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MODERNISING COPYRIGHT: A modern, robust and flexible framework Government response to consultation on copyright and exceptions and clarifying copyright law

Analysis prepared by the BCC Working Group on Copyright & Technology as a "think piece" for the British Copyright Council and as a discussion paper for the meeting with IPO on 14th March 2013

General issues for consideration prior to Technical Review of new Regulations

The BCC recognises that at this stage the focus of this technical review is on the implementation of the policy put forward in "Modernising Copyright". Whilst many BCC members continue to have concerns about some of the assumptions behind the policy, it is intended that this Analysis will assist in highlighting specific comments for consideration in the drafting before any Regulations are laid before Parliament.

In doing this the BCC acknowledges that the substance of "Modernising Copyright" reflects the business reality of IP to a much greater extent than the recommendations set out in "Digital Opportunity". However, the revised Impact Assessments published in December 2012 recognise that there are a significant number of issues on which the Government has not been able to "monetise the benefits despite seeking additional evidence through consultation" or alternatively "it is acknowledged that "it has not been possible to monetise the costs due to lack of available data, despite seeking evidence through consultation".

It is in recognition of such "gaps" that the revised Impact Assessments of "Modernising Copyright" significantly downgrade the economic benefit of the proposed changes from that stated by Professor Ian Hargreaves in the Hargreaves Review of Intellectual Property and Growth. The Hargreaves Report stated that the minimum benefit of the proposed changes to copyright law would be £4bn. In "Modernising Copyright" it is £0.5bn. The Hargreaves Report stated that the maximum benefit of the proposed changes would be £26bn. The figure in "Modernising Copyright" is £0.79bn. These equate to reductions of 87% and 97% respectively and yet these reforms are still being positioned as being of great benefit to the UK.

However, it is hard to identify the "great benefit" (or any benefit) whilst it still remains the case that the Impact Assessments have not been able to monetise the costs and benefits in ways that in any way address justification for introduction of the "grey areas" for future application of copyright law, which are the focus of BCC concerns within this analysis. Additionally the differences in the economic Impact Assessments, supporting specific identified areas of policy undertaken by the same unit within IPO within a short period of time, remain a worry for the creative sector.

Recognition by Government that there are "gaps" in the currently published Impact Assessments suggest that further work is necessary to analyse the data that many BCC members believe has been supplied to IPO in response to various earlier consultations (but which, for some reason, are not picked up, referred to or refuted within the published Impact Assessments).

BCC believes that further analysis of this "missing" evidence must take place if real problems for any future Post Implementation Review are to be avoided.

The British Copyright Council has concerns that the Government has disclosed, in

response to a series of Written Questions that it intends to leave important definitions relevant to defining the scope of new exceptions undefined in the Regulations, with any clarification deliberately being left to the courts.

Costs of litigation ignored

The economic and legal concerns arising from this approach are touched upon elsewhere in this analysis. However, it is a concern that no evaluation of the inevitable and necessary costs of obtaining legal clarification of the laws through the Courts has been included in the Impact Assessments published to date.

In a response to a recent Parliamentary Question about this omission the Secretary of State replied, “While legal disputes may occur following any legislative change, it is not possible to predict accurately the extent or cost of such action, and accordingly, no such assessment has been made”.

The Council is concerned that the Assessments are incomplete because the general reason given above is incompatible with the stated policy objectives of promoting improved clarity and transparency for the future of copyright licensing to meet demand from users.

Recommendation

Any Regulations must be clear in terms of providing boundaries to any new permitted acts in order to meet the clarity and transparency objectives of Government. This should be addressed before any draft Regulations linked to the Modernising Copyright proposals are published for Technical Review.

Overarching issues

“The Government intends [to] amend the number and scope of permitted acts….”

