



Technical review of draft legislation on copyright exceptions – Part One

17 July 2013

PART A: OVERVIEW

About UK Music

1. UK Music is the umbrella body representing the collective interests of the UK's commercial music industry, from songwriters and composers to artists and musicians, studio producers, music managers, music publishers, major and independent record labels, music licensing companies and the live music sector.
2. UK Music exists to represent the UK's commercial music sector, to drive economic growth and promote the benefits of music to British society. The members of UK Music are listed in Annex 2.

General Observations

3. UK Music welcomes the opportunity to comment on the first tranche of draft exceptions (in particular, private copying, parody and quotation) which seek to implement the policy as set out in Modernising Copyright. We will be submitting comments on the second tranche in due course. We consider that it would be appropriate to present revised wording of the draft exceptions, as informed by this technical review, prior to them being laid before Parliament in the form of a Statutory Instrument.
4. UK Music also welcomes the Government's confirmation that the scope of the technical review includes "*ensuring compliance with all relevant legal obligations, including ECJ case law*".¹ We agree that this is a fundamentally important aspect of the process.
5. Whilst it is not the subject of this technical review, UK Music is very concerned about the limited and often erroneous economic evidence underlying Government policy as expressed in Modernising Copyright.²

¹ <http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm130705/text/130705w0001.htm#13070541000023>

² The UK Music submission to the Copyright Consultation of 2012 highlights our previous concerns about the evidence used to justify the economic basis of this reform agenda <http://www.ipso.gov.uk/pro-policy/consult/consult-closed/consult-closed-2011/consult-2011-copyright/response-2011-copyright-ukmusic.pdf-link>

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Points of Principle

6. Before responding to the detail of the technical review, which is based on whether the drafting accurately achieves the policy objectives, there are certain points of principle that UK Music would like to put forward.

(i) Private Copying

7. We welcome a narrow exception, compliant with the requirements of European law, for personal and private copying by the individual consumer. UK Music believes that the current draft exception fails to meet these criteria.
8. As a matter of European law, the exception cannot lawfully be made without provision for fair compensation. Article 5(2)(b) of the Information Society Directive expressly provides that a private copying exception is only permitted on this condition. This has been further reinforced by decisions of the Court of Justice of the European Union (CJEU) – see amongst other cases Padawan v SGAE (Case C-467/08), Stichting de ThuisKopie v Opus (Case C-462/09), VG Wort v Kyocera (C-457/11 to C-460/11) and Amazon v Austro Mechana (Case C-521/11).
9. The technical review documentation accompanying the draft exception does not directly address the fair compensation requirements of Article 5(2)(b) (which is concerning in itself) but the clear implication is that Government believes compensation can be dealt with by rightholders at the point of sale of the copyright works being copied under the exception. It states that: *“The exception applies only to copies lawfully acquired by the copier, who may not transfer copies to other people. Constraining the exception in this way allows for appropriate compensation to be paid at the point of sale, and ensures the exception will cause minimal harm to copyright owners.”*
10. UK Music believes that this argument and analysis are fundamentally flawed – legally, economically and factually – with the result that the exception fails to comply with Article 5(2)(b). We have raised these concerns with the IPO previously and do not propose to recite them exhaustively in this submission. However, we would highlight that the argument that compensation is “priced in” at the point of sale has been disproved by the IPO’s own research³; it is inconsistent with the very structure and premise of Article 5(2)(b); and additionally, a recent CJEU case⁴ stated that a possible authorisation by the right holder *“has no bearing on the fair compensation owed, ...”* Furthermore, on 11th July 2013 the CJEU stated *“If a Member State has introduced a private copying exception into its national law, it must ensure.....the effective recovery of the fair compensation for the harm suffered.....”* A further paragraph of the decision restates the presumption of harm by the reproduction by natural persons for private purposes.⁵
11. During the Government’s Copyright Consultation of 2012, UK Music produced economic research which evidenced the value placed by consumers on the ability to copy music from CDs to a device (somewhere between 32% and 53% of the cost of an MP3 player).⁶ We therefore resubmit this evidence for further consideration by Government.

