

**RESPONSE ON BEHALF OF THE CITY OF LONDON LAW SOCIETY  
TO THE TECHNICAL REVIEW OF DRAFT LEGISLATION ON COPYRIGHT  
EXCEPTIONS**

**Private copying, Parody, Quotation, Public Administration**

**17 JULY 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 Private Copying, Parody, Quotation and Public Administration. Further comment will follow on the exceptions relating to Data analysis, Education, and Research, Libraries and Archives.

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 two points of general application.

**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 rephrase 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]*

*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]*

*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 Private copying**

### **CLLS response**

We have prepared the below mark-up and related comments. We have given our drafting reasons where we feel the amendment needs further explanation.

### **Wording**

~~(1) Copyright in a work is not infringed where an individual uses a copy of a copyright work lawfully acquired by him to make a further copy of that work~~ Copyright in a work is not infringed by the making by a natural person of a copy or copies of that work on any medium provided that:

- (a) ~~the natural person lawfully obtained the work with the authority or licence of the owner of the copyright in the work or pursuant to this section;~~
- (b) the ~~further~~ copy is made for that ~~individual's~~ natural person's private use and for ends that are, ~~at no time, neither~~ directly nor indirectly commercial;
- (c) the ~~copy from which the further copy is made~~ work is held by the ~~individual~~ natural person on a permanent basis (for example it is not ~~solely a copy that is~~ rented, lent, performed, showed, played or communicated to the ~~individual~~ natural person for a specified period ~~or borrowed from a library~~); and
- (d) ~~the making of the further copy does not involve the circumvention of effective technological measures applied to the copy from which it is made~~ section 296ZA does not apply.

~~(2) Copyright is infringed where an individual who has made a further copy of a copyright work pursuant to s-Subsection (1) ceases to apply when the natural person:~~

- (a) ~~permanently~~ transfers the copy made (including the medium on which the copy was made) to another person; or

(b) ~~permanently~~ transfers the ~~copy~~ work from which ~~it is the copy was~~ made to another person without destroying the further copy

and the ~~further~~ copy made shall in those circumstances be treated as an infringing copy from the date on which subsection (1) ceases to apply.

(3) Nothing in subsection (2) prevents ~~an individual a natural person~~ from storing a ~~further~~ copy made pursuant to subsection (1) in an electronic storage facility accessed by means of the internet or similar means, where ~~that facility is provided for his sole private use~~ only that natural person can access the electronic storage facility for retrieval of that copy.

(4) Copyright in a work is not infringed by the making by an electronic storage facility of a copy of that work where subsection (3) applies.

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

### Drafting reasons and comments

- 1 Other exceptions referring to copying (e.g. sections 28A and 31A) refer to the making of copies, rather than using a copy to make a copy, and in our view the simpler and consistent drafting we have suggested is preferable.
- 2 It is cumbersome to refer to a further copy made of a copy of a copyright work. It is simpler to refer to a copy of a copyright work.
- 3 Our proposed structure in the introductory wording to Section 28 B (1) is consistent with the present drafting of section 28A.
- 4 "Natural person" is the term used in the Copyright Directive and we do not see a reason why that wording should not be replicated.
- 5 The Copyright Directive refers to "reproductions" (plural) and we do not see a reason why that wording should not be replicated.
- 6 Any "medium" is referred to in the Copyright Directive and we do not see a reason why that wording should not be replicated.
- 7 We consider that the word "acquired" is too open to interpretation and may not include a work that is obtained under licence.
- 8 It is unclear whether "a copy of a copyright work lawfully acquired by him" includes a copy, for instance, obtained under another permitted act. We consider it better to refer to an acquisition which has been authorised by the copyright owner (subject to the next note).

The following example based on the time-shifting exception demonstrates why, in our view, "lawful acquisition" is, of itself, over-inclusive and why the government's policy and its intention not to include "fair compensation" require the addition of the "authority or licence" wording.