Increasing the number of permitted acts and widening their scope in the ways proposed risks introducing a “fair use” approach into UK law through the back door, even though it is recognised in Modernising Copyright that “it is important for the UK to remain compliant with international treaties and European law”. The BCC has set out in previous responses how the fair use approach in the US has been developed and fine-tuned in over 170 years of jurisprudence and cannot be merely “copied and pasted” into the fair dealing world if compliance with European law is to be maintained.

We note that Government relies a great deal on the definition of fair dealing to justify the new and expanded exceptions. The BCC hopes that IPO will engage with rights holders to ensure that the lack of definition does not end up reducing clarity and transparency for application of the law thus defeating a central aim of the policy driving these changes.

We welcome Government recognition of the value of licensing to all parties involved from creators and performers to commercial users and end consumers. This is surely promoted by facilitating certainty of licensing terms, rather than introducing new provisions which must be left to the Courts to analyse and for case law to establish thereafter whether and to what extent a licence may or may not be needed?

The priority to promote economic growth should lead to an environment in which decisions are made as to the terms on which a licence may be needed, rather than simply a decision of whether an exception should be applied.

“[Government] wants to shift some of the current uncertainty about whether something can be done lawfully into a question of whether a licence is needed or not.”

Once this approach is endorsed, if the use does not need the rights holder’s permission, then it is a permitted act and the question of whether a licence is needed is irrelevant. If it is not a permitted act, then the commercial terms (i.e. the licence) on which permission for the restricted act is granted by the rights holder, should be enabled to provide clarity of what has been agreed for both licensor and licensee.

Fair Dealing

Many of the new permitted acts under consideration will be reliant upon establishing the limits of fair dealing to justify the new and expanded exceptions. However, it has also been asserted that there is no current intention to define “fair dealing” in terms of its application to the increased scope of permitted acts to be addressed in new Regulations.

The BCC asks how this change of approach will make permitted acts more "clearly established and readily usable". Instead, additional tests will be required to interpret the longer list of exceptions to which it is proposed to apply generic expressions including "fair dealing", "parody", "teaching", "quotation", "research", "private study".

This approach appears to ignore the obligation that Member States have under European Law to provide effective remedies for the protection of the rights that the law requires them to protect. Imposing a requirement on rights holders to establish the important general requirements of the three step test on a case by case basis would appear to deny the rights holders such effective remedies for the enforcement of their rights.

We welcome the general appreciation in Modernising Copyright that in order to be fair the dealing does not include licensable activities. In addition to this general axiom of fair dealing which applies to all forms of fair dealing, the fairness of the dealing is assessed by the objective standard of whether "a fair-minded and honest person would have dealt with the copyright work in the manner in question in relation to the actual purpose of the specific exception". This means that in practice the fairness of the dealing has to be established in Court cases in relation to the new and expanded fair dealing exceptions. Whilst UK Courts have developed a clear and established approach to the fairness of the dealing, when applied to permitted acts, it will be costly to establish the parameters of fair dealing for all the new fair dealing exceptions. In this context it would be invaluable if the new or extended purposes of the fair dealing were clearly defined to create legal certainty. The reference to legal actions to establish the parameters of fair dealing for the new or expanded purposes are unsatisfactory (c.f. Government response to written Parliamentary questions on 4th and 7th February and 5th March 2013).

Recommendation

The purpose of any new or expanded fair dealing exceptions need to be clearly defined in the context of the clauses to which the test is to be applied. It is of utmost importance to ensure that exceptions are very clearly drafted, so that they do not create confusion for members of the public and businesses.

Whilst it is understood that publication of Copyright Notices is one route to help provide for greater clarity over application of the test, the status of such Notices will not be legally enforceable.

It would, therefore, be preferable if the contents of draft Notices are published at the same time as draft Regulations. This may allow for any clarifications that will clearly need to be relied upon to avoid costly subsequent litigation to "confirm" intentions outlined in the draft notices to be assessed and incorporated within Regulations. Such a process would improve clarity and transparency and significantly reduce the costs of litigation for both rights owners and users.

"Government will also publish an evaluation strategy…."