³ <http://www.ipso.gov.uk/ipresearch-private-150313.pdf>

⁴ 27th June 2013 Cases C-457/11 to C-460/11 VG Wort v Kyocera

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<http://curia.europa.eu/juris/document/document.jsf?text=&docid=139407&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1502739>

⁶ <http://www.ukmusic.org/assets/media/UK%20Music%20-%20OO%20Copyright%20Research%20Presentation.pdf>

12. We welcome the intention to publish a further Impact Assessment on the private copying exception including evidence on pricing and compensation⁷, particularly given the manifest flaws in the existing Impact Assessment which treat the harm done to rightsholders as counterbalanced by the benefit received by those that would otherwise have to pay licence fees. However, without an opportunity to comment on such evidence and/or to provide further evidence on the issues that may arise out of it, we find it difficult to understand how meaningful any further Impact Assessment on this point will be. CJEU decisions on private copying in the last 10 years have defined the concept of harm for the right holder caused by the private copying activities of natural persons. This has not been addressed in the draft; the implementation as outlined here is consequentially defective. The exception poses a threat to the income of UK musicians, composers, performers and songwriters.
13. In this context, we would again remind Government of its firm and repeated commitments to implement its exceptions policies in such a way as to comply with European law. In view of the other pending decisions of the Court of Justice of the European Union in this area (*Copydan*, Case C-463/12; and *ACI Adam and Others*, Case C-435/12) the implementation of the private copying exception as drafted seems, at the very least, extremely premature. Moreover, to proceed as the Government proposes self-evidently brings high risks and collateral costs. Should we be right that any statutory instrument brought forward that fails to provide for fair compensation is *ultra vires*, the amendments made thereby to the CDPA 1988 will be treated as ineffective from the outset. The consequence will be a substantial degree of commercial chaos and satellite litigation between the rightsholders and those commercial product or service providers that seek to profit from a private copying exception as, no doubt, those currently paying licence fees because their products or services depend upon making private copies (the Amazon “scan and match” Cloud Player and Apple’s iCloud for instance) will cease to do so, only for their conduct to become infringing (by dint of the falling away of the proposed exception upon it being ruled to be unlawful).

(ii) Unenforceability of contractual overrides

14. The relevant paragraphs in the specific sections of the exceptions concerning contractual override cannot be implemented using secondary legislation; such unenforceability is not covered by the Information Society Directive; on the contrary, the Directive is expressly without prejudice to the law of contracts (Recital 45 and Article 9 Information Society Directive). Government cannot implement policy by secondary legislation (which we continue to contest is justified) without sufficient legal basis. We urge Government to consider Article 6 (4) (4) Information Society Directive and the supremacy of contractual terms as expressed.
15. Consequentially, the pertinent subsections should not form part of any exception implementing Modernising Copyright.

⁷ As announced by Viscount Younger of Leckie, Parliamentary Under Secretary of State for Intellectual Property, on 18th June during the 3rd Grand Committee of the Intellectual Property Bill (Lords Hansard, GC77)

PART B: DETAILED COMMENTS

Private copying

16. Notwithstanding our view that the exception cannot lawfully be made without fair compensation, UK Music believes that these provisions are also not an effective implementation of Government policy. Our remarks on this draft exception are without prejudice to our view on compensation. Annex 1 of this submission contains a draft of 28B as amended by amendments outlined in this response.

“4. The exception is drafted as Section 28A⁸ of the Copyright, Designs and Patents Act. Subsection (1) defines who is permitted to make copies and under what conditions. These conditions include:

- The copier must be an individual, not a body corporate
- The individual must have lawfully acquired, on a permanent basis, the copy from which further copies are made
- The further copy must be made for the individual’s private use, for non-commercial ends.

Q: Are these provisions an effective implementation of the Government’s policy?

17. We suggest that the policy that the copier must be an individual is better reflected by restructuring the first subsection of 28B. We suggest possible wording reflecting this policy as part of the first amendment in paragraph 21. It is equally important to take into account the private nature of the use; this could be strengthened by clarifying that the act needs to be done for the individual’s sole personal use. Reference to personal use also mirrors verbatim wording of the policy set out in Modernising Copyright. Examples of such amendments can be found in paragraph 21.
18. The wording needs to reflect that the exception only applies to acts of reproduction in view of the Information Society Directive. It would not cover other uses such as communication to the public or authorisation of a third party. This can also be achieved by the first amendment in paragraph 21.
19. We do think that the phrase “lawfully acquired” is too broad and could potentially cover content acquired, for example, by virtue of another statutory exception – which we do not believe is what Government intends and which could create unnecessary uncertainty (by way of just one illustration, if the private copying exception applied to a copy “lawfully acquired” by virtue of the time-shifting exception in Section 70 CDPA, there could then be conflict between s.28B and s.70(2) which prohibits any subsequent dealing with the time-shifted copy). The wording needs to reflect the policy intention to confine the exception to products whose ownership has been transferred with the authorisation of the right holder. Consequently, this authorisation should be reflected in the wording; an amendment to achieve this is proposed in paragraph 21.

