



## POSITION ON GOVERNMENT'S PROPOSED AMENDMENTS TO COPYRIGHT EXCEPTIONS AND OTHER MATTERS<sup>1</sup>

### COMMENTS FROM THE BRITISH SCREEN ADVISORY COUNCIL (BSAC)

16 May 2013

#### 1. Private copying

*Will permit* any content lawfully owned by an individual to be copied for their own personal use.

*Good points:*

- some recognition that use of Technical Protection Measures (TPMs) to prevent / control copying must be permitted, because some acknowledgement that TPM workaround would be unlikely to be successful where consumers have option of buying content that can be format shifted etc.
- the exception will not apply to rented, borrowed or streamed content (although some BSAC Members wanted an extension to this content to be explored)
- the exception will not permit sharing of copies made.

*Issues:*

- the private copying exception may come into force before the film industry has had a chance to properly introduce new business models to offer consumers the ability to watch content that they have purchased across different platforms legitimately
- consumers can apparently appeal to Secretary of State for a TPM workaround due to lack of enjoyment of exception where TPMs are used in all cases<sup>2</sup>, even if this might be unsuccessful (and failure to acknowledge administrative etc. burden on right holders where an appeal can happen)
- it is not known what factors the Secretary of State must take into account (such as what is available in the market) when considering a TPM intervention, and what remedies are available to him / her

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<sup>1</sup> As announced in December 2012 in "Modernising Copyright: a modern, robust and flexible framework" (<http://www.ipo.gov.uk/response-2011-copyright-final.pdf>)

<sup>2</sup> Except presumably where not permitted by EU law – see footnote 3

- how the exception would apply to content that already provides consumers with the ability to format shift eg UltraViolet (UV) is not clear (does the exception apply to discs which come with UV rights, or does the exception apply to UV copies themselves?)
- whether electronic sell-through / download-to-own models would fall within the 'on-demand' definition,<sup>3</sup> and would therefore not be subject to the TPM workaround is not clear
- to what extent the exception will apply to already acquired content on DVDs, where TPMs have been routinely used (and right holders cannot, therefore, have been expected to factor private copies into pricing)
- to what extent the proposal to also prevent contracts overriding exceptions will make business models that have the option of content that cannot be copied no longer possible
- it is possible that legitimising private copying could be misconstrued by consumers as to what it permits even if narrowly drawn, including if the exception comes into force before the Digital Economy Act enforcement / education provisions.

## 2. Education

### *Will permit:*

- educational establishments to copy any content to a certain extent, and make it available to distance learners, but only when activity not licensed, ie this proposal expands existing exceptions which work this way
- anyone to use any content for the purpose of illustration for teaching in a way that is non-commercial and subject to fair dealing test.

### *Good points:*

- recognition of distance learning needs, something that has been supported by BSAC for a long time
- disapplication of exceptions for educational establishments when there is licensing (eg by ERA) will continue to apply as now.

### *Issues:*

- it's not clear to what extent the TPM / contract issues as identified for the private copying exception will be taken into account in an appropriate way for the new fair dealing exception that will apply to any educational activity, ie not just in educational establishments
- if educational access for television and film are to be provided under different provisions, this could give rise to anomalies / problems

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<sup>3</sup> Under Art.6.4.4 of the Copyright Directive

- the scope of the new fair dealing exception depends on the meaning of “illustration for teaching” and there could be problems of abuse if terms are not clear.

### 3. Quotation

*Will permit* fair dealing with anything for the purposes of quotation.

*Good point* is that this is in line with what BSAC has supported.

*Possible issue* if the purpose of any quotation is not clarified, so that use just for colour / entertainment is possible, rather than use of extracts for a purpose that relates to work itself.

### 4. Parody etc.

*Will permit* fair dealing with anything for the purposes of parody, caricature and pastiche.

*Good point* is that the limitation to “fair dealing” is what BSAC supported.

*Possible issue* if the Government refers to significant benefits from this new exception as this might encourage some people to do much more than permitted by “fair dealing” (but latest impact assessment is not a problem in this respect).

### 5. Research and private study

*Will permit* making copies of all works, ie including films, for the purposes of non-commercial research and private study, subject to fair dealing test.

