights management, and are of limited scope.
It is further notable that the specific provisions in relation to which the Software and Database Directives make conflicting contract terms null and void are all mandatory provisions, and that contract terms that conflict with the optional exceptions in Article 6.2 (and 9) of the Database Directive, or with Article 5.1 of the Software Directive are not rendered null and void.
Further, if effective technological measures can be applied to avoid the application of the exceptions, then it makes no sense that contracts cannot also avoid their application. The proposed position is inconsistent.

If a licensee chooses to accept less flexibility in return for paying less, then the relevant contract should be able to reflect that.

We believe therefore that the contract over-rides should be removed.

2 Data Analysis for non-commercial research

CLLS response

Consistent with our comments above about following the wording of the Copyright Directive, the wording should mirror the language of the exception for scientific research in the Copyright Directive, on which it is said to be based.

"5(3)(a) use for the sole purpose of [.....] scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved;"

Consistent with our comments above about overriding freedom of contract, and recognizing that rightholders are in any event entitled to limit access via technical protection means, subsection 29A(3) should be removed.

Wording

We suggest the following amendments:

29A Data analysis for non-commercial research

(1) Where a person has lawful access to a copy of a copyright work, copyright is not infringed where that person makes a copy of the work for the purposes of

carrying out an electronic analysis of anything recorded in the work provided that:

(a) it is done for the sole purpose of scientific research and only to the extent justified by the non-commercial purpose to be achieved ~~research~~; and

(b) the copy is accompanied by sufficient acknowledgement (unless this is ~~would be~~ impossible ~~for reasons of practicality or otherwise~~).

(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.

~~(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.~~

Equivalent changes will then be required to Schedule 2.2C.

3 Education

CLLS response

Overview of proposed changes

We believe that the changes proposed to sections 32, 35 and 36 have led to a number of instances of overlap, repetition and inconsistency, which should be removed if possible. For example, current Section 35 (1), which it is not proposed should be amended, now says little if anything beyond what is permitted by new Section 32. Moreover, it is not clear whether an educational establishment may rely on the fair dealing provisions of new Section 32 (which appears to be broad enough to protect their activities), or whether the intention is that Section 32 should not apply to them, and that they should only benefit from the different, arguably narrower, wording of Sections 35 and 36.

The difficulties appear to result from the changes to Section 32. The original Section 32 applied to a limited number of works and prohibited reprographic copying. New Section 32 covers all works and does not prohibit reprographic copying.

Each of sections 32, 35 and 36 is circumscribed by the wording of Article 5 (3) (a) of the Copyright Directive, which states that an exception or limitation is permitted for

"*use for the sole purpose of illustration for teaching [or scientific research], as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved*".

We do not make full wording suggestions below as to how the three sections should be aligned, but believe that section 32, as the most general and closest to Article 5(3) (a) of the Copyright Directive, may be the best starting point.

We believe that in any event, the wording of new Section 32 should be brought closer to Article 5(3)(a), in order to conform with what is permitted by the Copyright Directive, and that sections 35 and 36 should be amended only in so far as necessary in light of the changes to Section 32.

We have prepared the below mark-up and related comments, in relation to the wording as it stands. We have given our drafting reasons where we feel the amendment needs further explanation. We have omitted sections which we do not believe require amendment.

Wording

We suggest the following amendments:

(1) For section 32, substitute:

"32 Fair dealing for the purpose of instruction

(1) Fair dealing with a copyright work for the purposes of ~~instruction~~ illustration for teaching does not infringe copyright in the work provided that the dealing is:

(a) solely for a non-commercial purpose *and only to the extent justified by the non-commercial purpose to be achieved*; and

(b) accompanied by a sufficient acknowledgement (~~where~~ unless this is impossible).

(2) For the purpose of subsection (1) "~~instruction~~ teaching" 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 or instruction as to the answers sought.

[(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.~~

(2) Omit section 35(1). For section 35(1A) and (2) substitute:

"(1A) Copyright is not infringed where a recording of a broadcast or a copy of such a recording, whose making was by virtue of ~~subsection (1)~~ Section 32 not an infringement of copyright, is communicated to the public by a person situated within the premises of an educational establishment provided that the communication is received:

(a) on the premises of that establishment; or

(b) where it is received off the premises, by means of a secure electronic network which is only accessible to staff or pupils of the establishment and (c) it is communicated only for the purposes of illustration for teaching.

(2) …

(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~~ illustration for teaching 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 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 staff or pupil for the purposes of ~~instruction~~ illustration for teaching given by that establishment.

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

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

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

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

(4) ….

(5)… .

(6) ~~The terms of a licence granted to an educational establishment authorising acts permitted under this section, are of no effect so far as they purport 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) ….

Equivalent changes will then be required to Schedule paragraph 4.

Drafting reasons and comments

1 The Copyright Directive refers to "illustration for teaching" rather than "instruction" and we do not see a reason why that wording should not be replicated.

2 Whilst we are content to have a definition of "teaching" (rather than "instruction") we question whether the definition is compatible with the wording of the Directive, as "teaching" (and "instruction") may more naturally be seen as activities carried out by the teacher rather than the pupil.

