The Libraries and Archives Copyright Alliance

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Convened by CILIP: the Chartered Institute of Library and Information Professionals

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Technical review of draft legislation to modernise copyright exceptions

Response from LACA: The Libraries and Archives Copyright Alliance

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Introduction

The Libraries and Archives Copyright Alliance (LACA) is a UK umbrella group convened by CILIP (Chartered Institute of Library and Information Professionals). LACA brings together the UK's major professional organisations and experts representing librarians and archivists to lobby in the UK and Europe about copyright issues which impact delivery of access to knowledge and information by libraries, archives and information services in the digital age[1].

LACA has submitted a large body of evidence to all the UK reviews of Intellectual Property and to EU consultations on copyright over the years to highlight and communicate to policy makers the deficiencies in the current copyright framework in relation to the organisations that it represents.

LACA is much encouraged by the draft legislative text supporting a more balanced copyright regime recently published by the Intellectual Property Office. However, we are concerned about some of the wording proposed in the draft SI as indicated in our comments below. LACA strongly recommends IPO takes our comments on board to ensure that the intentions of the Hargreaves Review of IP are fully met.

Protection of copyright exceptions from over-ride by contracts and the use of Technical Protection Measures (TPMs)

Whilst we very much welcome the fact that in the vast majority of cases it is intended that no contract shall over-ride statutory copyright exceptions, we are very concerned that nevertheless, rights owners may instead impose TPMs that make it impossible in practice for people entitled to take advantage of the exceptions to do so.

The provisions of section 296ZE of the CDPA are rarely, if ever used, are cumbersome and present a real barrier to *bona fide* users of copyright works, and in any case do not apply in

[1] http://www.cilip.org.uk/cilip/advocacy-awards-and-projects/advocacy-and-campaigns/copyright/copyright-consultation-respons-0

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Representing ARA: The Archives & Records Association, ARLIS/UK & Ireland: The Art Libraries Society of the UK and Ireland, BIALL: British and Irish Association of Law Librarians, The British Library, CILIP: the Chartered Institute of Library and Information Professionals, IAML/UK & Ireland: The International Association of Music Libraries, Archives and Documentation Centres, JISC: Joint Information Services Committee, LIS-COPYSEEK online community, The National Library of Scotland, The National Library of Wales, Royal National Institute of Blind People (RNIB) National Library Service, Society of Chief Librarians in England and Wales, and SCONUL: Society of College, National and University Libraries.

cases outlined in section 296ZE(9), where such a work is available under a licence for online access. LACA wishes to see section 296ZE amended so that, rather than a copyright owner ignoring an instruction given by the Secretary of State being a breach of duty to the complainant, it becomes a criminal offence. LACA further recommends that section 296ZE (9) of the CDPA be revoked.

1. **Amendments to Exception for Public Administration** (http://www.ipo.gov.uk/techreview-public-admin.pdf)

LACA recommends that the wording of the SI is amended to reflect making available to the public by means other than by electronic transmission. In this case, the text could read '… available to the public by any means, including by electronic transmission in such a way…'

Other than the point above, we have no comments on the proposed new exception, which is a helpful change and for which the proposed revised wording to sections 47 and 48 is appropriate and fulfils the intended purposes.

2. **New Exception for Quotation** (http://www.ipo.gov.uk/techreview-quotation.pdf)

It appears that this new exception, which replaces section 30(1) of the CDPA, the exception for criticism or review, is intended to extend the old exception by expanding the possible uses beyond criticism or review, but on the other hand the proposed new language actually works against this and limits the old exception to quotation only.

It would be helpful if, once the SI is published, the Government provided revised explanatory notes which do not contain the word "extract" so as to ensure that a whole work may be used under this exception. This is indicated in case law: Eva-Maria-Painer v Standard Verlags gmbh and others (C-145/10), the European Court of Justice applied the Quotation Exception (5.3(d)) as outlined in the Information Society Directive, permitted the use of a whole photograph falling under 5.3(d) (quotation). "Quotation" implies the reproduction of only a part of the original work, and indeed para 9 of the request for comments refers to "use of an extract", thereby suggesting that the entire work cannot be reproduced under this exception.

LACA therefore recommends that the legislation language makes it clear that "quotation" can refer to the entire original work. In that way, the Government can ensure that this new exception extends the old criticism or review exception, rather than restricting it.