We welcome Government plans to publish a full evaluation strategy and Post Implementation Review (PIR). The PIR is to detail benefits and, we would expect, identification of any problems associated with the introduction of these reforms and will include input from stakeholders. Government will also set out how and when the benefits will be measured. Nevertheless, we are concerned that the shortcomings of the existing Impact Assessments will hinder a meaningful evaluation of the impact of the strategy given that there is no accurate benchmark of any notable quality.

Recommendation

Where there is acknowledged lack of evidence to support changes within currently published Impact Assessments, it remains important that any further documents recognise (and if appropriate discount) evidence that has been prepared and submitted by or for rights holders within responses to Consultations published by Government.

It is surely unhelpful to any PIR that evidence within Consultation responses is published as "responses", whilst Impact Assessments argue that no evidence has been supplied?

The BCC recommends that further consideration be given to mapping why evidence provided has been ignored or discounted for Impact Assessment purposes.

Licensing: should contract terms exclude permitted acts?

The BCC welcomes Government's opinion that "the benefits of clarity from licensing can be achieved by offering licences of broader scope than the permitted acts in UK law". However, it finds it difficult to reconcile this with Government's policy which is "to the extent that is legally allowed, the Government will provide for each permitted acts, considered in this document that it cannot be undermined or waived by contract".

Government is still undecided as to its approach but suggests it may include "a prohibition on licensing override of permitted acts".

A general prohibition of contractual override for copyright works is not recognised by relevant international or European Law provisions (c.f. Recital 45 Information Society Directive and freedom to contract underpinned by Art. 10 of the European Convention of Human Rights) nor does it provide a solution for the problem the policy purports to address, i.e. that users have to conclude multiple contracts. The existence of a multitude of contracts has nothing to do with contractual override prohibition.

The proposal relates to changes to contracts governed by the laws of England, Wales, Scotland and Northern Ireland. Those entering into licence agreements that are governed by the laws of other jurisdictions will not be assisted by the introduction of new contractual override prohibitions linked to changes to permitted acts proposed under Modernising Copyright.

Contract terms that prohibit or restrict the use of exceptions appear to be rare, not common. Where they do exist, the Information Society Directive acknowledges that they may be useful to ensure fair compensation to rights holders (Directive 2001/29/EC, Recital 45). Freedom of contract is a reason why English contract law is favoured internationally which, in many ways, is to the advantage of UK businesses. A "contract-override clause" would detract from this by imposing an unnecessary burden of compliance on contracting parties.

The example of a prohibition on a contractual override provided in Modernising Copyright (Section 50a CDPA) relates to very limited circumstances in which an act which is a permitted act under the relevant provisions of the section can apply. The section provides that "it is not an infringement of copyright for a lawful user of a copy of a computer program to make any back up of it which is necessary for him to have for the purposes of the lawful use".

Given the clarity which contractual arrangements provide for users and rights holders, prohibition of contracts terms that are understood by parties as defined licensed uses beyond the scope of "permitted acts" will only lead to uncertainty on whether certain uses around the parameters of "fair dealing" are legitimate. This policy would create uncertainties for rights holders and new business in particular concerning new business models. That is, rights holders offer licences according to the specific requirements of new business users; without licenses there will be legal uncertainty which is certainly not conducive for economic growth. This cannot be the objective of Government policy. In other more established areas a prohibition on contractual override will have a clear negative impact. In particular, in areas in which rights holders license activities of educational establishments for the benefit of all parties involved (Section 35 and 36 CDPA).

BCC members support Government efforts to promote clarity and transparency in all dealings with copyright licensees. This will not be helped, in any way, if every licensee is able to challenge licence terms on the grounds that some activities which "might" fall within a permitted act are always left open to question when licences are offered.

On a practical level we expect limitations on contracts in the UK to encourage creative businesses to choose the laws of other countries as their preferred jurisdiction iwhen international business rules permit. That is hardly conducive to UK growth.