3 If the wording of section 32 (1) (b) is amended as we suggest, section 32(3) becomes otiose.

4 As we have said similarly elsewhere, we do not believe that an educational establishment should be prevented from agreeing alternative arrangements if it wishes to do so.

5 New section 35 (1)(A) as drafted does not make it plain that the communication to the public which is envisaged can only be for the

purposes of illustration for teaching. We believe this should be expressly stated.

6 In Section 36 (2), it is not clear what the word "which" refers to.

4 Research, Libraries and Archives

CLLS response

Research and Private Study

We note that under Article 5 (2) (a) of the Copyright Directive, an exception in relation to private use, is conditional on rightholders receiving fair compensation. We can see no reference to such compensation in the draft wording.

To the best of our knowledge, other member states which have private use exceptions have specific arrangements – such as copying levies - in place to remunerate rightsholders. This raises a real question why the UK thinks that can simply be achieved through rightsholders – who will not have advance knowledge of the amount of private copying of any specific work that will occur – making upfront price adjustments. The pricing consequences could well disadvantage, rather than advantage consumers and users of copyright works. Moreover, price adjustments cannot be made where copies have already been sold or otherwise made available.

For the reasons already expressed, we believe proposed Section 29 (5) and proposed Schedule 2 paragraph 1A(2) (No contract override) should not be included. Otherwise we have no comments on this wording, which appears to achieve the objectives.

Provision of copies by librarians and archivists

CLLS response

Wording

We suggest the following amendments:

"37 Copying from published works by librarians for non-commercial research and private study

(1) This section applies…

(2) Where the librarian accedes…

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

(a)…;

(b)…;

(c) …;

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

(i) …;

(ii) …;

(iii) …; ~~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
(v) states in the case of a request under subsection (1) (b) that in the person's view the portion requested is reasonable and

(e) …; 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.

(4) ….

(5) …".

In section 40A(2), ….

Drafting reasons and comments

1. It will be very difficult if not impossible for a library to know, or judge, what makes a "reasonable proportion" of a work for the purposes of Section 37(1)(b). We have added wording at subsection 37(3)(d)(v) to place some of the burden of compliance on the person requesting the material.

Copying by librarians: supply of copies to other libraries

CLLS response

It is not clear who should take responsibility for ensuring compliance with the condition set out in subsection 41 (2) (b), and we assume that both libraries, and the person requesting the material, will be unable to benefit from this exemption if they fail to ascertain the position. We suggest this should be expressly stated.

Wording

We suggest the following amendments:

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

(1) Subject to the conditions in subsection (2), …

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

(a) …

(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 be ascertained 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.

Copying by librarians, archivists or curators: replacement copies of works

CLLS response

The ability to replace copies is based on Article 5 (2) (c) of the Copyright Directive, which does not include galleries. We suggest therefore that the wording of the directive is adhered to, and "galleries" removed. We would anticipate that the word "museum" would be broad enough to catch the intended institutions.

Wording

We suggest the following amendments:

42 Copying by librarians, archivists or curators: replacement copies of works

(1) A~~The~~ librarian, archivist or curator may, without infringing copyright in any copyright work, copy any item in the permanent collection of the library, archive, or museum ~~or gallery~~ in order to:

(a) preserve or replace that item by placing the copy in its permanent collection in addition to or in place of it, or

(b) ~~to~~ preserve or replace in the permanent collection of another library, archive, or museum ~~or gallery~~ (provided that the library, archive, or museum ~~or gallery~~ is not conducted for profit) an item which has been lost, destroyed or damaged.

(2) Subsection (1) applies provided that:

(a) the item is in the permanent collection of the library, archive, or museum ~~or gallery~~ copying the work

(i) wholly or mainly for the purposes of reference on the premises; or

(ii) available on loan only to other libraries, archives, museums or galleries;

(b) it is not reasonably practicable to purchase a copy of the item to fulfil the purposes under subsection (1)(a) or (1)(b);

~~(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 under this section, that term is unenforceable.~~

Drafting reasons and comments

1. There seems no reason why the copy cannot be supplied to a second institution in order to preserve, rather than only replace, an original item.
2. It is not clear in subsection 42(2) which institution should hold the item in its permanent collection. We have added wording to make this clear.

Copying by librarians or archivists: unpublished works

CLLS response

We suggest the following amendments:

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 and remains unpublished at

the date of the request, 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~~ supplied 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 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~~ material 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 not less than~~ the cost (including a contribution to the general expenses of the library or archive) attributable to its production.

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

(3) …

Drafting reasons and comments

1. We do not see why a person requesting a work which is published by the date of the request should rely on this section rather than section 37.

43A Making works available through dedicated terminals

CLLS response

We have no comment on section 43A, which appears to meet the objectives, save that

- the reference to educational establishments seems redundant in the light of sections 32, 35 and 36, and
- subsection 43A (2) (c) should read:

(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~~ acquired.

New section 43B (References to librarians etc)

CLLS response

We have no comment on this section.

Amendments to section 61 (Recording of Folk songs) and section 75 (Recordings of broadcasts for archival purposes)

CLLS response

We have no comment on these sections.

2 August 2013

THE CITY OF LONDON LAW SOCIETY
INTELLECTUAL PROPERTY LAW COMMITTEE

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