'Fair practice'

LACA would also welcome clarification regarding the new expression 'fair practice', a term which appears in Art.10(1) of the Berne Convention on Quotations. WIPO provides the following explanation of 'fair practice' in its 1978 *Guide to the Berne Convention:*

"It implies an objective appreciation of what is normally considered admissible. The fairness or otherwise of what is done is ultimately a matter for the courts, who will no doubt consider such questions as the size of the extract in proportion both to the work from which it was taken and that in which it is used, and, particularly the extent to which, if any, the new work, by competing with the old, cuts in upon its sales, circulation, etc." *World Intellectual Property Organization, Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971)(Geneva: WIPO, 1978), 58–59 para 10.4.*

However, the meaning of 'fair practice' as used in the SI is unexplained as is the need for it, since the courts have commented extensively on the meaning of 'fair dealing'. If 'fair practice' is different, what does it mean that is different?

LACA welcomes the provision that no contract can over-ride this exception.

LACA, for the reasons given above, does not believe that as it is currently worded, Subsection 1 is an effective implementation of Government policy as previously announced in its response to the Hargreaves Review.

3. New Exception for Parody (http://www.ipo.gov.uk/techreview-parody.pdf)

LACA supports the inclusion of this new exception, which will be of greatest benefit to our colleagues in Higher and Further Education, as well as galleries and museums.

LACA welcomes the provision that no contract can over-ride this exception.

4. New Exception for Private Copying (http://www.ipo.gov.uk/techreview-private-copying.pdf)

LACA supports the inclusion of this new exception, which will be of greatest benefit to the legitimisation of activities already undertaken by private individuals and align the UK more closely to private copying provisions elsewhere in Europe.

5. Amendments to Exceptions for Research, Libraries and Archives (http://www.ipo.gov.uk/techreview-research-library.pdf)

LACA welcomes the proposed changes, but we do have some concerns about the proposed wording in some cases.

- **Revisions to ss. 29 and 37-40 – copying for research or private study**

We are content with the proposed changes to the research or private study exception and believe the wording achieves the stated objectives. We are also pleased that no contract can over-ride this exception. The proposed changes will address a long-standing and irritating barrier to *bona fide* non-commercial research and private study.

LACA welcomes the provision that the librarian or archivist can copy for a patron on receipt of an electronic instruction, and that the wording of the provision simply refers to "writing", The removal of the need for a signature removes a piece of bureaucracy which has long been a burden to library and archive staff.

We note that the proposed new section 37(1) includes the provision that copies may be supplied "in such medium as the person may request". Due to the quantity of published materials, including the manuscripts of published works, in archives, LACA would be very keen to see the wording of this section amended to specifically include archives as well as libraries.

- **Revisions to s.43 – copying by librarians and archivists - unpublished works**

LACA is also content with the proposed changes to the law in regard to librarians and archivists making copies of unpublished works for patrons.

- **'Prescribed' library v. library 'not conducted for profit'**

LACA notes that a library not conducted for profit replaces the concept of a 'prescribed' library. Under the old regulations, a non-prescribed library was one that was conducted for profit, OR was part of an organisation conducted for profit, whereas the new wording

restricts it to a library conducted for profit, irrespective of whether the parent body is conducted for profit or not. We wonder if this change is deliberate.

- **s.42 - copying for preservation**

With regard to preservation copying, the draft SI refers to "items in the permanent collection" of the library, archive and museum, that the item is wholly or primarily for reference only, and cannot be loaned to the public. There is also a clear implication that only one preservation copy can be made, whereas current technology inevitably requires that further back-up copies are made. All these facts make the proposed revision to the exception unduly restrictive and will impede the proper preservation of materials. Similarly, we are concerned that replacement copies are not always "purchased", as cultural heritage organisations often acquire collection items via gifts, bequests etc and so the clause should reflect this.

LACA believes that the proposed revisions do not offer a solution to the needs of those libraries, archives and museums that need to make preservation copies. LACA therefore urges the Government to make this exception more wide-ranging. In light of this, LACA would recommend that Section 42(1)(a) is altered to say 'a copy'.