If an individual created a time-shifted copy of a broadcast under section 70, that copy would arguably be a lawfully acquired copy of a copyright work. That "time-shifted" copy could then be further copied. This, in combination with subsection 3, would enable the individual to make a copy in remote cloud storage. A viewer could make a time-shifting copy on his local device then send it to the cloud and delete the local copy. This result would drive a coach and horses through the "in

- domestic premises" limitation to the time-shifting defence introduced to implement the Copyright Directive.
- 9 We assume that the intention is that individuals will be able to make further private copies of private copies they have made pursuant to this section; otherwise it would be impractical for individuals to have to return to the original source to make further copies.
  - 10 There is an "and" in the equivalent wording of section 28B(1)(b) in the Copyright Directive and we do not see a reason why that wording should not be replicated.
  - 11 The proposed drafting is unclear as to when the individual's "ends" would be established. If, for example, an individual made a copy with no commercial ends but those ends changed later on, then the exception should cease to apply.
  - 12 "Solely" acknowledges that works that are, for example, communicated to the public may also be held on a permanent basis by an individual.
  - 13 To ensure clarity on what forms of access to a work do not enable an individual to make a private copy of that work, more of the relevant restricted acts which might form the basis of that individual's access should be listed.
  - 14 To avoid any discrepancies in the wording between this section and section 296ZA, in our view section 296ZA should be simply cross-referenced.
  - 15 As drafted, the wording of subsection 28B(2) appears to create a new restricted act (that of "permanent transfer") within the drafting of an exception. This is unsatisfactory for many reasons, not least that "permanent transfer" is not one of the restricted acts and there has been no consultation on creating such a restricted act. In our view, the intention of subsection 2 is better served by disappling subsection (1) rather than referring to an infringement if the conditions of subsection 2 are not satisfied.
  - 16 The additional wording in subsection 28B(2)(a) clarifies that if, for example, an individual transfers a digital music player containing private copies then the exception would not apply to those copies.
  - 17 Use of permanently in subsection 28B(2) suggests that temporary transfer to another person would be permissible.
  - 18 Section 28B(2)(b), as currently drafted, suggests that if the individual destroys the further copy but transfers the original, there would not be an infringement. This arguably suggests that transfer of digital copyright works in these circumstances is lawful and that the principles in the *UsedSoft v Oracle* case apply to copyright works other than computer programs. Regardless of the correctness of that position (which has yet to be decided), a resolution should not be introduced by the back door in this exception. We would therefore prefer that the "without destroying the further copy" wording be deleted.
  - 19 It is very difficult to imagine any electronic storage facility being provided for anyone's "sole private use", as the whole purpose of cloud storage is that many people share the same facility. We therefore suggest that the wording be amended as shown.
  - 20 As the government wishes this exception to apply to private cloud storage, it should be made clear that the private cloud storage providers also do not infringe copyright by receiving the copies which the individual is entitled to make.
  - 21 As discussed, if effective technological measures can be applied to avoid the application of the exception then it makes no sense that contract terms cannot also avoid its application. The proposed position is inconsistent.
  - 22 A vast number of contracts will already have been entered into which prohibit private copying. It would be very unfortunate and could lead to any number of unintended unfortunate consequences if those terms were ruled retrospectively unenforceable. For example, a term of a current agreement might provide that a licensee is not able to do any act other than those which it is entitled to perform

under the terms of the licence. Is that term, as a whole, to be declared unenforceable? That appears to be the effect of the current wording.

### **3 Caricature, parody and pastiche**

#### **CLLS response**

We have prepared the below mark-up and related comments. We have given our drafting reasons where we feel the amendment needs further explanation

#### **Wording**

- (1) ~~Copyright in a copyright work is not infringe[d] by any f~~air dealing with ~~the a~~ work for the purposes of caricature, parody or pastiche does not infringe any copyright in the work ~~does not infringe any copyright in the work.~~
  
- (2) In determining whether the use of a work is fair dealing for the purpose of this section, a court shall take into account all matters which appear to it in the particular circumstances to be relevant and, amongst other things, shall have regard to:
  - a) the nature of the commercial use of the caricature, parody or pastiche;
  - b) the extent of the author's own intellectual creation in the caricature, parody or pastiche;
  - c) the extent to which the caricature, parody or pastiche could be a substitute for the normal exploitation of the work: and
  - d) the extent of the work used compared to the transformative nature of the caricature, parody or pastiche.