Recommendation **The limited scope of the permitted acts to which the provisions of s.50 A (3), s.50 BA (2) and s.50 D apply must be distinguished economically for any further consideration of a prohibition of contractual override to permitted acts which by their nature are described by reference to "fair dealing" or concepts such as "non-commercial research", "teaching for illustration", "private study" or "non-commercial educational use".**

Private copying (Annex A)

Proposal *"**Introduce a narrow private copying exception, allowing copying of content lawfully owned by an individual (such as a CD) to another medium or device owned by that individual (such as a mobile phone, MP3player or private online storage), strictly for their own personal use"**.*

The BCC welcomes a policy which allows users to copy privately under the parameters provided under the Information Society Directive. However, this depends on the details of the wording; the BCC objects to an extension which encroaches on areas which are licensable or even those which are already licensed.

This applies particularly to cloud computing services. Many are already operating under licensing terms which were agreed to meet the business requirements of cloud computing services. Extending the exception to cover such services will remove already established certainty and clarity for users of creative works in new ways.

The market is developing to address territoriality, security and other commercial issues which form an important part of the licensing terms (and which have not been addressed or analysed in the context of the published Impact Assessments).

The proposal will remove new and important streams of income from the creative industries if the drafting of the exception is imperfect in any way. Government's intention is to extend the exception only to cloud storage services without additional functionalities. However, the BCC has concerns that an adequate definition of those functionalities will be difficult to achieve.

The Government needs to address functions such as the ability for users to make available the access code to their private storage which is often the competitive motivation underlying the business model of such cloud storage services, that is, their aim to attract more website traffic and thus increase advertising revenue. The BCC hopes that the importance of limiting any proposals to the reproduction right (and distinguishing it from related dealing and electronic transmission of any kind) will be addressed effectively in any drafting.

Recommendation **In order to minimise confusion for consumers and businesses, the legislation needs to set out the scope of the exception, as it has already been set out by Government in Modernising Copyright and in the Impact Assessment – including that the exception would only cover copies made by private individuals of works that are lawfully owned by them, for personal use that is neither directly or indirectly commercial.**

The concept under consideration is an exception to the reproduction right and does not apply to the act of communication to the public covering electronic transmission of works in the form of streaming. Neither could it permit the copying of material when accessed as a result of consents granted for other restricted acts including rental, lending and all forms of communications to the public.

There needs to be a provision for any subsequent dealing which may be relevant to other restricted acts (c.f. Section 70 (2) CDPA). Any ensuing permitted acts must independently meet the requirements of the three step test. This is particularly important when the nature of the copyright works being streamed or delivered electronically is considered in terms of economic impact of the use. Different criteria may apply to sound recordings, E-books, digital magazine publications, film and to radio and television programming forming part of broadcast output.

The absence of any mechanism for fair compensation is problematic in view of the ongoing policy initiatives in the European Union (e.g. the report on mediation prepared by Mr. Antonia Vitorino on mediation on private copying and reprographic levies); mandatory European Law (Article 5 (2b) Information Society Directive; and lastly jurisprudence on the scope of fair compensation by the Court of Justice of the European Union (in particular the Padawan and the Opus case of 2008 and 2010 respectively; but more importantly the upcoming Copydan case). The BCC would hope for opportunities to address how, within the Government's proposals, this requirement can be taken forward at UK level.

Finally, the issue of education about the value of copyright must continue to be addressed with any new proposals. It is important that users of copyright appreciate that what may be permitted as a "sale" or a "purchase" of goods in other contexts, is in fact a "licence" to use copyright works on agreed terms.

Recommendation

It is therefore important that any Regulations promote clarity in permitted acts (for which no licence is required) and the ability for rights holders to licence rights under terms that set out clearly the extent of rights that stakeholders have granted.

