



## About BAPLA

Picture libraries and agencies provide many types of users with access to many millions of unique images, either wholly owned by them or by the photographers and estates that they represent. BAPLA (the British Association of Picture Libraries and Agencies) is the trade Association that represents their interests in the UK.

Copyright licensing is the very lifeblood of our industry. Copyright gives the creator the right to choose to sell or give their work away and licensing binds an agreement between two parties stating exactly how it can be used.

Government states that <the> “intended effect of copyright exceptions - to allow users (e.g. library readers, students and researchers) to do some limited, reasonable, things with copyright works, that do not undercut the way copyright offers incentives to creators – is not overridden by contract. Giving users the full scope of action established by copyright law, and clarity and certainty in exercising that. Reducing costs for institutions (e.g. libraries) caused by administering multiple contracts which override contracts in different provisions, across large numbers of copyright works. “

To quote Dominic Young, as drafted, “copyright exceptions are compulsory requisitions of property”.

We are supportive of Governments desire to create exceptions that limit a very narrow band of others to access content on a strictly personal, non-commercial basis. However, an expression of our concerns will come as no surprise as we have been warned that the **costs** of government policy, such as contract overrides...

“are likely to fall to a range of rights-holders, especially licensors of copyright works, as: loss of fees where they currently charge for uses covered by exceptions; loss of freedom to contract; reduced ability to control some uses of works, potentially increasing risks in some areas. There could also be transitional effects: adjustment to new terms; possible renegotiation of licences.”

The introduction of these exceptions, far from reassuring rights holders will cause great uncertainty and lack of stability within the licensing system, both in terms of primary law and statutory instruments.

## New Exception for Data Analysis for Non-Commercial Research

The exception conflicts with protection of databases as sui generis right.

The database right allows its owner to prevent others from extracting data - which is permitted under s. 29A.

***Q. Is the term "lawful access" effective?***

No. Both terms 'Electronic analysis' and Lawful access are unclear. Many photo agencies offer website registration giving registrants the ability to conduct searches of content available for licensing.

"Lawful access" to the copyright work means that any registrant will have the right to analyse the contents of our databases and publish the results. "Lawful access" should be replaced by "licence". This means with the permission of the owner of the copyright in the database.

We are wholly supportive of the comments made by FOCAL regarding 'Electronic analysis' and authorized access.

Our understanding of this exception appears to focus on gaining legal access to all copyright works whether as a public body or as an organisation's competitor for 'scientific research purposes in the loosest terms possible. How can we be assured that an exception for non-commercial research will not be used to aid a competitor whether directly or indirectly? The opportunity for exploitation is much greater with this exception, and it will be a challenge for those exploited to litigate against.

Also we are unclear who this exception is for and under what terms would scientific research be labelled. Could an internet company create a computer science R&D Department and analyse any data and exploit the information gained? The definition of scientific research is problematic because it is a nebulous term. By this term are the government referring to such organisations using scientific method to compare input & output variables or for comparing numerous variables for statistical analysis, if so many do so under the guise of computer studies. Currently many online technology companies already gain legal access to websites and databases, but under specific uses or permissions, this exception gives broader access than can be anticipated at greater risk of exploitation, to the disadvantage of the rights holder. There are also examples where the term 'scientific research' has been used for obfuscation, therefore there should be a clear definition that specifies or narrows the scope of the exception.

We would like to see absolute clarification of the term non-commercial scientific research to prevent uncertainty and potential litigation of this exception by such parties regarding unanticipated exploitation using future technological developments. Many small organisations and individuals would find it difficult to challenge any scientific research that could be deemed as 'commercial gain'. Examples passing through the European committee headed by Joaquin Almunia (European Commissioner responsible for Competition Policy), regarding Google's exploitative advantages across the internet are well-known. regarding Google's exploitative advantages across the internet are well-known.

Again as previously expressed the terms such as non-commercial and fair dealing are too broad and provide much uncertainty and confusion for rights holders and users.

Either the provision must be amended to achieve clarity or it should be removed.

### **Amendments to Exceptions for Education**

The explanation for amending the exception for education provides much concern for our members. Like FOCAL we would strongly wish to see this removed.

- It places enormous trust in those within education establishment with ever depreciating budgets to use copyright materials for the purposes of instruction under a non-commercial use with sufficient acknowledgements.
- There is overlap between s35 and s36
- It should be stated that 'educational establishment' must be not for profit only.

The use of the term 'giving instruction' does not define whether the person providing that instruction is receiving commercial gain for doing so. For higher education, many individuals are asked to present (give instruction) to those studying but receive payment by the institution. Many institutions set up licences with those that can grant the use of copyrighted works for such purposes. This exception is in direct conflict with this commercial business model. A number of educational establishments use cloud systems to store copyrighted works, such as VLE's and MOOC's (Virtual Learning Environments & Massive Open On-line Course) which either may not have the appropriate license, or stores content illegally – both providing the impression the content on these sites are appropriate for use.

It is also unclear, for example whether the following activities are covered:

- conference materials provided online
- content made available to online users for free (e.g. under Creative Commons licence).

The ambiguity has the potential of depriving the images industry of current revenue streams.

However, properly defined, this term should be introduced to s. 32 to reduce ambiguity around the meaning of the term 'non-commercial purpose'. We are supportive of the proposed suggestion re "instruction" by FOCAL.