⁸ We presume that the reference to Section 28A is in error and this should refer to Section 28B.

20. Additionally, we suggest clarifying Section 28B (1)(b) that the copy from which the further copy is made is a physical copy that is held by the individual on a permanent basis at the time the further copy is made. Officials from the IPO at an open meeting on 11th July stated that the exception was not intended to cover streaming yet some streaming files may sit on hard drives indefinitely and so the word “held” in subsection (1)(b) is not an adequate safeguard to achieve this objective. It should be replaced by the word “owned”. This can be found in the last amendment in paragraph 21.

21. Examples of amendments that would be a more effective way to implement the policy throughout subsection (1):-

- In subsection (1) leave out “Copyright is not infringed where an individual uses” and insert “An individual does not infringe copyright when that individual copies”
- In subsection (1) leave out “him” and insert “authorisation of the copyright owner”
- In subsection (1)(a) after “made” insert “exclusively”
- In subsection (1)(a) after “individual’s” insert “sole personal and”
- In subsection (1)(b) leave out “held” and insert “owned”

5. Subsection (1)(c) provides that, if technological copy protection measures are applied to a copy, the exception does not permit an individual to circumvent those measures in order to make copies.

Q: Is it necessary to provide subsection (1)(c), or is Section 296ZA, which already prohibits circumvention of technological measures, sufficient?

22. UK Music welcomes that subsection (1)(c) clarifies that technological protection measures are protected from circumvention notwithstanding the draft wording on unenforceability of contractual overrides. Whilst this represents the current status of the legal framework the subsection is helpful to avoid any confusion in particular with regard to subsection (4). It might equally make sense for this paragraph to be transposed in subsection (2) of the draft 28B as subsection (2)(c).

“6. Subsection (2) is intended to ensure the exception does not allow the making of copies for multiple people – either by transferring a copy made under the exception, or by transferring the original and retaining the further copy.

Q: Does this provision meet this objective?”

23. We suggest clarifying subsection (2) with the following amendments. The first amendment will ensure that the exception covers only acts of private copying carried out by an individual, otherwise it will include activities of third parties carrying out the copying on behalf of the individual. The second amendment is consequential. The fourth amendment clarifies that the subsection applies to the further copy and not to the original. Additionally, undefined reference to “permanently” does not reflect the varied nature of downloading and streaming services. In order to cover all such activities as an

infringement the subsection needs also to cover temporary transfers; “permanently” is too limiting and we suggest its deletion from 28B. Such limitation to only permanent transfers constituting infringement does not reflect the policy; Modernising Copyright states that temporary copies should not be covered by the exception as it should not permit “copying of rented, borrowed or streamed content”.

- In subsection (2) leave out “where” and insert “by”
- In subsection (2) after “(1)” insert “where he”
- In subsection (2)(a) leave out “permanently”
- In subsection (2)(a) after “the” insert “further”
- In subsection (2)(b) leave out “permanently”

“7. Subsection (3)⁹ aims to clarify that an individual who makes a copy under this exception is permitted to store that copy in any private place, including a private cloud or other remote electronic storage.

Q: Does this provision meet this objective?

24. We suggest clarifying Subsection 28B (3) to ensure that it does not authorise the making of a further copy by another person or entity, such as an electronic storage provider, in relation to a further copy. The wording needs to reflect that any form of communication to the public is outside the application of Article 5 (2)(b) Information Society Directive. This would ensure that the policy objective is met, i.e. to limit the scope of the exception to private and personal storage without any additional functionality. Without such a clarification, the exception could seriously impact the music industry’s ability to licence innovative value added services, such as scan and match services in the Cloud. There is a necessity for an amendment to help ensure that the exception does not inadvertently cover services provided for one type of use but then actually used for another, infringing use. We understand from the open meeting on 11th July 2013 at the IPO from officials that the exception is meant to be narrow and therefore not cover such services.