Quotation, reporting current events, and speeches (Annex B)

Proposal: ***"Introduce an exception permitting fair dealing with quotation, as long as sources are identified."***

BCC comments on the implementation of this policy depend on the actual drafting of the relevant part of any Statutory Instrument seeking to amend the scope of a permitted act; particularly in so far as the definition of quotation is concerned. Licensing parts of works is routine business for copyright owners and users. If any new exception is drafted too broadly, it carries the risk of undermining established licensing models and generating unnecessary litigation to define the scope of a fair dealing exception for the purposes of quotation. It is difficult to reconcile a wide quotation exception with Article 5 (3) (d) of the Information Society Directive which covers "quotations for purposes such as criticism or review" (i.e. not "for any purpose") "provided that … their use is … to the extent required by the specific purpose" (which implies there must be a *specific purpose*).

Recommendation

In the respective Impact Assessment the Government notes that the fair dealing condition could be clarified: "further restrictions or considerations can be explicitly included into the legislation if necessary in order to ensure that the allowed uses do not unfairly affect the legitimate rights of the original copyright owner." The phrase "fair dealing for the purposes of quotation" does not clearly communicate to businesses and consumers in plain English the fact that uses that are normally licensed or otherwise exploited are not included. We suggest that this is stated on the face of the legislation if the exception is implemented; together with guidelines on what constitutes "quotation" in particular in view of recent European and UK jurisprudence in this area (e.g. Infopaq International A/S v Danske Dagblades Forening 2008 and NLA v Meltwater 2010 onwards).

Parody, caricature and pastiche (Annex C)

Proposal ***"Introduce a fair dealing exception to allow limited copying for parody, caricature and pastiche, while maintaining current system of moral rights"***.

BCC continues to challenge the economic justification for the introduction of an exception for parody, caricature and pastiche. However, in order to render this exception workable in practice it is important to provide key definitions of parody, caricature and pastiche.

It is deeply worrying that the main (and almost sole) example for a parody provided by Professor Hargreaves "Newport State of Mind" has been identified in Modernising Copyright as not being a "clean example" of a parody. In fact, it is not a parody of "Empire State of Mind" whose music it reproduces in its entirety. If Professor Hargreaves is confused about the meaning of parody, the BCC envisages even more uncertainties on the part of the general public on the definition of pastiche. In order to avoid undermining normal licensing, the scope of the exception needs to be clarified, as the Impact Assessment suggests.

Further, to avoid further confusion in application of any clearly defined exception it should be made clear that when users rely upon the exception, any parody, caricature or pastiche must not infringe the moral rights of the authors or performers. Uncertainty about this has caused confusion in the application of the exception in other jurisdictions (cf. France).

We welcome the limitation of the exception e.g. in as far as it excludes the reproduction of whole works and suggest that this is reflected in the wording of the exception (and not left only to the interpretation of fair dealing).

Recommendation

Any Regulations should provide that a parody or pastiche must involve an adaptation of the original work; and to qualify for the exception, the work that is used must not merely be used in relation to what is claimed to be parody or pastiche.

As far as fair dealing for the purpose of parody, caricature and pastiche is concerned, uses that are normally licensed or otherwise exploited, or which unreasonably prejudice the interests of the rights holder, are not fair.

Regulations should provide that any parody, caricature or pastiche which infringes any moral right of an author will not benefit from the exception.

Research and private study (Annex D)

Proposal: ***"Change the scope of copyright law to allow copying of all types of copyright works for non-commercial research purposes and private study. Introduce an exception to allow educational institutions, libraries, archives and museums to offer access to all types of copyright works on the premises by electronic means at dedicated terminals for research and private study."***

The Impact Assessment argues that the change to apply the permitted act beyond the current provisions of s. 29 CDPA will enable "increased quantity of higher quality research in relevant fields". However, these fields have not been analysed for the Impact Assessment. Instead the Assessment reports that "it has not been possible to monetise the costs due to the lack of available data, despite seeking additional evidence through consultation". This is surely insufficient to comply with the conditions for evidence based policy set by Professor Hargreaves?

