Response to UK IPO Second Stage Consultation on Copyright Exceptions

INTELLECTUAL PROPERTY LAWYERS' ASSOCIATION

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This response is made on behalf of the Intellectual Property Lawyers' Association ("IPLA"). The IPLA was formed in November 1982 to act as a centralised voice for those law firms in England and Wales with significant IP practices who wished to lobby for improvements to the law and practice of intellectual property law in the UK. Some sixty firms are members and their practices extend throughout England and Wales. Whilst it is not appropriate for us to comment on the commercial/political aspects of the Consultation (as our members act for both rights holders and users) we consider that there is some benefit in the IPLA submitting a response to the Consultation putting forward our legal opinion on the drafting of the proposed amendments.

Research and Private Study Exceptions

Section 29

As the current or proposed subsections 29(1), (1A), (1C) and (1D) are alternative means of fair dealing, as opposed to being aggregate in effect, we suggest that the proposed section 29(1F) should substitute "or" for "and", and so read:

"Where a copy which would otherwise be an infringing copy is made in accordance with subsections (1), (1A), (1C) **or** (1D) but is subsequently dealt with -..." (emphasis to highlight the proposed amendment).

The proposed new section 29 (1F) limits dealings with a copy of a work made in accordance with sections 29 (1), (1A), (1C) and (1D). How is the government proposing to deal with non-commercial use (in particular non-commercial acts of communication to the public) such as the publication of a PhD student's thesis online or collaborative research between different universities (in circumstances where, e.g. the thesis may contain part of a copyright work), which now appears to be limited where it was not so limited under the current provisions?

Further, we are confused as to why commercial dealings with copies made under section 29 (2) is excluded from the further dealing provisions at section 29 (1F).

Educational Exceptions

Sections 35 and 36

The proposed amendments to section 35 (1A) and the new 36 (1C) include the requirement that any communication to the public shall be to "authorised persons" (being teachers and pupils) only. We agree with this approach. However, the use of the words "by an educational establishment" potentially has the effect of limiting the benefit of the exception to infringement to the educational establishment itself and not its teachers. Consequently, we suggest that it should read:

"Copyright is not infringed by a member of an educational establishment or a person acting by or on behalf of an educational establishment etc."

A definition of a "member" of an educational establishment, as included at section 29 (1D) should also be included in sections 35 and 36.

The proposed amendments to section 35 (1A) include a reference to the term "receive" in relation to a communication, rather than "access". We think that the term "receive" is sufficient if it is intended to cover everything from using a computer to showing a recording of a broadcast to a group of people to making content available within a VLE.

The proposed sections 35 (1B) and 36 (1D) are directed at the activities that pupils may lawfully undertake. Whilst we agree that the proposed amendments should deal with this, we think that the current draft wording creates some uncertainty about what a student can and can't do. The list of questions in Annex B states that the current draft wording would allow a pupil to make a hard copy of the material, whereas the draft wording currently reads: "..copyright is not infringed by an authorised person who *in the course of receiving the communication* (our italics) ... makes a copy of the material communicated." We think this language could be interpreted to mean temporary copying (such as that which is permitted under section 28A) which occurs during (or 'in the course of') a user streaming content. It is not at all clear from the proposed provision what activities a pupil may lawfully undertake (such as printing hard copies and storing copies electronically).

Further, if these provisions are extended to cover the lawful acts of pupils, we think that the further dealing

provisions should also be extended to prevent pupils from participating in non-commercial activities beyond the scope of the educational purposes e.g. disseminating the material received in a communication. This is particularly important in relation to section 35, where the communication by the educational establishment is of a whole broadcast programme, rather than an extract. The activities of a person who receives a communication through a VLE and makes it available on the internet to friends, appears to fall outside the further dealings provisions.

The restriction on communicating a copy to the public in section 35 (1A) and 36 (1C) and 36 (1E) is limited to communication from within the premises of an educational establishment. It is not clear to us why a restriction on the place from which the communication is made is necessary and it seems unnecessarily restrictive in the "virtual world" (e.g. the teacher may be working remotely).

We also do not understand why the definition of "dealt with" in section 35(3) is different to section 36(5) and, in particular, why "communication" is not "to the public" and why it is limited to the premises of an educational establishment for similar reasons to the above.

Section 36

We understand that the government's proposal is to extend section 36 to incorporate film and sound recordings but not broadcasts or artistic works. Broadcasts are covered by the section 35 exception and we recognise that, in relation to artistic works, the 1% restriction is problematic from a practical perspective. However, we suggest that the government should seek the view of art and history of art departments at universities on whether the exclusion of artistic works is a significant issue for them. In our view, if artistic works are excluded from the exception this will limit the usefulness of the exception in relation to extracts from literary works, which may contain illustrations and diagrams. We think there would be an obvious benefit to educators if artistic works were included and little impact on rights owners, as they have the option of including their work in a licensing scheme.

The proposed amendments to section 36 remove the reference to "reprographic copying". The government should be aware that one implication of this change is that the exception will now apply to reproduction in any material form of passages from published literary, dramatic or musical works. Literary works includes databases and computer programs. The Database Directive 96/9/EC Art. 6 2 (b) permits optional exceptions for teaching and scientific research. However, the reference to "passages" is not appropriate in relation to databases. We suggest that the term "extracts" is used in both 36 (1A) and 36 (1B). Moreover, the Software Directive 2009/24/EC does not contain any provision permitting exceptions to infringement for educational purposes. Consequently, we think there is no basis for extending section 36 to computer programs under the Software Directive.

Performers' Rights

Our comments above also apply to the extent that the government's proposed amendments to the exceptions apply to performer's rights in Schedule 2 CDPA.

For further information please contact:

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