

Technical review of draft legislation on copyright exceptions

Amendments to Exceptions for Education

(See <http://www.ipo.gov.uk/types/hargreaves/hargreaves-copyright/hargreaves-copyright-techreview.htm>)

Background

This is a collaborative submission from a group of academics based in the UK with expertise in intellectual property and information technology law and related areas.

The preparation of this response has been funded by (1) British and Irish

Law, Education and Technology Association (“BILETA”) <http://www.bileta.ac.uk/default.aspx> and (2) CREATE (Creativity, Regulation Enterprise and Technology) the RCUK Centre for Copyright and New Business Models in the Creative Economy <http://www.create.ac.uk/>

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This response has been approved by the Executive of BILETA (the British and Irish Law, Education and Technology Association <http://www.bileta.ac.uk/default.aspx>) and is therefore submitted on behalf of BILETA.

This response has been approved by the Management Committee of CREATE (<http://www.create.ac.uk>) and is therefore submitted on behalf of CREATE”.

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1. As described in ‘Modernising Copyright’ the Government intends to amend the current permitted acts for education so that they apply to all types of copyright work and all types of modern technology, in order to bring these provisions up to date and make them relevant to the modern educational environment.
2. To achieve this, Section 32 of the Copyright, Designs and Patents Act 1988 (“the Copyright Act”) will become a fair dealing provision for the purpose of instruction, enabling teachers to make reasonable use of copyright materials without infringing copyright, as long as such use is minimal, non-commercial, and fair to copyright owners.
3. Sections 35 and 36 will be amended so that together they apply to all types of copyright work. These provisions will continue to apply only to the extent that licences are unavailable for the activities in question, so schools, colleges and universities will continue to need to hold licences for uses of copyright materials such as photocopying books, or recording television programmes. The amendments to Sections 35 and 36 seek to simplify the licensing and use of such materials and reduce the risk of accidental infringement by teachers.

Commentary on the Draft Legislation

The overarching aim of these provisions is to modernise the copyright framework to support modern educational practices ranging from increasingly interactive classrooms to distance learning initiatives such as Massive Open Online Courses (MOOCs). The reforms, therefore, need to provide flexibility and clarity while also ensuring the protection of the interests of rights holders. Given the pace of change, it is essential that these provisions be termed in technologically neutral language to support innovation. The initial impact assessment on the changes¹ outlined three key issues to address: the need to expand upon the types of media that the exemptions cover; the expansion of the level of copying permitted; and the need to address the challenges of distance learning.

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?

¹ IPO Extending Copyright Exceptions for Educational Use IA No: BIS0312, 2012
<http://www.ipa.gov.uk/consult-ia-bis0317.pdf> [Accessed 25/07/13]

The phrasing of these provisions in terms of fair dealing is to be welcomed and they sit well with proposed reforms on parody.

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

Section 35

7. Subsection 35(1A) is intended to allow the use of broadcasts permitted by Section 35 to take place both on the premises of an educational establishment and via a secure distance learning networks, provided the copyright material is not transmitted to persons unaffiliated with the educational establishment.

Q: Do these provisions meet these objectives?

Re: Section 32(5): It is essential that a balance is achieved in educational exceptions between users and rights holders. Society as a whole benefits from the sharing of ideas, particularly in the sphere of education. It would be detrimental to the wider objectives of this reform to allow the exceptions to be overridden by agreement. As highlighted in the original consultation document² there is a possibility in certain situations for contractual terms to be breached through a reliance on the exceptions. Section 32(5) brings much-needed clarity to the legal framework by expressly providing that the fair dealing for the purpose of instruction section cannot be limited by contract.

Re: Subsection 35(1A): the subsection fulfils its remit of expressly extending the provisions to distance learning education by outlining provisions that apply to users outside of the physical educational establishment. However, the term “secure electronic network” may not be the correct technical term to encompass the secure Virtual Learning Environments or platforms to which users are connecting using an electronic network. The term “electronic network” requires further clarification.

The provision applies to “a broadcast or a copy of such a recording” which “is communicated to the public by a person situated within the premises of an educational establishment”. This wording links the work’s communicator to “an educational establishment”, a term that indicates a physical location. A modern education provider may not operate from an identifiable “establishment” and working practices in more traditional establishments will often see educators uploading material while working from home. The linking of the communicator to a physical location appears to serve no purpose and, as such, is redundant in this provision.