Rights holder concerns about the difficulties over distinguishing recreational use of materials from research and private study are dismissed on the grounds that "such uses are outside the scope of the proposed exception". While there is recognition that "it is important to implement this in such a way that any scope for abuse or misunderstandings is minimised", in terms of use of copyright works, it is hard to see how a sound recording or a film can be "researched" or "privately studied" without the sound recording being listened to or the film being viewed in a similar way to viewing or listening for recreational purposes.

This is particularly pertinent when consideration is given to how s 29 CDPA potentially overlaps with the application of licensing schemes permitted under s 35 CDPA and paragraph 6 Schedule 2 CDPA and the research or private study is also undertaken in connection with the non-commercial educational purposes of an educational establishment.

In this context it is important that clear distinctions can be made between non-commercial research and private study which is not linked to the activity of a business (such as an educational establishment, a library and museum or a gallery) and research and study which is really undertaken as part of the activities of such bodies.

When research or private study is undertaken by individuals there must be a means of distinguishing this from "recreational" use.

No economic Impact Assessment analysing this "challenge" has been undertaken; instead the Impact Assessment states "We have assumed that this is possible, as the existing exceptions appears *(sic!)* not to have caused adverse effects". The reason

why the existing exception may not appear to have adverse effect on rights holders is because the ability to apply a test of fair dealing to limited reproduction or access to a literary work is quite different from "researching" and listening to or viewing a whole sound recording or film.

The Government Assessment states that fair dealing should not cover anything beyond what is necessary for research or private study in the respective cases at hand. If sound recordings, films and broadcasts can be used for "fair dealing" research and private study purposes – and no licence terms can "override" application of this entitlement - what realistically will rights holders be able to do to monitor when an individual use of materials beyond the limits of "fair dealing"?

Recommendation

As with all fair dealing exceptions, licensed and licensable activities are excluded from the scope of the exceptions given that these activities constitute normal exploitation and any dealing in such areas cannot be fair. This should be clarified.

Regulations must make it possible to distinguish non-commercial research and private study which is not liked to the activities of a business (such as an educational establishment, a library and museum or gallery) from research and study which is really undertaken as part of the activities of such bodies.

Before this is taken forward the BCC recommends a new and more detailed Impact Assessment looking at the possible impact of such an expanded exception. This is an important area in which clarity about definitions such as "non-commercial" and "private" are key, together with appropriate wording on sufficient acknowledgement.

There is a need for further clarity and details of how this exception will operate in practice within the framework of the existing activities of educational establishments; in particular there needs to be clarity on the relation between s 29 and ss 32, 35, 36 CDPA.

Data analytics for non-commercial research (Annex E)

Proposal: ***"Creation a copyright exception to cover text and data analytics for non-commercial research within certain restricted limits, which will protect publishers from large-scale copyright infringement."***

The BCC hopes that the restricted limits referred to in Modernising Copyright are positive recognition of concerns raised about the damaging scope of the general recommendations suggested during the Hargreaves Review. However, concerns about the economic effect of general "data analytics" as opposed to targeted and defined text mining have not been commented upon within the published Impact Assessment. It is also a concern that evidence provided by publishers about current systems for the granting of licences for text mining was not included within the published Impact Assessments.

Recommendation

Given that no real demand for the "new" permitted act has been shown to exist, that is not satisfied by existing or developing licence models from publishers, we would urge Government to continue consultation with rights holders and users to establish the actual need for such an exception.

The wording provided for any exception should recognise existing and developing initiatives by rights holders, such as the PLS Clearing House for permissions.