~~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.~~
  
- (3) No inference shall be drawn from this section as to what does or does not amount to an infringement of the rights contained in Chapter IV of this Part.

#### **Drafting reasons and comments**

- 1 The Copyright Directive refers to "purpose" rather than "purposes" and we do not see a reason why that wording should not be replicated.
- 2 It is cumbersome to refer to "Copyright in a copyright work..." The proposed rewording of subsection (1) mirrors the structure of the existing fair dealing exceptions. There is no reason to depart from that structure, particularly as the exception should be grouped, as proposed, with the other fair dealing exceptions. That structure is also more consistent with the structure of the exception in the Copyright Directive.
- 3 In the (understandable) absence of definitions of caricature, parody and pastiche and without knowing how fair dealing might operate in this context (even though it is well established in other contexts), we recommend including reference to a number of "fair dealing factors" to which a court (and copyright owners, users and their advisers) can refer in deciding whether the exception applies. We

consider this to be an important way of reducing the inevitable uncertainty that will follow the introduction of this exception and of adapting the fair dealing concept to this new context, which poses greater concerns for copyright owners than other fair dealing exceptions. Further, it would also reduce the difficulties posed by including "pastiche", which, as an art form, necessarily involves less transformative use and is more likely to involve reproduction of all of a work (and be competitive with the original) than parodies or caricatures. In our view, this approach will make it clear that the exception cannot be used as a defence to outright copying of a work, whereas the current drafting does not make this clear.

- 4 The wording of the introduction to subsection (2) reflects the wording currently used in section 97A.
- 5 If a licensee chooses to accept less flexibility in return for paying less, then the relevant contract should be able to reflect that.
- 6 A vast number of contracts will already have been entered into which prohibit caricature, parody and pastiche. It would be very unfortunate and could lead to any number of unintended unfortunate consequences if those terms were ruled retrospectively unenforceable. For example, a term of a current agreement might provide that a licensee is not able to do any act other than those which it is entitled to perform under the terms of the licence. Is that term, as a whole, to be declared unenforceable? That appears to be the effect of the current wording.
- 7 In our view it is important to be clear within this section that a fair dealing caricature, parody or pastiche that falls within the exception may, nonetheless, infringe an author's moral rights. We have adapted wording used elsewhere in the Act (see, for example, sections 21(5) and 28(3)).

#### **4 Quotation**

##### ***IPO Statement***

*1 As described in 'Modernising Copyright' the Government intends to amend the current fair dealing exception for criticism and review, reframing it as a quotation exception for purposes such as, but not limited to, criticism and review.*

*4. The exception is drafted as Section 30A of the Copyright, Designs and Patents Act. As it will replace the present fair dealing exception for criticism and review, Sections 30(1) and 30(1A) will be deleted.*

*5. Subsection (1) defines the scope of the exception. The exception permits the use of a quotation from a work for purposes such as criticism and review. In one dimension this slightly narrows the current criticism and review exception by permitting use only for the purpose of quotation. In another it slightly widens it by allowing such quotations to be used for purposes other than, but similar to, criticism and review.*

*Q: Is Subsection 1 an effective implementation of Government policy?*

##### **CLLS response**

Yes.

##### ***IPO statement***

*6. Subsections (1)(a) to (c) add further conditions of use to the exception. The work must have been lawfully made available to the public; the quotation must be*

*accompanied by a sufficient acknowledgement; and the use of the quotation must be a fair dealing with the work.*

*7. The first two of these conditions – subsections 1(a) and (b) are conditions of Article 5(d) of the Copyright Directive.*

*8. The third condition, fair dealing, is intended to operate in a similar way to existing fair dealing provisions. It will permit use of a work for the purpose of quotation only to the extent that is fair.*

*Q: Do these conditions effectively implement the Government's policy, including obligations under the relevant European legislation?*

## **CLLS response**

### **Scope:**

The wording of the proposed exception seems to make it wider in some respects than is permitted under Art 5.3(d) of Directive 2001/29, and narrower in others.

