



# **Response to the technical review of draft legislation on copyright exceptions (2)**

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**DACS submission 2013**

# Technical review of draft legislation on copyright exceptions

## Executive Summary

DACS recommends:

- That 'non-commercial' is defined consistently using the phrase 'for ends that are neither directly nor indirectly commercial' which is used within the draft private copying exception.
- Section 32(2) of the Copyright, Designs and Patents Act 1988<sup>1</sup> wording should replicate that used in the Copyright Directive (Directive 2001/29/EC) Article 5 (3)(a) which says 'for the sole purpose of illustration for teaching'.
- DACS proposes the inclusion of a clause which would prevent the further use of copies made under Sections 37, 41, 42 and 43. Such a clause could state: 'For the avoidance of doubt, any subsequent dealing of these copies is prohibited.'
- We would urge the Government to exclude visual works from Section 29A in its entirety as its inclusion is not appropriate and will not achieve the stated policy aims.

## Introduction

This response relates to the draft legislation for copyright exceptions for:

- Education
- Research, Libraries and Archives
- Data analysis for non-commercial research

As a member of the British Copyright Council, and the Alliance for Intellectual Property, DACS' general concerns in relation to this technical consultation are covered in their responses. Many of our concerns are also covered in the responses from The Educational Recording Agency (ERA) and the Copyright Licensing Agency (CLA). We have focussed our response on specific areas of concern for visual artists.

It does not appear that any consideration has been given as to how these new exceptions may interact with each other, and with other existing exceptions, creating unintended consequences and ultimately undermining provisions which

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<sup>1</sup> Any further reference to legislation that isn't specified refers to this Act.

are supposed to protect the rights of creators. For example, there is the possibility that content digitised through the Government's proposed exception for Libraries and Archives could be made available through the education exception. This significantly undermines the usefulness of the legislation dealing with orphan works that has recently come into being through the Enterprise and Regulatory Reform Act. To illustrate the point, a museum will be able to, under Section 42 create a digital copy of an orphan work, which could then be used under Section 32. Or an individual could acquire a copy of an artistic work under Section 37 and then make additional private copies for themselves under the proposed private copying exception.

## Education

The absence of definitions within the draft education exceptions creates a great deal of uncertainty. While case law does exist in respect to fair dealing, it does not exist in relation to these new purposes and the burden will fall to rightsholders to take cases to court in order to establish the extent of the exceptions. This is an unfair burden on individual creators whose incomes are already low (in 2010 the national median wage for a fine artist was £10,000<sup>2</sup>), and which stand to be further diminished by these exceptions. This has not been taken into account in the impact assessments.

DACS is conscious of the on-going debate about what 'non-commercial' means. Section 32(1)(a) states 'for a non-commercial purpose' however, the IPO's draft private copying exception helpfully uses the phrase 'for ends that are neither directly nor indirectly commercial' which we think would be more appropriate here and provide consistency in the drafting of the legislation.

There is a lack of definition in Section 32(2) relating to the definition of 'instruction'. The wording should accurately transpose the more limited permission used in the Copyright Directive (Directive 2001/29/EC) Article 5 (3)(a) which says 'for the sole purpose of illustration for teaching'.

In addition, without reference to 'instruction' taking place in the context of an educational establishment, Section 32(2)(a) could apply to events and seminars hosted by private companies in public spaces – arguably not commercial if they are not charged for, unless the wording of Section 32(1)(a) is changed to 'for ends that are neither directly nor indirectly commercial'.

It is also worth noting that the current exception also speaks about instruction, however, the current exception has a limitation as to the way of reproduction and excludes copying by reprographic means. This has been removed from the section which now allows any mode of reproduction and which therefore is significantly wider than previously.

The impact of Section 32(4)(c) needs to be considered in light of the widening of this exception. Because the scope of the exception is wider, subsequent uses of the copyright protected work are allowed to be used in such a way as would be

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<sup>2</sup> Kretschmer, Martin, Lionel Bently et al, *Copyright contracts and earnings of visual creators: A survey of 5,800 British designers, fine artists, illustrators and photographers*, Bournemouth: CIPPM, 2011

detrimental to the rightsholder. For example, digital copies of visual art acquired through the course of receiving instruction could be used by the pupil to instruct somebody else, whilst the existing exclusion of reprographic copying is more likely to prevent the creation of a permanent copy that can be used for such purposes.