8. Subsection 35(2) confirms that, as is currently the case, this exception only applies to the extent that licences authorising the acts covered by it are unavailable. In order to simplify the application of such licences and reduce bureaucracy, it also removes the requirement for such licensing schemes to be certified by the Secretary of State. It should be noted that consequential

² IPO HM Government Consultation on Copyright, 2011 para 7.242 <http://www.ipo.gov.uk/consult-2011-copyright.pdf> [Accessed 25/07/13]

amendments will be made to Section 143, and the relevant Orders which currently relate to such schemes will be revoked (subject to appropriate transitional provisions).

These provisions will bring much-needed simplification to the current licensing regime.

Q: Do these amendments effectively simplify this provision?

Section 36

9. The current Section 36 is amended so that it applies to all types of relevant copyright work. Subsection 36(1)(b) is intended to allow the use of copies permitted by Section 36 to take place both on the premises of an educational establishment and via a secure distance learning network, provided the copyright material is not transmitted to persons unaffiliated with the educational establishment.

The comments made above relating to section 35 (1A) relating to the term “secure electronic network” also apply to subsection 36(1)(b(ii)). There is a need to clarify this term.

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

10. Subsection 36(2) is intended to provide that this provision does not apply to broadcasts (as they are covered by Section 35), or to artistic works which are not incorporated in another work (allowing, for example, reproduction of extracts from a textbook including embedded photographs).

Yes

Q: Does this provision meet these objectives?

11. Subsection 36(4) raises the amount of a work that may be copied under these provisions from the present one per cent per quarter of a calendar year, to not more than five percent in any period of twelve months.

Yes

Q: Does this provision meet this objective?

12. Subsection 36(5) is intended to ensure that where copyright material is available under licence then educational establishments will continue to gain access to it via those licences. In this way, as at present, the exception operates as a safety net to cover the copying of material which falls outside of the licences which educational establishments already hold.

13. Subsection 36(6) is intended to prevent licensors from purporting to restrict the amount of work which can be copied under their licence such that licensed material is more difficult to use than unlicensed material.

14. Amendments to Schedule 2 to the Act apply these exceptions to rights in performances to the same extent as they apply to rights in copyright works.

Annex A: Draft education exceptions

Education

(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 does not infringe copyright in the work provided that the dealing is:

- (a) for a non-commercial purpose; and
- (b) accompanied by a sufficient acknowledgement (where this is possible).

(2) For the purpose of subsection (1) “instruction” 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.

(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) 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) 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.
- (2) Acts which would otherwise be authorised by this section are not authorised if, or to the extent that, licences are available authorising the copying in question and the person making the copies knew or ought to have been aware of this fact.”

(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 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 given by that establishment.

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

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

- (a) be accompanied by a sufficient acknowledgement (except where this would be impossible for reasons of practicality or otherwise); and
- (b) be made for the purposes of instruction which is for a non-commercial purpose.

(4) Not more than five percent of any work may be copied pursuant to this section by or on behalf of an establishment in any period of twelve months and for these purposes a work which incorporates other copyright work shall be treated as a single work.

(5) The activities mentioned in subsection (1) are not authorised by this section if, or to the extent that licences are available authorising those activities and the person undertaking those activities knew or ought to have been aware of that fact.

(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) 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.
- (4) For paragraph 4 of Schedule 2 substitute:

“Fair dealing for the purpose of instruction

4. Where a dealing with a sound recording, film or broadcast is fair dealing for the purposes of section 32, such a dealing does not infringe any rights conferred by this Chapter .”.

(5) In paragraph 6 (recording of broadcasts by educational establishments) for sub-paragraph (1B) substitute:

“(1B) The activities mentioned in sub-paragraphs (1) and (1A) are not authorised by this paragraph if, or to the extent that, licences are available authorising those activities and the person undertaking those activities knew or ought to have been aware of that fact.”.

(6) After paragraph 6A of Schedule 2 insert:

“Copying and use of extracts by educational establishments

6AA.—(1) Where copyright is not infringed in a copyright work by the making or use of extracts in circumstances that are permitted by section 36, such making or use of extracts does not infringe any rights conferred by this Chapter.

(2) Where by virtue of section 36 a copy made pursuant to that section is to be treated as an infringing copy, such a copy shall be treated as an illicit copy for the purposes of this Chapter.”

End of submission