This exception allows for the legalization of these systems rather than protecting the rights holder by enabling them to seek legal compensation.

**Q1: Are [the Section 32] provisions an effective implementation of the Government's policy?**

No, Section 32 goes even further than CDPA 1988 Exception for private study.

- a) Government policy is that this section should not apply where licenses are available under s36 and s36
- b) This creates greater uncertainty and *will* impact on creators ability to derive revenue– this in our view goes against Government policy;
- c) There has been no economic impact assessment; this also goes against government policy.

We would wish to establish:

1. Which contracts are being referred to here? All licenses including embedded works?
2. Under which specific and limited circumstances can contract override be applied?
3. What does instruction mean (s.32 (1))
4. Are those who fall foul of the terms of this exception aware of the penalties for breaching these terms – for example when a work is used in a commercial setting?
5. What is “non commercial” (s.32 (1)(a))? How will this be defined and by whom?
6. If a non commercial personal use was intended but a work is distributed in such a way that breaches exceptions what remedy or recourse do rights holders have and against whom – an ISP?

One example, such as, if a school or institution makes student / researcher's work available to others worldwide who is at fault? Is it moral to permit an exception to use a copyright as part of research funded programme if these are then made available through paid subscription sites.

The relationship between s. 32(5) and s. 35(2) is unclear. The prohibition of contract override under s. 32(5) conflicts with the requirement to make use of available licensing schemes under s. 35(2).

**Q2: Do [the Section 35] provisions meet [the stated] objectives?**

Much content is protected by Technical Protection Measures, it is unlikely that “institutions’ or persons that these exceptions are intended to cover will know what this means. We think in order to achieve the policy of simplification, what can and cant be done with a work needs to be clear.

**Q: Are [the Section 36] provisions an effective implementation of the Government's policy?**

No.

The relationship between s. 32(5) and s. 35(2) is unclear. On the face of it, the prohibition of contract override under s. 32(5) conflicts with the

requirement to make use of available licensing schemes under s. 35(2).

s. 36 - extracts. Section 36(2) defines the categories of works which may be copied and extracts of which may be used by educational establishments (comments re definition of this term set out above apply to this section as well). The clause reads:

"(2) In this section "relevant work" means a copyright work other than a broadcast or and artistic work (which is not incorporated into another work). It is unclear what "incorporates" relates to, and this should be deleted.

Clarity is needed whether the section means:

- A) That only stand-alone works (i.e. as long as they are not embedded into another work) are covered by s.36? This would mean that artistic works (photographs) are included as long as they are not embedded into e.g. text.
- B) That artistic works are excluded as a class, regardless of whether they are embedded or not.

Consistent with our comments regarding the quotation exception, photographs and other works that are reproduced in entirety should be excluded from this section.

### **Amendments to Exceptions for Research, Libraries & Archives**

The definition of fair dealing as expressed previously is open to interpretation. We would like to see a clear definition of what this government sees as 'fair dealing', as it stands, such a broad interpretation will be exploited and create general ambivalence and reluctance on behalf of the rights holder to publish works for the purposes of research for archives and libraries. We would like to see this provision amended or removed entirely as an Exception.

It is also unclear whether Section 37 Subsection 1A where articles in periodicals can be copied, regardless of the medium, would be affected by those works claiming to be Orphan Works, how does a public body such as a library or archive differentiate between a government-approved orphan work and a infringed copy?

Again, the definition of a non-commercial work would need to be defined to reassure rights holders that such a term is not exploited. Many disputes arise from the term non-commercial – for example the use of an image in a publication may be for commercial gain but the institute publishing it may have a non-commercial status. This example can be reversed. So under which circumstance is the use non-commercial? Organisations that license copyrighted works would most certainly be affected by this exception.

Subsection 4 suggests that it removes the liability from those working for libraries and archives. Yet under s39 and 61, there is no requirement by the Secretary of State to define whom this exception applies to – except that it is for any body not established or for profit. Our concern is further compounded in that there is no limit to the number of works that can be

copied nor any way (s75) of checking what copies had been made and for what purposes.

We are also concerned by the need to include any published works in Section 41 subsection 1 – what are the safeguards for embedded works or copyright/moral rights within the works? With regards to unpublished works, we would like to see the removal of photography from this exception as with the ERR Act. Where the reference to the exception only applying where there is no licensing or contractual terms – what are the safeguards and how will amateur photographers not be affected?

Concern over the terminology of ‘dedicated terminals’ both in terms of the interpretation of hosted websites based on the premises; and a terminal supplied by a commercial organisation in a public institution\*. The former can allow for dissemination of copyrighted content under the guise of ‘access for all’ with its inherent problems, the latter does not prohibit the printing and subsequent exploitation by a ‘commercial’ company on such premises.

The Googlization of Everything by Siva Vaidhyanathan – Chapter 5. The Future of Books.

## **Conclusion**

The purpose of this consultation was to review whether Government’s proposed drafts carry out the Government’s policy as set out in *Modernising Copyright* published in December 2012. We would wish to see greater clarity of terms, greater distinctions between the sections in order to provide certainty to the target user non commercial user group and rights holders whose work they may wish to copy.

## **Questions / queries**

Please direct any questions in the first instance to

Linda Royles

Senior Consultant BAPLA