Section 35(2) should read ‘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.’ The last part of this subsection (‘...and the person making the copies knew or ought to have been aware of this fact.’) should be removed as copyright infringement is *per se* a strict liability offence and is independent of somebody knowing about it or not.

To require a user to have knowledge of the licensing solution risks introducing this element into copyright infringement in general. The same element is already in Section 36 but is now extended to Section 35 and there is a risk that this will undermine the usual strict liability. This could also potentially extend the responsibilities of collecting societies even further to being required to make people aware and then proving that the relevant people ought to have been aware of the fact that such a licensing scheme existed.

Section 36(4) states that “not more than five percent” of any work can be copied pursuant to the section. However it is unclear what the 5% relates to. For example, 5% of a book could mean copying 100% of the visual works held within that book if they only amounted to 5% of the book as a whole.

DACS also wonders how this exception relates to copyright protected works which are embedded within works that are no longer copyright protected, for example, art works printed in books. We would ask for further clarification on subsection 2 where it says that it does not include copyright protected artistic works which are not incorporated in another copyright protected work.

Section 32(5) states that any contracts overriding the freedoms granted by this exception are invalid, but this could potentially invalidate the licensing schemes allowed for under Sections 35 and 36. It should be made clear in Section 32 that this clause does not apply where this is a licence allowed for under Sections 35 and 36.

Section 36(3)(b) uses the phrase “non-commercial purposes”. We recommend that it is replaced with wording like ‘for ends that are neither directly nor indirectly commercial’.

## Research, Libraries & Archives

The expansion of Section 29 to cover sound recordings and films will make it necessary for non-commercial research and private study to be tightly defined. We suggest that the phrase ‘for ends that are neither directly nor indirectly commercial’ would be more appropriate here.

This clause also makes it even more important to be aware of the potential interaction between the exceptions as it could allow a copy to be lawfully acquired under this exception and then privately copied.

Section 37 no longer contains the requirement of the library to be prescribed. However, it is not clear what 'not conducted for profit' means. This could mean that the library can in no way make a profit which could exclude libraries of profit making institutions or universities.

Section 37(1)(b) enables the copying of a "reasonable proportion" of a published copyright protected work for non-commercial research and private study. The absence of a definition of "reasonable proportion" makes the position unclear and will lead to confusion and ultimately copying of larger proportions of copyright protected works. Furthermore, how would this concept relate to artistic works without potentially infringing an artist's moral rights by mutilating the work?

While it is understandable that there is a desire to enable a declaration to be completed electronically, we are concerned that there is no requirement for a signature. It is imperative that some sort of formality is introduced to ensure people take the declaration seriously and sign it honestly.

Section 42(1)(a) is clearly drafted with literary works in mind but does not translate to artistic works. Artistic works are preserved differently to other creative works, for example, music, where making digital copies results in a replica copy of the original which would serve to preserve or replace the item.

Short of creating a forgery, there is little which could be done to make a copy of a painting or sculpture for the purposes of preserving or replacing the item. A digital copy of a painting or sculpture would not be adequate, arguably even for research and study, except for cataloguing or documenting the original.

There have been claims that a copy of an art work is necessary so that it can be used in place of the original in order to preserve the original. However, as a representative of visual artists, DACS does not agree with this argument as viewing an artistic work not in its original medium but as a digital version, is an entirely different experience and can therefore not serve as a replacement. The experience of the unique original is also influenced by the texture and the size which would not be possible to replicate digitally in the majority of cases, therefore failing to replace or preserve the original.

It stands to reason that if a work is digitised under Sections 37, 41, 43 or 43 in order to supply an individual or another library, archive, museum or gallery with a copy, then the supplier of the copy will retain their own digital file. There does not seem to be anything in the draft regulations which prevents the further exploitation of this residual copy.

The impetus behind the recent orphan works provisions included in the Enterprise and Regulatory Reform Act (ERR Act) was largely said to be the desire of museums to digitise their collections without being prevented from

doing so because they are unable to identify or find the rightsholder. However, with this exception as it is drafted, the orphan works provisions largely become redundant and the interests of rightsholders illegitimately prejudiced.