*Good point* is that exception is to be drawn in such a way to reflect concerns over possible abuse, including impact on TPMs.

*Issues:*

- it is not clear to what extent the TPM / contract issues as identified for the private copying exception will actually be taken into account in an appropriate way
- it is not clear whether for born digital material it will be accepted that an unencrypted version of films deposited in the BFI National Archive, National Archives in Scotland and Wales (and arguably other publicly funded archives) can be used to facilitate permitted research use, so that there can then be no appeal to the Secretary of State for a TPM workaround.

## 6. Data analytics

BSAC has not so far commented on this exception as it does not seem to be directed at audiovisual material.

## 7. People with disabilities

*Will permit* accessible copies of any content to be made by and for people with any type of disability that prevents access to the content, ie this proposal expands existing exceptions applying to text material and visually impaired people.

*Good point* is that charities etc. will not be able to make and supply accessible content in a format that is commercially available, such as where DVDs with audio-description can be bought.

*Possible issue* because licensing override of existing exception is to be removed and so lack of licensing relationship could make dealing with requests for content without TPMs, in order to make accessible copies, more burdensome for right holders.

## 8. Archiving and preservation

### *Will permit:*

- preservation of any type of content in permanent collection of libraries, archives, museums and galleries, ie this proposal expands existing exception applying to text material in libraries and archives
- archiving of folk songs and broadcasts with less bureaucracy.

### *Good points:*

- preservation of audiovisual material will be easier, including for born digital material
- in general it will remain impossible to make preservation copies where it is not reasonably practicable to purchase a copy.

### *Issues:*

- BFI and national archives in Scotland and Wales collect material by donation,<sup>4</sup> so the exercise of this exception by national collections with heritage value should not be limited to preservation only where such institutions cannot purchase a copy
- recording broadcasts off-air for archiving could undermine right holders if lessening bureaucracy leads to many copies being made by a large number of

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<sup>4</sup> Except in the case of films in receipt of discretionary public funding including Lottery funded films (ie films only benefitting from statutory tax reliefs are excluded), and for commercial public service television as provided by the Communications Act 2003

organisations other than the National Television Archive (the BFI) and other key UK archives.

## 9. Public administration

*Will permit* public bodies allowed under current exceptions to publish material in the physical world to also make it available online.

*Good point* is that this proposal recognises safeguards needed to not undermine right holder publications as now.

## 10. Copyright notices

*Will permit* the IPO to issue Notices providing basic guidance about copyright law and practice.

*Good point* is that the notices will be non-statutory and there will be no obligation on the courts to have any regard to what is in a Notice.

*Possible issue* is that a Notice might result from lobbying by one stakeholder group with no possibility for others to feed in views before a Notice is published.

## 11. Contract terms

*Will prevent* a contract from overriding an exception to the maximum extent possible, ie this will only not be the case where EU / international law prevents the change.

*Good point* is that there may be some exceptions where this is fair.

### *Issues:*

- BSAC argued for looking at exceptions on a case by case basis before making a decision on this, and this has not been done
- in looking at each exception, additional restrictions might then be needed to deliver a fair result if contracts cannot prevent things, eg to disapply from rented, broadcast or streamed content
- relationship with TPM issues does not seem to have been explored and so, for example, EU law prevents appeal to the Secretary of State for a TPM workaround to enjoy a private copying exception for content delivered online and on demand<sup>5</sup>, but a contract may not be able to prevent that private copying.

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<sup>5</sup> See footnote 3

## 12. Technical protection measures (TPMs)

*Will permit* appeal to the Secretary of State for a TPM workaround to the maximum extent possible where TPMs prevent enjoyment of an exception.

*Good point* is that criteria for Secretary of State to take into account, such as availability of commercial offerings that deliver activity otherwise permitted under an exception, are to be developed.

### *Issues:*

- any possibility of appeal to the Secretary of State would mean an administrative burden on right holders, even if the appeal does not require a TPM workaround to be delivered
- whilst TPM workarounds may be fair for, say, educational establishments and disability organisations trying to enjoy exceptions, there is no recognition of the difficulties of dealing with a workaround for content routinely using TPMs, eg DVDs, and exceptions which could apply to many individuals, eg private copying and private study exceptions.