Our concern as to excessive breadth relates to the sufficient acknowledgement. Art. 5.3d requires this "unless this turns out to be impossible." The proposed language for the UK exception "where possible", seems a weaker test, or at least a reversal of the burden of proof.

Since the Court's practice in IP cases when construing wording deriving from a Directive is to refer to the Directive, in practice the Court should construe this exception as meaning the same thing as "unless this turns out to be impossible". Unnecessary debate and uncertainty on the difference in wording should be removed by tracking the language of the Directive on this point.

Similarly, the Directive allows "quotations [plural] for purposes of criticism or review...". The current draft wording is of concern both because it may be interpreted to mean that only one quotation from a work is allowed under the exception, and because the inclusion of the words "from that work" may be interpreted to mean that the quotation cannot consist of the whole of a work (e.g. the whole of an artistic work). Tracking the language of the Directive would lead to consistency of interpretation.

### **Contract override**

The mandatory contract term override should be removed.

The permitted exception for quotation in Article 5.3 d of Directive 2001/29 is, of course, optional, not mandatory.

In practice, many instances in which copyright material is quoted will not involve a relevant contractual relationship between the right holder and the person quoting. Even where there is such a relationship, in our experience as lawyers who frequently advise on copyright-related agreements, it would be unusual to see a licence which prevented the licensee from making quotations from publically available sources in ways that would fall within the proposed exception. So, this proposed provision not only lacks any basis in Directive 2001/29, but also operates as an unnecessary restriction on freedom of contract, with possible unintended consequences, including increased complexity in licence terms to protect other restrictions from being tainted by possible nullity.

## **Wording**

We suggest the amendments below. They are intended to reflect the wording of the Directive more closely.

### **30A Quotation**

(1) Copyright ~~in a work~~ is not infringed ~~in a copyright work~~ by the use of ~~a~~ quotations ~~from that work~~ for purposes such as criticism or review provided that:

(a) ...

(b) use of the quotation is accompanied by sufficient acknowledgement (~~where this is unless this is impossible~~); and

(c) the use of the quotation is fair dealing with the work.

(2) Use of a quotation from a copyright work is not fair dealing unless:

(a) the use of the quotation it is in accordance with fair practice; and

(b) the extent of the quotation is required by the specific purpose for which it is ~~required used~~.

## **5 Public Administration**

### ***IPO statement***

#### *Public administration*

1. *The amendments to section 47 and 48 are intended to allow public bodies to make material that is open to public inspection or on an official register...available to the public through online services.*

2. *This will mean that the public will be able to obtain copies of relevant information easily and conveniently.*

3. *We do not believe this extension should include material that is commercially available to purchase or license.*

#### *Commentary on the Draft Legislation*

4. *The wording in (2) (a) (iii) is intended to cover the publication of copies of the material on the internet by the public body.*

5. *The wording is designed to allow for instances where material already open to public inspection is made available by a public body. Currently a public body can 'issue' copies to members of the public (by letter, email, or other means).*

### ***IPO question***

*Q: Does this wording sufficiently capture the policy aim?*

### **CLLS response**

Yes, although we would suggest some word changes, in order to make it easier to understand which acts are authorised by the sections. Sections 47 (2) (b) and 47 (3) (c) are effectively definitions, but this is not clear on the current wording.

## **Wording**

We suggest draft Section 47 (3) (c) is amended to read:

*(c) the acts mentioned in paragraph (b) (i) are [acts] [those] done for the purposes of disseminating the information mentioned in paragraph (a); and*

And that the introductory wording to Section 47 (2) (b) is amended to read:

*(b) the acts mentioned in paragraph (a) (i) are those whose ~~the purpose of the doing of any act mentioned in paragraph (a)~~ is to:*

*(i) enable the material to be inspected... etc.*

***IPO question***

*Q: Does the wording need to explicitly refer to electronic transmission?*

***CLLS response***

We believe it would be preferable. The draft wording of Section 47(2) (a) (iii) and Section 3 (b) (iii) is presumably intended to take these acts outside Section 20 (Infringement by communication to the public). As Section 20 (2) (b) states that communication to the public includes making available by electronic transmission, it makes sense for the exception to reflect that wording.

***IPO question***

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

Yes

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