



## Technical review of draft legislation on copyright exceptions – Part Two

2<sup>nd</sup> August 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 to promote the benefits of music to British society. The members of UK Music are listed in annex 2.

#### **Points of Principle**

3. UK Music welcomes the opportunity to comment on the second tranche of draft exceptions which seek to implement the policy as set out in Modernising Copyright. We have previously submitted comments on the first tranche of copyright exceptions subject to the technical review (private copying, parody and quotation).
4. UK Music's primary interest in the second tranche of copyright exceptions is focused on the amendments to the exceptions for education. The policy on educational use is aimed at ensuring that educational establishments are in a position to use relevant works for educational purposes, in ways that modern technology allows, while rights holders – especially authors of educational textbooks – will continue to benefit from licences for uses of their materials such as photocopying, which could otherwise undermine sales of educational works.
5. The changes to Section 32 have to be considered jointly with the exceptions in Sections 35 and 36; We understand that the motivation to change Section 32 was to enable, for instance, the use of PowerPoint presentations for illustration which is currently not covered by Section 36.
6. A wholesale inclusion of reprographic copies within the scope of Section 32 is not required to achieve the policy objective. It only puts in danger a considerable income stream from music publishers. It should remain in Section 32.

UK Music  
British Music House

26 Berners Street  
London, W1 3LR

T. 020 7306 4446  
F. 020 7306 4449  
E. [contact@ukmusic.org](mailto:contact@ukmusic.org)

[www.ukmusic.org](http://www.ukmusic.org)

7. Changes to Section 32 need to reflect the wording of the Information Society Directive and the policy expressed in Modernising Copyright. Exempted is the “use for the **sole purpose of illustration for teaching**, 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**; ...” (Emphasis added).
8. It is not possible to introduce rules on the unenforceability of contractual overrides in this Statutory Instrument (as argued in the previous paper, c.f. Recital 45 and Article 9 Information Society Directive).

## PART B: DETAILED COMMENTS

### “Section 32

4. Subsection 32 will be substituted with a new fair dealing provision for the purpose of instruction. As set out in Subsection (1), this permitted act, which is based on Article 5(3) (a) of the Copyright Directive, only permits fair dealing with a work for the purposes of instruction when done for non-commercial purposes and accompanied by sufficient acknowledgement.

5. Subsection (2) sets out what is meant by the term “instruction”, namely acts done by persons giving and receiving instruction, as well as acts done for the purpose of examination. The exception will thus encompass much of the current section 32(3), which concerns copying for the purposes of examination. However, unlike the current provision it will be limited by fair dealing.

*Q: Are these provisions an effective implementation of the Government's policy?”*

9. In order to achieve an effective implementation of the Government's policy, whilst ensuring consistency throughout the European Union, we recommend the adoption of the wording of Article 5(3)(a) in the Information Society Directive, as referred to in the policy document Modernising Copyright.<sup>1</sup> The wording should reflect that exempted is the “use for the sole purpose of illustration for teaching, 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 suggest amendments in paragraph 13 in order to meet this.
10. Reprographic copies need to be removed not only in relation to instruction but also for examination, thus reflecting the two aspects of Section 32 (instruction and examination). This is reflected in the consequential amendments in paragraph 13 suggesting a new subsection (2A).
11. Furthermore, the exception must be restricted to the rights provided for under Article 5 of the Information Society Directive, hence the necessity for a further clarification in subsection (1). A suggested amendment proposing a new paragraph (d) is designed to

<sup>1</sup> Page 38 of Modernising Copyright

meet this and can be found in paragraph 13. Certainty for business is also necessary and this can be achieved by linking fair dealing with the three-step test. It should therefore be clarified that fair dealing excludes uses that would normally be exploited. New subsection (2B) has been drafted to this end. New subsection (2C) is also necessary in order to avoid a confusing situation with Section 35 and 36 which could otherwise mean uses are both subject to licence and a free exception..