- **s.42 - copying for replacement**

The revised provision retains the confusion in the prescribed conditions in the current legislation, in that the same section refers both to replacement within an institution, and replacement of a copy in one institution by a copy originating in another. In the case of s42(1)(b), we understand the intention to be that the recipient library must not be conducted for profit, since it is the beneficiary of the exception, so we suggest that it would be clearer if the passage in brackets were amended to read 'provided that the recipient library, …'

- **New s.43A(1)(a) – 'publicly accessible library'**

The proposed new s.43A(1)(a) refers to a "publicly accessible library" without defining that term. Presumably this means a library accessible to anyone (e.g., a public or national library) or to a significant sub-section of the public (e.g., a college or university library, a Government Departmental library, a subscription library such as The London Library, a learned society library, or other non-profit specialist library, etc.) For consistency, it would be better if the wording were instead linked to the idea of a library not being conducted for profit.

- **New s.43A(2)(b)(iii) – 'dedicated terminals**

The proposed new section 43A(2)(b)(iii) refers to "dedicated terminals". The term comes from Art. 5(3)(n) of the Information Society Directive 2001/29/EC, which this provision implements. Is the language in the SI intended to mean that the terminals are ONLY to be used for making works available to patrons, or could the terminal also offer (say) word processing software, or Internet access? Three main scenarios present themselves:

1 'Terminals' in library, etc., premises which only display the works in question;

2 'Terminals' in library, etc., premises which only offer basic library functions such as catalogue search and subsequent display of retrieved items (including but not limited to works covered by the draft regulation);

3 'Terminals' in library, etc., premises which offer full workstation capabilities including all the above, Internet access, access to Intranets, word-processing, spreadsheets, etc.

Terminals of type (b) above usually and necessarily include general web access e.g., for posting results to web-based email, or resource discovery tools (catalogues) that are delivered from remote web servers. It is impracticable and restrictive to users to do otherwise since people work with electronic resources from intranets and the Internet in a totally integrated way. LACA recommends that the phrase "dedicated terminals" is properly defined, perhaps by a ministerial statement to Parliament.

The proposed new section 43A(2) (c) does not invoke the "no contract can over-ride this exception" sub-clause, which is applied to most of the proposed new exceptions. Indeed, it says a contract **can** over-ride this exception. LACA urges the Government, should an opportunity occur, to seek amendment of the directive so that this exception also cannot be over-ridden by a contract. LACA is also concerned that this section is limited to readers involved in non commercial research or private study. That limitation is not part of the Directive (which talks only of unqualified research or private study). It will be impossible for a librarian or archivist to check on the motives of every reader wishing to use these terminals in order to prevent access by those doing commercial research. The reader is acquiring no copy in this process, so what is the problem?

- **Schedule 2 – 'illicit copies'**

There is reference to "illicit copies" in the proposed wording for Schedule 2 of the Act, when surely the term should be "infringing"? Also, as not all copies owned by libraries, museums and archives will be purchased, we would also like to see the terms "obtained" or "acquired" instead of purchased.

6. Amendments to Exceptions for Education (http://www.ipo.gov.uk/techreview-education.pdf)

LACA welcomes the approach adopted by the Government for amending the law in respect of educational purposes, which will help the provision of non commercial teaching activities, many of which are taking place in a range of organizations across the UK's public sector, whilst ensuring that this does not disadvantage rights owners.

- **s.32(2) Significant grammatical error changing the meaning**

We note a significant grammatical error in the proposed wording for section 32(2); 'and' between the subsections of 32(2) should be replaced by 'or', for as it stands, all three of the conditions will have to be true simultaneously before the provision can be invoked.

Specifically, looking at the text of the amendment, you could take a more restrictive view;

(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.
It could be said that the use of 'and' at the end of (2)(b) restricts the meaning of 'instruction' to 'for the purposes of examination.....' only, whereas the 'old' s.32 was for 'Things done for purposes of instruction **or** examination**'.**

- **s.32(2)(c) – copying for the purposes of examination**

In addition, LACA does not believe things done for the purposes of examination should be subject to fair dealing. The current legislation states in s32(3):

"Copyright is not infringed by anything done for the purposes of an examination by way of setting the questions, communicating the questions to the candidates or answering the questions".

This would greatly restrict teachers who rely on the examination exception to reproduce whole works for analysis by students, with a specific example in written music examinations of arranging whole musical works for different instrumental forces. It is unlikely that such a use would be considered 'fair', and it is also unlikely that this use would be covered under "quotation" as it also includes an element of adaptation.

LACA therefore does not agree that the draft legislation continues to permit the current uses and recommends that the examination exception be a separate sub-section from teaching, retaining the original wording of s.32 (3, 3A and 4) of the Act (which includes the specific exclusion of making a reprographic copy of a musical work for use by an examination candidate in performing the work. . In addition, as a minor grammatical point, the words "where it is received" should be removed from section 2(b) as this is a duplication of the ending of (2)(1A).