Education (Annex F)

Proposal: ***"Introduce a fair dealing exception for non-commercial use of copyright materials in teaching. Expand the type and extent of copyright works that can be copied by educational establishments. Expand the exceptions to enable distance learners to access educational materials over secure networks. Retain existing licensing arrangements for recording broadcasts and photocopying."***

I. New fair dealing exception for use in teaching, new Section 32 CDPA

By introducing new exceptions linked to general descriptions of activities to cover use within exceptions such as “teaching” in addition to “research” and “private study” and “non-commercial educational use” – the BCC is concerned that the scope for reduced transparency over the limits in application of exceptions is increased. Consequently, this may reduce the ability for rights holders to be clear and transparent in licensing terms.

The BCC has concerns that this will be further exacerbated if any “users” are able to challenge any contractual terms that seek to define the scope of licenses, when they wish to claim that a use falls within the scope of any exception.

Taken as a whole, the new exceptions may then work against the established system, built on trust between rights holders and users in the educational world, which seems in conflict with Government aims for its policy.

Recommendation **There is need for further clarification in particular on the parameters of a fair dealing exception for the purposes of teaching (for instance as to what is meant by the wording “fair dealing for the extent necessary”).**

The extension of permitted acts for “teaching” to all organisations and individuals and not only those which are defined as “educational establishments” in the Copyright Act, is neither appropriate nor legally acceptable (c.f. Art 5 (2c) Information Society Directive).

Recommendation **The definition of “educational establishments” provided in Section 174 CDPA is crucial for distinguishing those entities which are able to benefit from the permitted acts linked to activities linked to an educational establishment on the one hand and reproductions by natural persons for private use on the other.**

If this is not done the whole system of educational exceptions loses focus along with its policy justification. The suggested broad range of beneficiaries of a fair dealing exception for the purposes of teaching is unacceptable because it upsets the balance between rights holders and educational users (c.f. Recital 31 Information Society Directive).

It also blurs the demarcation of other exceptions in particular s 29 CDPA and the new exception for the purposes of private copying and fails to take account of the important reference in Article 5.3 (a) of the Information Society Directive to “use for the sole purpose of illustration for teaching”. In no part of any Impact Assessment has Government, or Professor Hargreaves in his Report, look at the cumulative effect of the exceptions, for example, by linking the current provisions of s29, s32, s34, s35 and s36 CDPA.

In order to avoid undermining normal licensing, it is important that any new permitted acts linked to the current provisions on s32 CDPA expressly state that uses that are normally licensed or otherwise exploited are not fair dealing.

It is also important that any new provisions recognise the distinct restricted acts that may be involved in sourcing, accessing and electronically communicating works when “distance learning” is involved.

Recommendation **It is important that bodies able to offer works for “distance learning” are defined. This will then enable the person responsible for any electronic communication to the “learners” to be identified (and the economic effect of such electronic communication to learners to be assessed (c.f. s35 1 (A) and s35(2) CDPA) which recognise licence options for rights holders linked to communication to the public of relevant works when the “learners” are within the premises of an educational establishment).**

Regulations must recognise that the three step test and international treaty provisions must be applied distinctly to assess “legitimate interests of rights holders” against –

(a) public performance;
(b) broadcasting;
(c) making available on demand; and
(d) any type of "communication to the public" relevant to s 20 CDPA which is outside broadcasting and making available on demand but included as communication to the public under s 20 CDPA.

For electronic relays of recordings of broadcasts made by or on behalf of an educational establishment whether "within the premises of an educational establishment" for presentation to students or beyond the premises to "distance learners" the restricted act of "communication to the public" must be respected and addressed separately to the question of whether, when the electronic transmission is received a separate "public performance" occurs (c.f. s 34 CDPA).

Whenever an "educational establishment" is the body electronically "making available" on demand, recordings of which they may have legitimately acquired under licence for non-commercial educational purposes to any of the people relevant to s.34 CDPA – then even if the people receive the works transmitted "as distance learners" – the educational establishment still needs to have licences in place to ensure that fair compensation for rights holders can be secured.