25. Consideration should be given to the following amendment in order to assist in achieving the policy statement in this regard:-

- In subsection (3) after “provided” insert “and thereafter only used”
- In subsection (3) after “sole” insert “personal and”

“8. Subsection (4)¹⁰ aims to prevent contract terms restricting use of this exception.

9. Amendments to Schedule 2 to the Act apply this exception to rights in performances to the same extent as it applies to rights in copyright

⁹ We presume that the reference to subsection (4) in the consultation document is in error and this should refer to subsection (3)

¹⁰ We presume that the reference to subsection (5) in the consultation document is in error and this should refer to subsection (4)

works.

10. Amendments to Schedule 5A to the Act apply the Section 296ZE complaints mechanism to this exception. Under this mechanism, individuals who are unable to access the exception as a result of technological copy protection measures applied to a work can complain to the Secretary of State.

Q: Do these provisions meet these objectives?"

26. The unenforceability of contractual overrides for an exception cannot be introduced via secondary legislation. The examples mentioned in Modernising Copyright only relate to computer software and are based on Article 5 (2) of the Computer Software Directive 2009/24/EC. There is no corresponding provision in the Information Society Directive (and conversely there is clear wording in Recital 45 and Article 9).
27. Schedule 5A needs to consider Article 6 (4) (2) Information Society Directive. This Article enables a differentiated approach in cases where reproduction for private use has already been made possible by right holders to the extent necessary in order to benefit from the exception or limitation concerned. It is noteworthy that Article 6 (4) (4) Information Society Directive expressly excludes the possibility of circumventing of Technological Prevention Measures if the works have been made available to the public on agreed contractual terms.

Parody

28. We understand that this is not subject to this technical review but would like to reiterate that there is no evidence of any positive economic, social and cultural benefits of the introduction of such exceptions according to the IPO's own impact assessment.

“3. Article 5(3)(k) of the Copyright Directive¹¹ does not require fair dealing for the exception to apply. However, we have opted to limit the exception in this way. Our view is that the concept of fair dealing is well-established in UK copyright law and needs no further definition.

Q: By framing paragraph (1) as outlined below are we meeting the objective outlined above?”

29. Whilst the concept of fair dealing as applied to existing exceptions is indeed well established, it will need to be defined by the courts for each of the three new specific exempted acts.

30. We suggest amendments to Section 30B in order to add certainty. It is not sufficient for Government to implement policy in an ambiguous way by leaving the definition of fair dealing for the purpose of the exempted activities to the courts. We welcome the policy that Government intends to exclude uses that would normally be licensed or otherwise exploited from the scope of the exception by way of fair dealing. This clause could be redrafted to include the following amendment:-

- After subsection (1) insert –

“(1A) Uses that would normally be licensed or otherwise exploited, or unreasonably prejudice the legitimate interests of the rightholder, are not fair dealing.”

31. The policy expressed in Modernising Copyright relates to the protection of genuine political and satirical comment. “Pastiche” seems completely irrelevant. The inclusion of “pastiche” in this section should be removed; pastiche does not feature in the underlying policy documents. Additionally, it seems that neither Government nor anyone else has a concept of the meaning of a pastiche; we suggest it would be better left out of the exception completely. In view of the potential indefinite scope of the fair dealing exception for the purposes of pastiche, it will conflict with the first and second step of the Three-Step Test without further definition. It is not limited to certain special cases and it conflicts with the normal exploitation of the work.

32. Similarly, in order to narrow the scope of a parody, in line with the policy objectives, it should be drafted to be specific to a parody of the work being used (which could be done at the end of subsection (1)). Additionally, we recommend including the requirement of sufficient acknowledgement of the author of the original work. Cf. Section 31 (1) of the CDPA 1988.

¹¹ Throughout our response we refer to the Information Society Directive as meaning the Copyright Directive.

33. To improve legal certainty it would be helpful expressly to say that moral rights continue to apply.

34. We suggest following changes to subsection (1) of the draft exception:-

- In Title, leave out “or pastiche”
- In Subsection (1) leave out “parody or pastiche” and insert “or parody of the work”
- After Subsection (2), insert –
“(3) Chapter IV Moral Rights applies”

“4. By making this a fair dealing exception authors of original work will be protected from abuse of this exception. We do not want this exception to be used as a defence for outright copying of an original work.