Subsection (5) provides that the acts permitted under this section cannot be limited by contract.

12. The interaction between Section 32 and Sections 35 and 36 is unclear in particular regarding the significance of clear contractual agreements in this area; the existing arrangements with ERA and CLA which are based on contractual arrangements; they create certainty and are thus appreciated by right holders and users. This has been acknowledged in the policy document. In addition to our legal concerns on the provision of unenforceability of contractual overrides throughout the draft Statutory Instrument we suggest that the role of contracts in this area be addressed; most simply this could be done by removing reference to unenforceability of contractual overrides in Section 32. We suggest respective amendments in paragraph 13.
13. Examples of amendments that would be a more effective way to implement the policy throughout Section 32 (an amended Section 32 reflecting these changes is set out in annex 1):-
  - New title “Fair dealing for the sole purpose of illustration for instruction”
  - In subsection (1) leave out “for the purposes of instruction” and insert “for the sole purpose of illustration for instruction”
  - In subsection (1) at end insert– “(c) not done by means of a reprographic process.”
  - In subsection (1) at end insert-“(d) an act of copying or communication to the public.”
  - After subsection (2) insert – “(2A) Subsection (2)(c) does not extend to the making of a reprographic copy of a musical work for use by an examination candidate in performing the work.”
  - After subsection (2) insert – “(2B) Uses that would normally be licensed or otherwise exploited are not fair dealing.”
  - After subsection (2) insert – “(2C) This section does not apply to copying or communication to the public by or on behalf of educational establishments of broadcasts or extracts of relevant works as defined in section 36(2).”
  - Leave out Subsection (5)

Questions on Section 35 and 36

14. Some UK Music members are members of the Educational Recording Agency and we support the comments made by them on the changes to Section 35. Our member the Music Publishers Association, distribute their schools printed music licensing scheme (PMLL) through the Copyright Licensing Agency (CLA); we support the position of the CLA on the amendments to Section 36.

**PART C: OTHER EXCEPTIONS**

15. We submit some general thoughts on the draft research, libraries and archives exceptions which we hope the Government will consider when redrafting the exception.
16. The sections on libraries and archives needs to be very tightly drafted. The specific intention expressed in Modernising Copyright needs to be reflected, in particular by clearly spelling out the beneficiaries i.e. genuine libraries and archives; this is by consequence of removing reference to “prescribed” libraries in the draft new sections. Otherwise, any library or archive can claim that they are not conducted for profit, and argue they fall under the exception notwithstanding the commercial nature of their activities.
17. The section on private study and research needs to take into account that the purpose might have changed. The act might have been for genuine academic purposes at the time the act was carried out but the results of the private study and research will be subsequently used for commercial purposes. Modernising Copyright states that there is an intention not to require establishments to get students and researchers to sign any form of declaration as to the intended use of the work yet there still needs to be certainty that those benefiting from this exception are using it for genuine academic inquiry.
18. Similarly, regarding the concept of “non-commercial” research, we believe certain terms, concepts and processes within the exception need defining in order to mitigate any confusion or incorrect application of the legislation when it comes into force.

**Annex 1**

**Proposed wording for Section 32 CDPA**

**32 Fair dealing for the sole purpose of illustration for instruction**

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

- (a) for a non-commercial purpose;
- (b) accompanied by a sufficient acknowledgement (where this is possible);
- (c) not done by means of a reprographic process; and
- (d) an act of copying or communication to the public.

(2) For the purpose of subsection (1) "instruction" means acts done:

- (a) by a person giving instruction or in preparation for instruction
- (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.

(2A) Subsection (2)(c) does not extend to the making of a reprographic copy of a musical work for use by an examination candidate in performing the work.

(2B) Uses that would normally be licensed or otherwise exploited are not fair dealing.

(2C) This section does not apply to copying or communication to the public by or on behalf of educational establishments of broadcasts or extracts of relevant works as defined in section 36(2).

(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.

## 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