It seems possible, under the drafted exceptions, for a museum to digitise their entire permanent collection, for preservation purposes, and then make those copies available to the public either under Section 43A or Section 32. This completely undermines the provisions in the ERR Act. The orphan works provisions require due diligence and the provision of compensation to the rightsholder. But under these draft exceptions rightsholders will not receive any compensation and in effect will, unwittingly, find themselves subsidising the mass digitisation of content by large, well-funded institutions.

Furthermore, it also seems possible for the individual who has lawfully acquired a copy of a copyright protected work under Section 37 to go on and make additional private copies of that work.

DACS proposes the inclusion of a clause which would prevent the further use of copies made under Sections 37, 41, 42 and 43, and to continue to exclude museums and galleries from these sections as artistic works are preserved differently to other copyright works. Such a clause could state: 'For the avoidance of doubt, any subsequent dealing of these copies is prohibited.'

DACS is concerned about the absence of a definition of 'permanent collection'. In the case of artistic works, 'permanent collection' would mean that the museum/gallery must own, and retain the original. Section 42(1) only restricts the recipient of a copy to organisations that are not conducted for profit but does not restrict the supplier of a copy of a work to not for profit museums and galleries. Therefore, how does a commercial gallery determine if a work is in their 'permanent collection' if it could just as easily be sold? It is also not uncommon for public galleries and museums to sell works in their permanent collection. If the original is sold, there should be an obligation to destroy the copies.

We are also concerned that by extending this exception to any item, there is no requirement that the copyright work referred to in Section 42(1) be an original work, as opposed to being a copy of an original held in a permanent collection.

Article 5(3)(n) of the Copyright Directive permits cultural institutions to make works available for research or private study via dedicated terminals located on their premises – but only if this use is not subject to purchase or licensing terms. The draft Section 43A would allow works to be made available to the public on the premises of a public museum or library through dedicated terminals. DACS currently offers a digital engagement licence which licenses our members' works for use on dedicated terminals in public museums and galleries, therefore this exception goes beyond the authorisation under the Directive and undermines established licensing practices and licensing income paid to artists and their estates.

## Data Analysis for Non- Commercial Research

S43A(1)(b) and (c) should be deleted. Educational establishments are covered in the proposed educational exception and it will only confuse users and rightsholders if it is also included here.

DACS believes that this exception will create unintended consequences for visual artists. Throughout the consultation process and in the Government's Modernising Copyright document, we were led to understand that this exception was to apply to text mining with the policy aim that it would facilitate scientific research. However, Section 29A(1) incorporates all forms of copyright work, including artistic works. The Government has not consulted on the consequences of incorporating visual works into this section and has not carried out an impact assessment in relation to this.

We therefore believe that the Government is proceeding on the basis on incomplete and inaccurate information. We would urge the Government to exclude visual works from this section in its entirety as its inclusion is not appropriate and will not achieve the stated policy aims.

If Government fails to exclude visual works from this section then it is imperative that safeguards are put in place in the regulations to go some way towards safeguarding the investment of creators and ensuring that legitimate licensing streams are not undermined.

We would suggest the following safeguards:

1. Include a further subsection in Section 29A which explicitly states that if a work is subsequently used for any purpose other than data mining itself then this amounts to an infringement of copyright.
2. Add a further subsection to 29A which prohibits the creation and dissemination of anything acquired through the process of data mining which would conflict with the exploitation of the original work.
3. Remove Section 29A(3) from the legislation which renders contract terms which purport to restrict or prevent the doing of an act which would otherwise be permitted under the section unenforceable.
4. In respect of the phrase 'non-commercial research' under Section 29A(1)(a) we recommend that the IPO looks to the draft private copying exception which helpfully uses the phrase 'for ends that are neither directly nor indirectly commercial' which we think would be more appropriate here.
5. The phrase 'permanently transferred' under Section 29A(2) should be deleted from the Regulations. The phrase 'permanent' is not necessary when discussing the illegal transfer of a copy as any form of transfer would amount to an infringement. Deleting this wording would clarify that even temporary copies must not be transferred.

If artistic works are not excluded from this section or if the safeguards are not included, then we envisage that databases of artistic works which require subscriptions and generate huge revenues for artists will be mined and their content exploited in a number of formats.

The contract override clause in this section would also mean that any currently existing terms and conditions (such as those which state that content cannot be removed from the database or subsequently exploited) would be rendered void, undermining the very existence of this sector.

DACS also supports the contribution from the Alliance for Intellectual Property and the Publishers' Association in respect to the draft data analysis exception.

DACS  
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