- **Revision to s.35(1A) - communication to the public**

The proposed revision to 35(1A) requires that the person doing the act (communication to the public) be on the premises of the educational establishment. Just as the recipients may be off the premises but connected by a secure electronic network, so may the sender, yet the secure networks will still be used. The wording should reflect this fact.

- **New s.36(2) - exclusion of artistic works**

The proposed new s 36(2) meets the objective as stated but the exclusion of standalone artistic works is a serious limitation, especially in view of the fact that the term embraces not just photographs and pictures, but maps and diagrams. The previous restrictions based on the form of the work (for example the library privilege sections) are being lifted: why is the exclusion of artistic works being retained here, anomalously?

This runs counter to the statements in *Modernising copyright* and in the introduction to the current document that 'the Government intends to amend the current permitted acts for education so that they apply to all types of copyright work'. This section is thus not an effective implementation of the Government's policy.

- **s.36(1)(b) - transmission of learning materials via secure network**

Whilst the ability to send materials down a secure network to staff and students is welcome, the proposed wording does not make it legal for an external authority, such as an external examiner (or maybe the QAA for schools and colleges) to receive, and thereby inspect, what staff are creating and students are receiving. It would be helpful if the wording were revised to permit external individuals or bodies that perform a validation function to be included in the exception.

- **Exceptions as a safety net**

The proposed legislation argues in a number of places that copying is not allowed under one of the proposed exceptions to the extent that licences are available authorising the copying in question. But what if the licences are available on totally unreasonable terms? In the case of RROs such as CLA or NLA, one can appeal against unfair terms through the Copyright Tribunal, but not in the case of licences offered by e book or journal publishers, or online

hosts. It would be helpful if there were extra words along the lines of "….that licences on reasonable terms are available authorising the copying in question…."

- **s.36(1) - superfluous language**

The proposed wording for 36(1) starts "Subject as follows, copyright is not infringed…." Those first three words appear to be unnecessary.

7. New Exception for 'data analysis for non-commercial research' (new s.29A and Sch.2 Para 2C) (http://www.ipo.gov.uk/techreview-data-analysis.pdf)

LACA welcomes these proposed changes to the law, which will assist non-commercial research.

However, we note that the proposed headings for the new s.29A and Para. 2C in Schedule 2 and also the wording of Para 2C itself, use the words 'data analysis for non-commercial research'. This limits the exception merely to computer analysis of data only, whereas computer analysis of **text** is also needed. We understand from Annex E of the government's paper, '*Modernising Copyright'* (pp.36-37) that the government's intention is to provide an exception for both text and data mining for non-commercial research. To achieve this, the three instances of the words 'data analysis' should be preceded by the words 'text and'.

- **Rights in databases**

We assume that the proposed new s.29A and Schedule 2 amendments will provide that the exception for data analysis also applies to copyright in databases since they are classed as a literary work in CDPA s.3(1)(d). It is, however, essential that this exception additionally applies to the *sui generis* right in databases. The provisions need to be unambiguous that such acts of analysis do not constitute infringement of any rights in databases.

Journals and articles are contained in databases and in practice whole databases or significant extracts of databases need to be copied in order to carry out the text or data mining without disrupting access to other users. To achieve the government's objective a similar new section in CDPA is needed to provide a data analysis exception to the *sui generis* database right (for instance following s.50D 'Databases: permitted acts'?) and also the Copyright and Rights in Databases Regulations 1997 (SI 1997/3032) may need amendment.

- **Derivative works**

It is unclear what is meant by "a copy" in new s.29A and Schedule 2, since many derivative works will be created as a result of the data analysis incorporating the data and the findings. This needs clarification.

- **What can be done with the results of text and data analysis**

A very important oversight is that the issue of the types of activity, i.e. what someone can do with the results of text and data mining, that are intended to be covered by the new exception. This has not been addressed anywhere. It is presumably the government's intention that what is being extracted from the text or data is, as facts and data itself, not subject to copyright and also its use is treated as fair practice or fair dealing and therefore does not undermine the legitimate interests of the rightsholder. This needs to be made clear, possibly in the legislation, or in an Explanatory Note.

Again, we welcome that no contract can over-ride the proposed new exception.

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