THE COPYRIGHT AND RIGHTS IN PERFORMANCES (PERSONAL COPIES FOR PRIVATE USE) REGULATIONS 2014

THE COPYRIGHT AND RIGHTS IN PERFORMANCES (RESEARCH, EDUCATION, LIBRARIES AND ARCHIVES) REGULATIONS 2014

THE COPYRIGHT AND RIGHTS IN PERFORMANCES (QUOTATION AND PARODY) REGULATIONS 2014

THE COPYRIGHT AND RIGHTS IN PERFORMANCES (DISABILITY) REGULATIONS 2014

THE COPYRIGHT AND RIGHTS IN PERFORMANCES (PUBLIC ADMINISTRATION) REGULATIONS 2014

MEMORANDUM BY THE DEPARTMENT FOR BUSINESS, INNOVATION AND SKILLS

1. The Department for Business Innovation and Skills is submitting this memorandum in order to assist the Joint Committee on Statutory Instruments in its deliberations relating to the above Regulations. The main purpose of those Regulations is to ensure that UK law contains appropriate exceptions to copyright and rights in performances in order to strike a fair balance between the rights of creators and users of copyright works and performances. The scope of national law relating to copyright is constrained by the provisions of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (O.J. No L167, 22.6.2001, p 10). This directive was originally implemented in 2003 by the Copyright and Related Rights Regulations 2003 (S.I.2003/2498). The Regulations seek to expand the scope of exceptions relating to copyright and rights in performances, in order to achieve a fair balance between the rights of creators and users of copyright works and performances, in a manner that is permitted by the Directive.

2. The Committee and their legal advisers have received a number of representations relating to the scope of the powers under section 2(2) of the European Communities Act 1972 to make the proposed regulations.

Contract override clauses

3. It has been asserted that there is an argument against the Secretary of State being able to introduce contract override clauses, such as those implemented by new sections 29A(5), 31F(8) and 32(3). In particular, it is argued that such clauses are not allowed in the narrow area of on-demand services, by virtue of a reference to such

services in Article 6(4) paragraph 4. The Department disagrees with this conclusion for the reasons below.

4. It appears to be clear that, in general, the Directive gives Member States freedom to choose whether or not they make copyright exceptions subject to contract terms or resistant to them. Certain exceptions (such as Article 5(3)(n), the "dedicated terminals" exception) are expressly subject to contract or licence terms (this is implemented by new Section 40B(3)(c)), but others are silent on the matter. Recital 45 explicitly states that "national law" is able to (but not obliged to) define contractual relations in order to provide "fair compensation" in the context of exceptions, but is silent on other types of contracts.

5. On the face of the legislation therefore, it appears that Member States generally have a choice over whether or not to allow exceptions to be overridden by, limited by, or otherwise dependent on contract terms. The judgment in the recent ECJ cases C-457/11 to C-460/11 VG Wort supports this view, and moreover suggests that the default position where contract or licence terms are not expressly allowed to limit the scope of an exception is that the exception will prevail over any rights holder authorisation. Paragraphs 36 to 38 of the judgment are as follows:

> "36 It must also be noted that ... it is open to Member States to decide to introduce, in their national law, exceptions or limitations ... Where a Member State does not make use of that option, rightholders retain, within that State, their exclusive right to authorise or prohibit reproduction of their protected works or other subject-matter.
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> 37 Where a Member State has decided, pursuant to a provision in Article 5(2) and (3) of Directive 2001/29, to exclude, from the material scope of that provision, any right for the rightholders to authorise reproduction of their protected works or other subject-matter, any authorising act the rightholders may adopt is devoid of legal effects under the law of that State. ...
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> 38 By contrast, where a Member State has decided not to exclude completely the right for the rightholders to authorise reproduction of their protected works or other subject-matter, but merely to introduce a limitation of that right, it is necessary to establish whether, in the particular case, the national legislature intended to preserve the reproduction right from which the authors benefit."

