

Response to first batch Draft Legislation to modernise copyright exceptions published for technical review

(See <http://www.ipso.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.

In addition, this response is submitted by the following individuals:

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New exception for private copying

4 - Q. Are these provisions an effective implementation of the Government's Policy?

The provisions outlined in the draft section give effect to the governmental policy of improving copyright in a narrowly defined manner to allow format shifting and lawfully copying content which is owned by individuals for their personal use.

The draft section 28B aligns domestic copyright law with that envisaged at a wider European level, and broadly correlates to the permitted acts outlined within the Copyright Directive relating to private copying.

This does seem to be an effective implementation but does not per se modernise copyright – rather it aligns it with both the expectations of consumers and with European law.

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

For the sake of clarity the inclusion of (1)(c) highlights that copies cannot lawfully be made through the circumvention of technical protection measures. This subsection is important in making this point.

6 - Q. Does this provision meet this objective?

The aim behind subsection 2 of the draft exception is to ensure that the exception does not allow the making of copies for multiple people. The draft exception is not clear in this. Subsection 2 (a) and (b) are clear but the final element of this subsection indicating that the further copy will be an infringing copy is not clear or helpful here. At present it is doubtful whether it meets the stated objective comprehensively.

7 - Q. Does this provision meet this objective?

Subsection 4 does not clarify that an individual who makes a copy under the exception can store it in a private cloud or other remote electronic storage. Subsection 3 makes this clear, and the statement that it be for sole private use is effective in meeting the objective.

8-10 - Q. Do these provisions meet these objectives?

There is no subsection 5 in the annex – subsection 4 deals with the contractual terms restricting the exception. This is a useful inclusion but perhaps would benefit from the

inclusion of license as well as contract terms. Subsection 4 of the draft section 28B needs to be broadly aligned with the Draft Consumer Rights Bill,¹ especially in relation to digital content.

The amendments to the Schedules are effective.

General Comments on Draft s28B Private Copying:

The draft exception for private copying is an important move in the progression of copyright for digital content and consumer content. The broad impression of this proposed exception is good – it seems to meet the overall objective and is an appropriate response to the various comments from the Hargreaves Review. However, the contract terms seeking to restrict this exception are likely to be varied, especially when it comes to music purchases.²

The exception as drafted, seeks to ensure that the exception is neither exploited nor restricted, and this is a useful inclusion in the legislation. It is important that the law moves forward to reflect what is now ‘common practice’ in consumer use of digital content, especially format-shifting.

End of submission

¹ Draft Consumer Rights Bill, June 2013, Cm 8657.

² R Camerani et al, ‘Private Copying’ (IPO 2013) 6.