Q: Is this sufficiently clear?”

35. The acts which can be subject to an exception for caricature or parody under the Information Society Directive are limited to the acts covered by the European Copyright Acquis, i.e. reproduction and communication to the public (excluding, for example, the public performance and the adaptation right). The current wording exceeds the legislative basis and needs to be limited to these rights.

36. We do not think that it is sufficiently clear to the average consumer or user that the exception does not permit outright copying of a work.

Quotation

“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?”

37. The exception is drafted in a way which is broader than required to implement Government policy. The policy states that exceptions should only “cause minimal harm to copyright owners, such as academic citation or hyperlinking, without undermining the general protection provided for copyright works.” There is a danger that quotation will be raised indiscriminately as a defence to the use of a small snippet of music without a licence. The drafting also appears to misapply the Information Society Directive in this regard which is a direction to member states, not individuals. As drafted the exception could permit quotation for any purpose, making it incompatible with the Three-Step Test.
38. Additionally, a comprehensive assessment whether subsection (1) constitutes effective implementation of Government policy can only be made once the courts have determined the actual scope of fair dealing in this context. Clarification is necessary so that fair dealing excludes uses that would constitute normal exploitation of the work to avoid uncertainty for music businesses.

“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?

“9. Subsection (2) adds two restrictions to the requirement for fair

dealing. It means that the use of an extract that is greater than required for the specific purpose, or the use of an extract which is not in accordance with fair practice, will not be permitted under the exception. These conditions are provided by Article 5(d) of the Copyright Directive, which this exception implements.

10. By setting out what is not, rather than what is, fair dealing, this subsection aims to allow a court to consider additional factors in any fair dealing analysis, which could further limit the use of this exception.

Q: Does Subsection (2) effectively implement the Government's policy, including obligations under the relevant European legislation"

39. We agree that these conditions are required by the relevant European legislation. We stress that this exception can also only apply to the acts harmonised in the European Copyright Acquis , i.e. reproduction, communication to the public and distribution.

Annex 1

Proposed wording for private copying exception taking into account the commentary in paragraph's 16 to 27 of this submission:-

(1) After section 28A insert:

“28B Private copying

(1) An individual does not infringe copyright when that individual copies a copy of a copyright work lawfully acquired by authorisation of the copyright owner to make a further copy of that work provided that:

(a) the further copy is made exclusively for that individual's sole personal and private use for ends that are neither directly nor indirectly commercial;

(b) the copy from which the further copy is made is owned by the individual on a permanent basis (for example it is not a copy that is rented to the individual for a specified period or borrowed from a library); and

(c) the making of the further copy does not involve the circumvention of effective technological measures applied to the copy from which it is made.

(2) Copyright is infringed by an individual who has made a further copy of a copyright work pursuant to subsection (1) where he:

(a) transfers the further copy to another person; or

(b) transfers the copy from which it is made without destroying the further copy and the further copy shall in those circumstances be treated as an infringing copy.

(3) Nothing in subsection (2) prevents an individual 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 and thereafter only used for his sole personal and private use.”

Annex 2

UK Music's membership comprises of:-

- AIM – Association of Independent Music - representing over 850 small and medium sized independent music companies
- BASCA - British Academy of Songwriters, Composers and Authors – with over 2,000 members, BASCA is the professional association for music writers and exists to support and protect the artistic, professional, commercial and copyright interests of songwriters, lyricists and composers of all genres of music and to celebrate and encourage excellence in British music writing
- BPI - the trade body of the recorded music industry representing 3 major record labels and over 300 independent record labels.
- MMF - Music Managers Forum - representing 425 managers throughout the music Industry
- MPG - Music Producers Guild - representing and promoting the interests of all those involved in the production of recorded music – including producers, engineers, mixers, re-mixers, programmers and mastering engineers
- MPA - Music Publishers Association - with 260 major and independent music publishers in membership, representing close to 4,000 catalogues across all genres of music
- Musicians' Union representing 30,000 musicians
- PPL is the music licensing company which, on behalf of over 75,000 members (65,000 performer members and 10,000 recording right holder members), licences the use of recorded music in the UK
- *PRS for Music* is responsible for the collective licensing of rights in the musical works of 100,000 composers, songwriters and publishers and an international repertoire of 10 million songs
- UK Live Music Group, representing the main trade associations and representative bodies of the live music sector