6. Article 6(4) deals with something quite different to the question of contracts preventing use of the copyright exceptions – namely, complaints against technological protection measures which prevent use of an exception. Article 6(4) paragraph 1, which deals with a number of exceptions, is implemented in domestic law via Section 296ZE. Article 6(4) paragraph 2, which deals exclusively with private copying, is implemented in the new appeal provision relating to personal copying (see the draft Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014, new s296ZEA as inserted by regulation 3(2)). Article 6(4) paragraph 4 is explicitly implemented in each of these provisions, via Section 296ZE(9) and Section 296ZEA(7), respectively.

7. Article 6(4) paragraph 4 was inserted into the Directive to address the particular security concerns arising where material is made available on-demand. It was recognised that in an on-line environment rightholders should be entitled to enhanced protection against unauthorised copying and that technological measures applied to on-demand services should enjoy enhanced legal protection

8. In the Department's view, the language of Article 6(4)(4) is quite clear and it excludes the application of sub-paragraphs 1 and 2 when as part of on-demand services, works are made available to the public on agreed contractual terms. The effect of this provision is to remove, in respect of on-demand services provided on agreed contractual terms, the obligation or right of a Member State under subparagraphs 1 and 2 to require rightholders to cause their TPMs to permit users to benefit from the exceptions.

9. Accordingly, where rightholders elect to use TPMs to restrict or prevent certain uses of material made available on demand, where such material is made available on agreed contractual terms, a user will have no right to appeal for the removal or relaxation of those measures, even where they restrict uses permitted under copyright exceptions. The measure is clearly aimed only at the enforceability of TPMs in the area of exceptions and does not say that exceptions do not apply in these circumstances. If it were instead intended to constrain the scope of exceptions, it would appear under Article 5, which defines the scope of exceptions available to EU Member States.

10. The argument has been put forward that restricting the contractual freedom of the rightholder to prevent uses which are permitted under copyright exceptions would deprive article 6(4) para 4 of actual effect, because the condition precedent for its operation would be prevented from arising. This is on the basis that the evident purpose of the subparagraph is to permit TPMs to be used to police compliance with the contractual terms, even if those terms confer rights narrower than a relevant exception.

11. Taking the contract override provision which appears in the Regulations relating to text and data analysis for non-commercial research as an example, this provides:

> *29A(5) To the extent that a term of a contract purports to prevent or restrict the making of a copy which, by virtue of this section, would not infringe copyright, that term is unenforceable.*

This provision does not render *all* contractual terms relating to the supply of on-demand content unenforceable – merely those which prevent use as permitted under s29A. Where a work is made available on demand there will be many contractual terms relating to the on-demand provision of that work which will have no bearing on what a user can do with that work under an exception to copyright – e.g. they may set out what the user has to pay to access the work. So even if certain terms are prohibited, it would still be possible to make works available on "agreed contractual terms". There is therefore no basis for asserting that the existence of a contract override would deprive the provision of actual effect.

12. In view of this, and given the clear language of the Article (which relates solely to the protection conferred on TPMs to on-demand material supplied on agreed contractual terms) we consider there is no need to resort to the purposive interpretation which has been argued. As a policy matter we consider that a user should not be liable for damages for breach of contract in circumstances where the individual has used a work in a way permitted under an exception, but it is accepted that a rightholder may apply TPMs which might prevent or restrict a use under an exception. In our view this position does not conflict with the provisions of the Directive.

Private copying exceptions: fair compensation

13. Another point that has been raised is in relation to the ability of Member States to introduce a private copying exception (such as the new Section 28B exception for the making of personal copies for private use) without providing for a system of rightholder remuneration such as a levy on devices and media. Article 5(2)(b) of the Information Society Directive says that Member State may provide exceptions to the reproduction right:

> "in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned".

14. Recital 35 of the Directive explains that, while certain general principles apply when determining fair compensation and its payment, Member States have discretion over the details:

> "When determining the form, detailed arrangements and possible level of such fair compensation, account should be taken of the particular circumstances of each case. When evaluating these circumstances, a valuable criterion would be the possible harm to the rightholders resulting from the act in question. In cases where rightholders have already received payment in some other form, for instance as part of a licence fee, no specific or separate payment may be due. The level of fair compensation should take full account of the degree of use of technological protection measures referred to in this Directive. In certain situations where the prejudice to the rightholder would be minimal, no obligation for payment may arise."