II. Extension of existing exception

The BCC welcomes that the approach established under s 35 CDPA, universally acknowledged as efficient by rights holders as well as educational users, is to be retained. If the certification provisions for licensing schemes operating under the current provisions of s.35 and paragraph 6, Schedule 2 CDPA are to be removed, the status of the existing licensing schemes will need to be preserved under suitable transitional arrangements. This will be important to avoid confusion for users licensed under the certified schemes and to allow for clarity over licence terms that apply (a) against the permitted act provisions within the scope of s.35 and paragraph 6 Schedule 2 CDPA (ERA and OU licensing schemes) and licence terms offered through ERA which license uses by educational establishments linked to such licences (the current ERA Plus Licence servicing distance learning).

The BCC also welcomes that licensing of permitted acts provided by s36 CDPA will be retained.

Copyright exceptions for people with disabilities (Annex G)

Proposal: ***"Broaden the scope of the current disability copyright exceptions to include all relevant types of disability and copyright work, and simplifying the processes and procedures related to these exceptions."***

The BCC broadly welcomes the suggested changes in this area and cross-refers to the possible WIPO Diplomatic Conference on a Treaty to facilitate Access to Published Works by Visually Impaired Persons with Print Disabilities.

It is significant that discussions at international level include clear definitions of "disability", "accessing" and "commercial availability". Further issues to be addressed in any legislative instrument at international (and at UK) level include a definition of organisations which are authorised to make accessible copies of works otherwise unavailable, as well as record keeping and notification requirements. The BCC hopes that the UK delegation at WIPO will consider these points. It is unclear who Government will seek to bring into the scope of the exception at UK level given that licensing schemes are already in place (in close and long standing co-operation with the RNIB).

Archiving and preservation (Annex H)

Proposal: ***"To enable libraries, archives, museums and galleries to make preservation copies of all classes of work."***

BCC has always supported such an exception.

Recommendation

We suggest the Government puts a ceiling on the number of copies that can be made for the purposes of preservation. We still have concerns on the broad

	scope of beneficiaries (including museums and galleries) but are confident that this can be addressed by clear definitions and qualifying criteria. **The BCC welcomes the fact that the scope of proposed new permitted acts remain subject to it not being reasonably practicable for a copy of the work to be purchased. This should be made explicit in any new Regulations.**
Public administration (Annex I)	Proposal: ***"Amend the current copyright exception for public administration and reporting to permit the publication of relevant third-party documents online."*** It is still the BCC's view that an exception which provides for the making available online of works protected by copyright and related rights (even though limited in the case of ss 47(2) and 47(3) to works which are not commercially available, and in the case of s 48 to works which are unpublished) conflicts with European and international laws, and does not comply with the Three Step Test (c.f. Article 2 (5) of Directive 2003/98/EC on the re-use of public sector information.
Recommendation	**The BCC stresses the need for practical measures to ensure that public bodies make proper efforts to identify whether or not material that is available commercially to buy or licence (ss. 47(2) and 47(3)) and material which is unpublished (s. 48) is identified as such and remains outside the scope of the exception.**
Other permitted acts in the Copyright Directive (Annex J)	The BCC welcomes the Government's decision not to amend or introduce these exceptions on the basis that it would provide little benefit or would be unduly harmful to the interests of rights holders.
Clarifying copyright law: copyright notices (Annex K)	The BCC supports this endeavour as long as it takes the form of "clear, authoritative and impartial general guidance on copyright law" and is limited to providing "guidance on copyright basics and areas where common misunderstandings occur". Anything beyond such general guidance is of no practical value and may lead to confusion when the legal unenforceability of terms or provisions in any Notices is highlighted by contradictory court decisions.
Recommendation	**It is noted that Modernising Copyright proposals state "However, the Government's intention is for these Notices to become an authoritative source of copyright clarification which the Courts would taken into account." Government needs to consider the separation of powers in this context.** The BCC looks forward to reviewing and commenting on IPO's proposals to introduce a non-statutory scheme as well as looking forward to participating in substantial discussions on initial areas in which further guidance would be useful from a rights holder perspective.