15. To date, the ECJ has not ruled on what may constitute a minimal prejudice situation in the context of Recital 35. However, it has indicated that Member States enjoy a good degree of discretion over compensation systems. Cases such as the Amazon case (Case C C-521/11) set out how Member States have discretion over how they provide compensation, as long as a fair balance is struck between rights holders and users of the exception.

16. As the Government does not intend to introduce the levies or taxes on media and devices which exist in many other EU states ("private copying levies") it has a policy of introducing private copying exceptions which do not cause harm (or at least cause

only minimal harm) to rights holders and so which (in accordance with Recital 35) do not require compensation to be provided.

17. It is important to note that those countries which do provide levy systems in order to deliver compensation do so in the context of wide private copying exceptions which allow people to make copies for friends and family and from sources they may not own. In some Member States this includes copies made from illegal sources. The Government does not dispute that these wide exceptions may harm rights holders. Because they allow individuals to lawfully make copies for friends, and to make copies from borrowed, rented or illegally distributed sources, then it seems clear that they could lead to lost sales, and that compensation is required in that context.

18. However, the new Section 28B exception has been drawn narrowly to ensure that no such harm is caused. It is limited to allow copying only by an individual who owns a copy and prohibits sharing of such copies. The archetypal activity which it will allow is the "format shifting" of an individual's own CD's to their own iPod. The Government's impact assessment shows that this activity is unlikely to cause any harm to copyright owners. The effect of the exception on rightholders, if any, will amount, in the words of recital 35, to "minimal prejudice" which accordingly does not require compensation.

19. It is also worth noting that the Copyright, Designs and Patents Act already provides three exceptions based on Article 5(2)(b) which take a similar "minimal harm" approach and in relation to which it was not felt necessary to introduce a compensation system upon implementation of the Directive in 2003. The most well-known of these is the "time shifting" exception (Section 70 CDPA) which allows an individual to record a TV program for later viewing without infringing copyright. These exceptions have not been challenged in the UK courts, or by the European Commission.

Private copying exceptions: applicability to distribution and communication rights

20. It has also been argued that a private copying exception can only relate to the reproduction right conferred by the Article 2 of the Information Society Directive, and that new Section 28B goes further than this, creating exceptions to the Article 3 right of communication and making available to the public, and the Article 4 right of distribution to the public, as well as an exception to the reproduction right. The Department disagrees that Section 28B creates an exception to the rights provided by Articles 3 and 4 of the directive.

21. Articles 2, 3 and 4 of the Information Society Directive (respectively reproduction, communication to the public including making available to the public, and distribution to the public) are implemented via Sections 17, 18 and 20 of the Copyright, Designs and Patents Act 1988. It is important to note that, although the reproduction right applies to private and public acts of reproduction, the communication and distribution rights apply only when works are communicated/distributed 'to the public'. It is correct that Article 5(2)(b)(private copying) only permits Member States to make an exception to the reproduction right, not the communication to the public right. This is logical, given that it concerns

private, not public acts.

22. Consistent with Article 5(2)(b), the Section 28B personal copying exception only provides an exception to Section 17 – the CDPA equivalent to the reproduction right (Article 2). This is clear because Section 28B refers only to "the making of a copy of a work", and not to other restricted acts such as "issuing copies to the public" or "communicating copies to the public". The "transfer provisions" (Section 28B (6) to (9)) do not provide exceptions to the communication/distribution rights but govern what can be done where those rights do not apply - in particular where copies are distributed in private (not restricted by Section 18) or where the right to control issue/distribution of copies to the public has been exhausted (per Section 18(3)(a)).

23. The transfer provisions essentially provide that one can still give a copy (eg. of a CD) to a friend in private, or resell that copy (to the extent that they entitled to under Section 18) but where they do so they cannot retain any personal copies they have made from it under the exception. Private distribution of personal copies is restricted, and public distribution and communication remains restricted by Sections 18 and 20.